

Chapter 2

The Law of Nations: Between Natural and Positive Law

The history of International Law intertwines with its definition. On the one hand, if International Law is defined as a group of positive and interstate rules then it is a recent enterprise and does not correspond to the concept examined in this work. On the other hand, the idea that there exist legal rules applicable to all men is as old as Natural Law itself. Even so, unlike the majority of the authors of the sixteenth and seventeenth centuries, contemporary internationalists do not hesitate in keeping Natural Law far aside from their subject of study.

From what can be termed as an intercivilizational perspective, Onuma Yasuaki poses some relevant questions regarding the origin of International Law. Would the presence of sporadic treaties be enough to confirm the existence of International Law or would a true international order be necessary? Which criteria differentiate International Law from other normative systems? Did agreements between the Hittites and the Pharaoh of Egypt constitute international or religious norms, since gods acted as guarantors of the covenants between the parties? Powerful empires, such as the Chinese and the Roman, did not recognize *de facto* foreign nations as their equals; as a result, the legal nature of their treaties was regarded as mere concessions or orders of the emperor, in other words, they were unilateral actions with no regard for the will of the other party. Even as late as the nineteenth century, the existence of International Law was a pressing issue still. Treaties of cession of territory and treaties creating protectorates shaped the conquest of Asia and Africa by the Europeans. However, the internationalists of that time believed that International Law applied only to civilized nations, a definition that excluded Asia and Africa. What is, therefore, the validity of such treaties?¹ All these questions interfere with mapping out a starting point to the very existence of International Law.

Establishing a definition *a priori* and then searching for its elements among thinkers of the past centuries is as damaging as the lack of clarity on the above issues, for it produces a bended and distorted reading of these authors. The past

¹Yasuaki (2000), pp. 2–3.

cannot be examined *vis a vis* present inquiries; the past has to be investigated by itself. Then, a paradox emerges: the lack of precise parameters prevents an accurate research, but their presence can corrupt the subject thereof. In order to avoid this paradox, negative criteria should guide the search for the origin of this field of study: if it is not possible to determine what International Law is, then we must exclude what it is not. And we can only speak of International Law solely when it becomes independent from others branches of Law, such as Natural Law and Domestic Law.

In this chapter, I examine all the efforts made in determining the origin of the concept of International Law, along with the successes and mistakes in the course thereof. Our point of departure will be the issue of the paternity of International Law, a misplaced problem in my point of view. Subsequently, I will explore the attempts to restrict the origins of international law to the doctrine of Just War. Despite being correct, these are innocuous attempts, for they are too wide and do not solve the issue of the autonomy of International Law *vis a vis* other types of Law. Then, before analyzing the authors that are the scope of this work—and who merit separate chapters—I will shed some light on the evolution of the notion of *jus gentium*, from the Romans to Francisco de Vitória and Alberico Gentili. The purpose of displaying such a development is to present how the original Roman notion of *jus gentium* persevered in all these writers. The original notion bears little resemblance to the contemporary International Law, because it does not separate it from Natural Law nor from Domestic Law. This entire chapter plays a role of prolegomena to the others; so that all the contours and the originality of Francisco Suárez and Hugo Grotius' definitions of *jus gentium* may be grasped.

2.1 The Law of Nations and International Law

The Philosopher Jeremiah Bentham coined the term “International Law” in his book **An Introduction to the Principles of Moral and Legislation**. In the translation to French made by the Swiss Étienne Dumont in 1802, the expression became *droit international*, and the new title found immediate acceptance among most scholars and official academic programs. Dumont also inserted the adjective “*public*” to the end.²

In fact, the translation is imperfect. In French, the word *Nation* derives from *naissance*, birth; while in English it endorses the polysemy of nation, country, or State. Nonetheless, Bentham's emphasis was in the prefix “*inter*.” He wished to highlight the idea that this branch of Law was applicable among the peoples. According to him, this notion remained ambiguous in the first name of the discipline “Law of Nations or Peoples.”

²Truyol (1952), p. 19.

The Philosopher was right. The ambiguity permeates the entire history of the concept, since its origin as *jus gentium* with the Romans until its decline in the last quarter of the eighteenth century. From a law applicable to foreigners in Rome to interstate Positive Law, the variation of meanings is so grand—Natural Law, imperial common law, common European Law and Positive Law between the peoples—that one might question whether the terms Law of Nations and International Law indeed relate to the same reality. There are those who defend an absolute separation between them. Others suggest that the term “Law of Nations” is broader and represents the genre of which International Law constitutes a specie. And still there are others who see a return of the contemporary International Law to the idea of *jus gentium*, which implies that there is no absolute identity between the two.

It is possible to outline differences between the Law of Nations and International Law that go beyond the chronologic criterion. Still, due to the polysemy above mentioned, it becomes impossible to determine all distinctions with precision. The distinguishing element will always vary or be more or less evident in accordance with the author’s inclination.

However, the first question that comes to mind is this: if there are so many differences, why do the two terms intertwine? The distinction between the two concepts is meaningless if one does not explain the confusion between them in advance. It is necessary to examine the reason why there appears to be a line of continuity between the Law of Nations and International Law. The answer to this question is apparently simple: because the terms share the same founding father.

2.1.1 *The Issue of the Paternity of International Law*

Few scholars have received as many praises as Hugo Grotius. In one of the most prominent translations of **De Jure Belli ac Pacis** into French, the translator Jean Barbeyrac spared no compliments when writing the preface.³ Vico proclaimed Grotius the “jurisconsult of the human race.” John Locke included him among the major writers that a civilized man should read.⁴ In Brazil, Miguel Reale does not hide his admiration: “prior to him [Hugo Grotius] it was not possible to talk about Philosophy of Law in the proper sense, because his book **De Jure Belli ac Pacis** is the first treatise on Natural Law, or rather, the first autonomy treaty of Philosophy of Law.”⁵

More than a man, Hugo Grotius became a myth: the incarnation of the Westphalia Treaty of 1648. He would have been the first author to escape of what Modern writers call “the darkness of the Middle Ages” and to rekindle the light of

³Grotius (1724), pp. I–XLIII.

⁴Tuck (1979), p. 63.

⁵Reale (2000), p. 103.

reason. As the first Modern man, Grotius embodies the very notion of an international society; the States relate among themselves no more in accordance with religion, but according to their own interests, and the rule of law limits these interests. Grotius became such a symbol also because he found an Europe receptive to his ideas regarding the interdependence of peoples, the lack of authority of the pope over shipping routes, the right of rulers to use force by through a consensual right, the validity of treaties, even those entered into with non-Christian nations.

Grotius' myth is widely spread; it is even more prominent among scholars of International Relations than international lawyers. In the book **International Theory: the three traditions**, tired of the intellectual reductionism of the dichotomy between Realism and Idealism, Martin Wight proposes a tripartite division of the traditions of International Relations: the Realistics or Machiavellians, the Revolutionaries or Kantians and the Rationalists or Grotians. In doing so, the author seeks to solve two problems: to overcome the "strait-jacket" in which intellectual works were confined and to broaden the "tradition" of a new science by resorting to the authority and to the greatness of a character as eminent as Hugo Grotius.

Wight describes the rationalists as the ones who "concentrate on and believe in the value of, the element of international intercourse in a condition of international anarchy mainly. They believe that man, although manifestly a sinful and blood-thirsty creature is also rational."⁶ This rational element sometimes would allow men to escape from the fate of living like beasts and to ascend to a less aggressive existence. The Grotian tradition would be in the middle ground between Realism and Idealism. Grotians as well as realists formulate descriptive—not prescriptive—theories of International Relations, but believe that law and diplomacy stem not only from the correlation of force between States and can also have a saying on International Politics. The *raison d'être* would remain unavoidable, but Grotians do not dismiss the idea of the rule of law.

In addition to distilling from the Grotian thought a somewhat dubious essence, Wight goes as far as portraying such a caricatural essence as follows:

The older International Law writers were divided into Naturalists, Positivists and Grotians. Naturalists maintain that the only Law of Nations is in the Law of Nature, that is, in first principles, and that custom and treaties make no true law; Positivists maintain the reverse that the Law of Nations is only what is found in custom and treaty, and the Law of Nature is non-legal or non-existent. The Grotians combine the two, saying both are essential to the Law of Nations.⁷

In this excerpt, the author seeks to portray the "Grotians of International Law" as scholars halfway between Positivists and Naturalists. They would accept the existence of international rules of a moral nature along with other rules whose creation depends on the willingness of States. Soon after, the excesses of that interpretation led Hedley Bull, Martin Wight's disciple and an assumed Grotian, to affirm, in a text from 1966 entitled "**The Grotian Conception of International**

⁶Wight (1991), p. 13.

⁷Wight (1991), p. 14.

Society,⁸ that the connection between Neogrotians of International Relations and Grotius himself was very much faint.

This mystifying reading of Grotius drifts away from Grotius' original intent, since it stems from today's men in light of contemporary concerns who believe that the Dutch jurist was addressing International Law in his works. But during Grotius' time, the national State was under construction and the only consolidated States were those from the Iberian Peninsula. Therefore, it seems inappropriate to read the Grotian Law of Nations as a synonym for interstate law. Moreover, during this period, the idea of unity among nations was fading: the Great Navigations had shown Europeans a diversity of habits and customs much wider than the non-European cultures already known to them (mainly Muslim). In addition, the Reformation had shaken the Pope's power over Christian princes as the only supranational authority since the fall of the Roman Empire.

The Dutch jurist arose in a time of transition. On the one side, the forces of the new, embodied in the person of Cardinal Richelieu, already conceived Politics in terms of national units. On the other side, the forces of the old, the papal, and imperial writers who preached the restoration of the fallen central institutions of Latin Christendom still existed. In this context, Grotius' writings found immediate success. When Gustavus Adolphus rode by Germania during the Thirty Years' War, he would have carried a copy of **De Jure Belli ac Pacis**. Years later, the British used the arguments regarding the free navigation of the seas against the Dutch monopolies.

The success of the Dutch jurist was so resounding that it shaped his myth. In 1661, in the University of Heidelberg, Samuel Pufendorf created the chair "Law of Nature and of Nations" to teach modern Public Law and its institutions: the social contract, the Natural Rights inherent to man and the Law of Nations. As a textbook, he used Grotius' **Law of War and Peace**. During the following century, among the members of the School of the Law of Nature and of Nations, the legend of a single founder of the subject arose. It is curious that while Grotius received many compliments, the Scholastics were associated with "obscurantism" and the "Medieval past."⁹

In the first 300 years since his birth, Hugo Grotius was considered the single father of an entire branch of law, Public International Law, as well as the father of Modern Philosophy of Law as well as of the notion of subjective right. His influence also spread to other fields, such as Private International Law. His work was revolutionary and pioneer in all the fields it came across. In 1874, however, Sir Thomas Erksine Holland, in his famous inaugural lecture at Oxford took Grotius off the pedestal and placed Alberico Gentili in his stead as the true creator of International Law. According to Sir Thomas, the jurist from Delft was a mere disciple to Gentili, surely his most popular one.¹⁰

The decline of Grotius corresponded to the rise of Francisco de Vitória. In 1860, there is a rediscovery of all the Spanish Scholastics, of which the Theologian of

⁸Bull (1966), pp. 51–73.

⁹Haggenmacher (1988), pp. 27–28.

¹⁰Holland (1874), pp. 1–23.

Salamanca is deemed the pioneer. There were other authors such as Domingos de Soto and Francisco Suárez whose works on Theology and general Philosophy were better known than those of Vitória. Yet Vitória's lecture on the Indians and on the civil power had an appeal that was hard to ignore and quickly the Dominican would become the central character of the Scholastic movement. The other Spanish Scholastics assumed a secondary role as followers of the great *maestro*.

The 1860s mark the turning point for the studies of Vitória due to a very unusual fact: the discovery of **De Jure Praedae Commentarius**, a work that Hugo Grotius had never published and that had disappeared. Rather than calling attention to the Jurist from Delft, the several references to the Scholastics, especially to Vitória, served only to ignite the dispute regarding the paternity of the Law of Nations. The very preface to the edition of Gerhard Hamaker underlines the decisive influence of the Spaniards.¹¹ By the end of that century, the revisionist literature had multiplied inside and outside Spain. Within this country, Eduardo Hinojosa had emphasized the importance of the Spanish Theologians. Moreover, in Belgium, Ernst Nys and the Swiss Alphonse Rivier virtually erased Hugo Grotius's originality:

[When it is said that Grotius is the father of Natural Law and the father of International Law], is it asserted that a whole new discipline came out of his head, that he invented or imagined as if by divine intuition, the previously unknown rules of war, peace and relations among states, among sovereigns, the covenants, the embassies? Nothing would be contrary both to the logic of things and to the truth. A number of canonists, jurists, publicists wrote, since the Middle Ages, on such diverse topics as well as on matters pertaining to the Natural Law.¹²

In the early twentieth century, the reputation of Francisco de Vitória was already quite established and no study on the history of International Law could neglect him. The Dominican Theologian ceases to be included among the forerunners of Grotius and becomes the central figure of entire theses, such as the one from Quilicus Albertini. Furthermore, studies like that of Alfred Vanderpol and Joseph Kohler honored the Catholic version of Natural Law and of the Law of Nations. The Protestants had lost the battle.¹³

A few years later, what were scattered voices became a resounding chorus. In 1927, at the Hague Academy of International Law, a disciple of Ernst Nys, Camilo Barcia Trelles teaches a course on Francisco de Vitória. In that same year, a Protestant and Anglo-Saxon author, James Brown Scott teaches lessons on Vitória in Spain. **The Hispanic Origin of International Law** is the first version of a work

¹¹GROTIUS, Hugonis. **De Jure Praedae Commentarius**. La Haye: Hamaker, Nijhoff, 1868. p. XI. Henceforth, **DJPC**.

¹²"*Est-ce à dire qu'une discipline toute neuve lui ait jailli du cerveau, qu'il ait inventé ou imaginé, par une sorte d'intuition divine, les règles inconnues jusqu'à lui de la guerre, de la paix, des rapports entre États, entre souverains, des alliances, des ambassades? Rien ne serait plus contraire, soit à la logique des choses, soit à la vérité. Quantité des canonistes, des légistes, des publicistes ont écrit dès le moyen âge sur ces divers sujets, comme aussi sur les sujets appartenant au droit naturel.*" (Rivier, 1883). See also Hinojosa, 1890 and Nys, 1882.

¹³Haggenmacher (1988), pp. 32–33.

that was reviewed and published time after time. The name of the Salamanca Theologian spread to all locations. In France, several works on Public Law—such as those of Hubert Beuve-Mery, Jean Baumel and the classic work of Joseph Delos—distinctly refer to him. In the 1930s Germany, Friedrich Heydte, Heinz Kipp, and Alois Dempf devote much more attention to Vitória than Carl von Kaltenborn had done in 1848. In Spain, the Francisco de Vitória Association was founded in 1926 and then named Francisco de Vitória Institute of International Law in 1933. Shortly before World War II, the Hall of Councils of the *Palais des Nations*, decorated by José María Sert, is named Room Francisco-de-Vitória.¹⁴

The prestige of the Dominican Theologian was such that he became independent from the other members of the Spanish Scholasticism. While some authors advocate the existence of a true Hispanic school of International Law, others seek to raise and separate Vitória above all others.¹⁵ Although most Theologians of that period attempt to formulate a notion of *jus gentium*, the Jesuit Francisco Suárez is often chosen for comparison purposes. In his book on the principles of Public Law, Delos compares the two writers, always to the detriment of Suárez, in order to prove that Vitória's notion of international society had an objective ground¹⁶ while that of Suárez denoted a State-centered Voluntarism—in the sense that he would be a precursor of legal Positivism.

Even in authors who accept a line of continuity between the Jesuit and the Dominican, Suárez is but a follower. James Brown Scott, probably the writer who most fervently acclaims both the Theologians of Salamanca and Grenade and finds the origin of various institutes of contemporary International Law in their works, optimistically considers Francisco de Vitória the first expositor, Francisco Suárez the Philosopher and Hugo Grotius the organizer. Still, the epithet of Philosopher does not prevent Scott from taking away all the originality from Suarez: according to him, the famous Suárez's distinction of *jus intra gentes* and *jus inter gentes* is

¹⁴Haggenmacher (1988), pp. 34–35.

¹⁵Among those that deny the existence of a Spanish School of International Law are Camilo Barcia Trelles (1933) and Joseph Delos (1950). Among those who support this idea are Adolfo Miaja de la Muela (1932) and Luciano Pereña in his series *Corpus Hispanorum de Pace*. Although Luciano Pereña believes in a true *hispanorum corpus de pace*, he devotes much of his works to study Suárez in particular. Chapters III and V refer to the works of this author. It is worth verifying whether those who see such discrepancies between the legal works of Francisco de Vitória and those of the other Spanish scholastics, and of Francisco Suárez in particular, are not merely influenced by the theologian dissonance between the Dominicans (Bañez) and the Jesuits (Molina) on the issue of the foreknowledge of God.

¹⁶*Or, à ce problème, il n'y a en définitive, que deux solutions: la force obligatoire du droit positif lui vient d'un fondement objectif, le bien commun, dont il interprète les exigences idéales en fonction d'un donné historique, – ou de l'accord de volontés. Voluntarisme ou droit à fondement objectif, telles nous semblent les seules branches de l'alternative. On pressent en quel sens se prononcera Suarez.*" Delos (1950), p. 270. I strongly disagree with this idea. For further information, see the final part of chapter V.

already found in Vitória, as well as his description of the international community, which Vitória allegedly already presented in a more appealing and complete way.¹⁷

As will be seen later, Francisco Suárez received an unfair treatment. It is Suárez, not Vitória, who occupies the most important place in the history of International Law. The Suarezian *jus gentium* refers to something new and different and influences the Grotian *jus gentium*.

The controversy over the paternity of International Law today remains unclear. In addition to Francisco de Vitória and Hugo Grotius, other authors dispute the title, though with less intensity, such as Francisco Suárez himself, Fernando Vasquez de Menchaca, and Alberico Gentili. The latter, ever since the inaugural speech of Sir Thomas E. Holland, occasionally arouses interest. However, contrary to a 100 years ago, Gentili no longer disputes the paternity of the Law of Nations, but that of the more original, more secular, more Modern or, at least, less Medieval doctrine¹⁸ thereof.

The debate regarding the founder of International Law is insolvable. Any work that advocates a name over another is ideological: in possession of what they consider the “quintessence” of International Law (generally, either Positive Law or “Statism”), historians of today attempt to find traces of these elements in the doctrines of the authors of the sixteenth and seventeenth centuries.

It is necessary to remember that Vitória, Suárez, Gentili, and Grotius wrote for different audiences and in light of different concerns than those of today. It is strange that James Brown Scott discovers, in Vitória, the source of the principle of the legal equality of nations and today’s notion of citizenship or is able to compare the thought of the Theologian with that of President Lincoln.¹⁹

¹⁷Scott (1934), pp. 183–184.

¹⁸Recently, historians of International Law have been studying the work of Gentili. Peter Haggemacher proves that he is the one who influenced Grotius the most. He also weighs that Grotius and Gentili cannot be both considered father of International Law; however, the approach of the latter—topical and less systematic—seems less “older” than Grotius’. The question is if Haggemacher only exalts Gentili or criticizes contemporary International Law altogether. (Haggemacher 2002). Diego Panizza presents the difference between a teleological view, inherent to the Scholastics, and that of the Humanists such as Gentili. The author takes note of the influence of Macchiaveli—and the consequent resemblance of Gentili’s *jurisprudencia* with Politics—and states that the Gentili, in addition to building the grounds for the Science of International Law, embodies the emergence of the modern paradigm (PANIZZA, 2005). The influence of Machiavelli undoubtedly explains why some authors can find elements of secularism in Gentili. Although secularism seems somewhat counterfactual in a writer of the early seventeenth century, his Realistic “tone” produces this belief. Yet, as it will be seen further, Gentili endorses a notion of *jus gentium* older than that of Grotius’ or Suarez.

¹⁹Scott (2003), pp. 137, 147 and 254.

The problem with this discussion lies in the very approach of all sides to the dispute: the pursuit of a single founder of International Law. The solution does not stem from a book of single authorship. In 1904, Antoine Pillet (who had previously directed the thesis of Quilicus Albertini) publishes a collective work entitled *Les fondateurs du droit international*,²⁰ composed of a series of essays, each regarding a founding father.

The title already indicates the change in perspective; instead of one, the discipline would entail several founders. The list opens with Vitória, then moves to Gentili, Suárez, Grotius and continues with Zouche, Pufendorf, Bynkershoek, Wolff, Vattel and ends with Martens, at the time of the French Revolution. The same perspective permeates the Classics of International Law collection, published in 1906 by the Carnegie Endowment for International Peace, under the initiative of James Brown Scott. The Belgian Internationalist Maurice Bourquin, in a conference in Geneva in 1946, summed up this new perspective well: “The father of the Law of Nations is a general partnership, if I may so express myself; is a series of thinkers and jurists, a few preceded Grotius and others magnified and developed his work during the seventeenth and eighteenth centuries.”²¹

It is important to bear in mind that the concept of the Law of Nations does not correspond, necessarily, to that of International Law. If the latter refers to a Positive Law between sovereign States that are equal among themselves, then perhaps the first Jusinternationalist would have been Emerich de Vattel. Indeed, there is no correlation between the titles from a summary of a textbook of International Law and those of the works of Hugo Grotius, or those of the Spanish Scholastics. These authors wrote on a subject that resembles International Law, but does not coincide perfectly with it. This subject is the Law of Medieval warfare, the Just War doctrine.

2.1.2 *International Law and the Just War Doctrine*

The Just War doctrine represents the middle path between the total repudiation of war, often seen among Idealists, and the unconditional acceptance of violence for the glory of the State advocated by certain conceptions of political Realism, as if kings and *potestades* were not bound by morality and laws of nature. The supporters of the Just War doctrine recognize that war is an evil, but that there are worse evils, like the murder of innocents and the desecration of cemeteries and holy places at the hands of invading soldiers. This is a universal tradition, first developed by Christian Theologians and Canonists, but also by lay jurists.

²⁰Pillet (1904).

²¹“*Le père du droit de gens, c’est une société en nom collectif, si j’ose ainsi m’exprimer; c’est une série de penseurs et de juristes, dont les uns on précédé Grotius, dont les autres on élargi et développé son oeuvre, au cours du XVIIème et du XVIIIème siècles.*” (Bourquin 1948, p. 77). The idea of this change in perspective is referenced in Haggennmacher (1988), p. 36.

Most historians credit the origins of the doctrine to the *jus fetiale* of the Romans *collegia fetiales*. This *corpus juris* existed from the days of the kings until the end of the Republican era. *Fetiales* were priests brought together in a form of corporation (*collegia*), and charged with a series of obligations, partly religious and partly legal (*jus sacrum*). Among their many duties, they were entrusted with pronouncing the beginning of a war. Two conditions of procedural nature were essential to that end: an official notice to the opponent insisting on the redress of the injury or offense directed to Rome and providing a term for the opponent to respond, followed by a formal declaration of war. The latter took place at an elaborate religious ceremony, marked by the recitation of legal formulas in an adequately grand tone of voice, ending with the throwing of a spear soaked in blood into the border of the enemy's territory. Rome could not go to war without the prior and express approval of the *fetiales*, since the gods only favored the *bellum iustum et pium*. Yet, as the *fetiales* were subject to the authority of political leaders, they always sought a justification for hostilities (e.g., violation of a treaty or immunity of ambassadors, violation of territorial rights or offenses against allied States).²²

However, the influence of the law of the fetials in the Just War doctrine turns out to be so elusive that it becomes difficult to establish any sort of correlation. Its development during the Middle Ages bears no resemblance to its Roman origins. The Medieval Law of War had no formalities and was not even subject to political authority. From Rome, solely the idea of preaching to the justice or injustice of certain armed conflicts seems to have survived. Wars were no longer natural events or fatalities and began to enter the domain of morally relevant actions.

Some authors²³ find in the Medieval Law of War influences of the Hebrews of the Old Testament. Hellenic reminiscences are also undeniable. Nevertheless, there appears to be a consensus that the Law of War is a specifically Christian doctrine that began properly with Saint Augustine (354–430). There were earlier influences, but their influence is only marginal to the main aspect of this tradition: the justice of a war.

From a purely procedural matter in the ancient times, the idea of Just War acquired a material element throughout the Middle Ages. War and all the violence and destruction it engendered posed a serious moral problem for Christianity; apart from always engaging in strifes against non-Christians and even against Christians, the sacred texts can be misleading. On the one side, there is Christ's teachings about peace and "turn the other cheek" to the enemy, which could generate a radical pacifist interpretation in repudiation of any war, even those that are defensive in nature. On the other side, in the Old Testament, God reveals himself as the "Lord of the armies," a title that might legitimize any holy war.

²²Fusinato (1885), p. 273 et seq.

²³Vanderpol (1919), pp. 160–170.

For Christianity, war is not an evil in itself. According to the Spanish *maestros*, the evils that befall war are merely incidental and do not exceed the drawbacks that there would exist should war not be allowed.²⁴ Moreover, no religious council has ever permanently prohibited Christians from taking part in a war. There are undoubtedly some restrictions: the Council of Nicaea outlawed battles after baptism; in Isaiah, there can be no killing and no dying on the holy mountain—and in wider interpretations, in any sacred places. The reasoning behind this notion lies in the fact that war is not opposed to peace, but to the bad peace, one that endures to the detriment of justice and law. There is a substantial difference between the concepts of peace and tranquility. The latter means paralysis, the former means harmony. Harmony always presupposes equilibrium, a balance in the scales of justice. Therefore, *true* peace rests in law.

The Just War doctrine is eminently a Christian tradition, because it was developed and re-elaborated by authors of the European Christendom. After its origin with St. Augustine, other Church Fathers, St. Isidore of Seville and Pope Nicholas I, took up the doctrine of Just War. There was then a hiatus during the high Middle Ages, when the doctrine received little attention. Only in the twelfth century did the subject begin to interest thinkers again with the Gratian Decree. Writing about the war became very popular in the late Middle Ages. Canonists and Theologians began to scrutinize the arguments until the doctrine acquired its classic formula with Thomas Aquinas. Due to Aquinas' interest on the subject, the idea of Just War became an obligatory reference for all scholars. For this reason, Alfred Vanderpol prefers to call it the "Scholastic doctrine of the Law of War."²⁵

²⁴SUÁREZ, R. P. Francisci. *Opera Omnia. Editio Nova. Parisiis: Ludovicum Vivès*, 1858. *Tomus XII. De Fide, Spe et Charitate. Tractatus de Charitate. Disputatio XIII. De Bello*, 1, 2. Hencerforth, DB.

²⁵Vanderpol (1919), p. 285. Besides St. Augustin, St. Isidore of Seville (560–636) and the Pope Nicholas I, with his letter to the Bulgarians, are both authors of this tradition, together with Bishop Rufin, in the treaty *De bono pacis* (1056), Yves de Chartres (1040–1116) and Abelardo (1079–1142). In the first half of the twelfth century, there is also the decree of the monk Jean de Gratian. Subsequently, there appears St. Thomas, Raimundo de Peñaforte (1180–1275), Pope Innocent IV (1243–1254), Hostiensis (Henri de Suse: beginning of the thirteenth century–1271), Alexandre de Halès (1170–1245), Henri de Gand (beginning of the thirteenth century–1293) and St. Boaventura (1221–1274). In the fourteenth and fifteenth centuries, there are other works which titles refer to war: Jean de Legnano (beginning of the twenty fourth century–1383)—*De Bello* (1360), Henri de Gorychum—*De Bello Justo* (1420), St. Anthony of Florence (1389–1459), Alphonse Tostate (1400–1455), Martin de Lodi—*De Bello* (fifteenth century), Gabriel Biel (1425–1495), Sivestre Prierias (1456–1523), Thomas de Vio (Cajetan: 1468–1534), Guilherme Mathiae—*Libellus de Bello Iustitia Iniustitiaive* (1533), Josse Clichthove (1472–1543). Afterwards, with the Great Navigations, names such as Francisco de Vitória, Francisco Suárez and Balthasar de Ayala—*De Jure et Officiis Bellicis et Disciplina Militari* (1582) appeared. From this period, it is also possible to cite: A. Guerrero—*Tractatus de Bello Justo et Injusto* (1543), Diego de Covarruvias (1512–1577), Domingos de Soto (1494–1560), F. Martini—*De Bello et Duello* (1589), Gabriel Vasquez (1551–1604), Domingos Bañez (1528–1604), Roberto Berlarmino (1542–1621), Leonardo Lessius (1554–1623), Gregory of Valencia (1561–1603), Luís de Molina (1536–1600), P. Belli—*De re Militari et Bello* (1558), Alberico Gentili—*De Jure Belli* (1598) and Grotius himself—*De Jure Belli ac Pacis* (1625).

According to some textbooks,²⁶ in the beginning of Christianity, as the religion faced persecution and represented a minority, the Church adopted a peaceful posture and even forbade Christians to enlist as soldiers. However, after the spread of Christianity, when it became the official religion of the Empire and Christians started to shed blood not only as martyrs, the question of whether it would be lawful or not to engage in a war arose.

This view seems rather cynical. According to Haggenmacher, the early Church Fathers expressed objections to military service, but it is not possible to infer therefrom a radical pacifism. Most of their objections focused not on the violence but on the service itself; the religious aspect, the mandatory imperial cult in the army, seemed incompatible with the worship of the true God. Moreover, these objections appeared very sporadically. “Therefore, only a few martyrs proceeded to the end in their refusal; faithful soldiers sometimes chose to withdraw from military life, as allowed by the Roman system; but the great mass of Christian soldiers obeyed, without doubt, to the word of the Apostle that exhorts each to retain the position he occupies.”²⁷

The Church has never accepted the thesis of radical pacifism. Christians did not cease to swell the ranks of the legions long before the Edicts of Rome and Milan. Their large presence in the army was the main cause of the last persecutions carried out by the Romans. Moreover, as it would be, the movement that would culminate in the Edicts of Toleration of Constantine and of Licinius in the year of 313—which did not consider the military profession to be a sin—actually rose within the army. The compatibility of the military service with Christianity was such that one of the Fathers of the Church, St. Athanasius, came to preach that it was not only allowed but even glorious to give one’s life in a Just War.²⁸

Haggenmacher also criticizes the notion, made popular by Alfred Vanderpol, that all scholars and authors after Augustine of Hippo had simply systematized a doctrine which essence had already been conceived. It is not about contesting the relevance that the work of St. Augustine has had to the Medieval Law of War, but that it would form a true doctrine. For this to occur, for a doctrine regarding a particular subject to be established, it is necessary that this subject is investigated by itself; it must be the main scope of a precise and relatively autonomous set of coherent propositions.²⁹

However, the first writings on the justice of war only dealt with war ancillary. As seen, war itself was not the main issue that the Fathers were attempting to solve, but the legitimacy of a public service, the military service, in the light of Christian morality. Therefore, St. Augustine’s statements are but a late manifestation of this

²⁶Dinstein (2004), p. 89.

²⁷“*Pourtant seuls quelques martyrs sont allés jusqu’au bout de leur refus, d’autres fidèles choisirent peut-être de se retirer de la vie militaire, comme le système romain le leur permettait; mais la grande masse des soldats chrétiens obéissait sans doute à la parole de l’Apôtre enjoignant à chacun de se maintenir dans la situation qu’il occupait.*” (Haggenmacher 1983, pp. 14–15).

²⁸Nys (1894), p. 45.

²⁹Haggenmacher (1983), p. 13.

concern. In the famous passage from *Contra Faustum manichaeum*, in which he defends the campaign of Moses against the actions of Faustus of Milev, war is not the central issue. What was central in his campaign was the unconditional obedience to the unfathomable but also just divine commands: “the fact that Moses waged wars should not provoke strangeness or horror, because he had done it not on cruelty, but on obedience and respect to the divine commands.”³⁰

In *De Civitate Dei*, war became target of criticism because it represented one of the main tools of the Roman imperialism. St. Augustine uses it as a warhorse within the larger fight against the false values chanted by Virgil: the illusory grandeur of Rome is a result of *superbia*, not of *pietas*. The famous verse of this poet appears in the preface of the same book.³¹ In truth, then Augustine’s criticism is not directed to war itself, but to all pagan morality. It is from the *pax* and from the related notion of *ordo naturalis* that his understanding becomes complete. As in his Theodicy, in which evil is reduced to an absence of good, without having a proper consistency, war is merely a reflexive idea of the positive notions of *pax* and *ordo*. The human will is free to undergo *ordo*, by *pietas*, or to contest it by *superbia*. The *pietas* leads to the *pax ordinata* that is in harmony with the *ordo naturalis*; *superbia* leads to the *pax perversa*, the peace from the diabolic city. In order for the war to be fair, it has to abandon this kind of peace and build a better one, more appropriate to the *ordo naturalis* that corresponds to the divine will.³²

In reaction to the feudal greed for combat, the Church positioned itself against war. Nonetheless, its hostility was limited to wars among the faithful. The aim was to reduce the violence and destruction caused by war. The clergy were then prohibited to shed blood. A council sentenced the companions of William the Conqueror to a 1-year penance for each person killed, 40 days for those they wounded and 3 days for all those who they wished to hurt. There was no question around the legitimacy of war itself; only the Unjust War was a true punishment from God.³³

Historians usually consider the St. Isidore of Seville’s eighteenth book of the **Etymologies** an obligatory reference in the High Middle Ages. The author distinguishes four kinds of war: *bellum justum*, *injustum bellum*, *bellum civile*, and *plusquam civile bellum* (the one between generals united by family). “Just is the war that is declared to recover things that have been taken or to repel the enemy.” And, in its turn, “the war that comes from a furor and was not initiated by a

³⁰“(…) nec bella per Moysen gesta miretur aut horreat, quia et in illis divina secutus imperia non saeviens, sed oboediens fuit (...)” (Agostinho. **Obras de San Agustín**. Trad. Pío de Luis. Edição bilingüe. Madrid: BAC, 1993. t. XXXI. *Escritos antimaniqueos. Contra Fausto*. p. 604. XXII. 74).

³¹Agostinho. **Obras de San Agustín**. Trad. José Moran. Edição bilingüe. Madrid: BAC, 1958. t. XVI. *La Ciudad de Dios*, p. 62. I. *Praefatio*.

³²Truyol y Serra (1944), pp. 57–70.

³³Nys (1894), p. 46.

legitimate reason is unjust.”³⁴ There are therefore two requirements for the justice of a war in this definition: a declaration of war and a just cause. The just cause may be that to repel an enemy, which characterizes a defensive war, or to vindicate a stolen property, a species of the genus injury.

Despite the significance that this definition would later acquire—mainly because it would be reproduced in the Gratian Decree—Haggenmacher points out that this formula is a commonplace in ancient literature and was not really central to the Just War tradition. The Swiss Internationalist demonstrates that the Bishop of Seville wanted to resume two sentences of Cicero and not carry on St. Augustine’s thought on the war,³⁵ which would have little or no impact at all in this period. It is important to bear in mind that this does not apply to the Augustinian notions of *pax* and *iustitia*, which comprise the heart of the Political Augustinianism. The Christian notion of justice is rooted in the West since the end of the Empire, due to the privileged role that various popes would play in the political organization of the Frank and Germanic monarchies.

Only in the twelfth century did the Just War doctrine begin to take shape. In Bologna, in the year of 1140, the monk Gratian writes *Concordia discordantium canonum* that marks the beginning of the classical Canon Law. A substantial portion of the work, the *Causa XXIII*, focused on war and it has ever since been a mandatory subject for future generations of Theologians and Canonists. The **Gratian Decree** proves to be a work on both Law and Theology, which opens it to many interpretations. The Decree consolidates several subject matters—including war—and brings together a wide range of Patristic quotations. All the passages that are traditionally associated with the Just War doctrine are in the same place. If Haggenmacher is right—and both Augustine and Isidore had not dwelled on the idea of Just War—then it is in the **Decree** that this tradition begins. The mere encoding of all Christian thought on the subject in a single place is a clear indication of the desire to investigate the issue for itself. The quotes were taken out of their original context and began to acquire a value of their own, as a universal rule. This is a more generic approach, characteristic of the understanding of the time regarding the *auctoritates*: rules of a general character are necessarily found in the *auctoritates*, without taking notice of the framework of which they were only a part. Gratian comes as far as granting to the excerpts of the Patristic the same weight as the decisions of councils and the decretals of popes: they all amount to canons.³⁶

³⁴“*Iustum bellum est quod ex praedicto geritur de rebus repetitis aut propulsandorum hostium causa.*” And “*Inustum bellum est quod de furore, non de legitima ratione inititur.*” (ISIDORUS HISPALENSIS EPISCOPUS. *Etymologiarum sive Originum Libri XX*. ed. W.M. Lindsay. Oxford: Clarendon Press, 1911. XVIII, *De bello et ludis*, I, 2).

³⁵The resemblance with Isidore’s phrases is clear: “*Illa iniusta bella sunt, quae sunt sine causa suscepta. Nam extra ulciscendi aut propulsandorum hostium causa bellum geri iustum nullum potest. (...) Nullum bellum iustum habetur, nisi denuntiatur, nisi dictum, nisi de repetitis rebus.*” (Cicerón 1954, p. 164. Book III, 23).

³⁶Haggenmacher (1983), pp. 24–25.

The *Causa XXIII* from the **Gratian Decree** is entitled *De re militari et bello* and is divided into eight issues. Unprecedented, the first issue expressly addresses the morality of wars: *an militare sit peccatum?* (“Is it a sin to make war?”). Despite evoking the Gospels that preach for sweetness and forbid revenge, the author admits that war may be legitimate. Some wars are necessary, and the necessity thereof would excuse a certain degree of violence.³⁷

However, the necessity in itself is not enough to legitimize a war. Gratian borrows from the Treaty of St. Augustine against the Manichees a list of all the reprehensible actions in a conflict: the desire to destroy, the cruelty of vengeance, the ruthlessness and violence of the spirit, the savagery in combat, the passion to dominate and all other such excesses. The mere engagement in a war does not equate to a sin, but war should not be carried out with cruelty and greed, but only in the pursuit of peace. The Decree sets forth two definitions of Just War, that of Isidore of Seville, already quoted, and one borrowed from St. Augustine: “It has been the custom to call just wars those which purpose is to avenge the injustices, to punish a city or a country that did not punish an unlawful act committed by one of their own, or to restore what has been taken unjustly.”³⁸ Therefore, just is the war which purpose is the pursuit of peace, to avenge an “in-jury” and to retrieve a good unjustly taken.

When Gratian uses the definition of the Bishop of Seville, he introduces a subtle modification. He replaces the expression *ex praedicto*, which implies the need of a declaration, by *ex edicto*, which implies the existence of an authority to order the wage of war.³⁹ Therefore, a vague notion begins to take shape—and would later be developed by Raymundo Penñaforte and Aquinas: the notion that a legitimate authority must declare the Just War.

Before the Gratian Decree, there are still some canonical collections relevant to the Just War doctrine, such as those of Burchard of Worms (1012), Anselmus of Lucca (1083) and Ivo of Chartres (1095), all of which influenced Gratian. However, Gratian’s merits lies in the fact that he devised the justice in a war not strictly in theological or moral terms, but also legal, at least partially.

For instance, in the collections of Ivo of Chartres the **Decretum Ivonis** and the **Panormia Ivonis**, the canons on war do not form a body of rules separated from the rest of the work; they are inserted in the subjects of murder, massacre, and violence in general. Although the Gratian Decree assembles several texts of the works of Ivo, the context had changed. Although it is possible to identify objective criteria, on the works of Ivo the aura of voluntarism prevailed: justice depends on the straight intention of the combatants. The soldier cannot fight with *odium* or *avaritia* in his heart. Nevertheless, when quoting Ivo, Gratian rearranged the texts and wipes out

³⁷GRATIANUS. **Decretorum Codex**. *Venetii*: Nicolai Jenson Sallici, 1477. Causa XXIII, I, 1.

³⁸“*Iusta enim bella definiri solent, quae ulciscuntur injurias, si gens vel civitas plectenda est quae, vel vindicare neglexerit quod a suis improbe factum est, vel reddere quod per injurias ablatum est.*” (GRATIANUS. **Decretorum Codex**. Causa XXIII, II, 1).

³⁹Nys (1894), p. 100.

any shred of “intentionalism” from it. War makes for an independent subject of study, no longer attached to the study of murder. There exists a sketch of an objective and legal public order.⁴⁰

Although the Gratian Decree examines war in itself, Haggenmacher emphasizes that Gratian’s purpose seems not to investigate the justice in a war. If one considers the *Causa XXIII* as a whole, then the key subject thereof is the legitimacy of coercive power among Christians in the domain of faith. War is but one manner of exercising such power. The first three questions that deal with war, especially the very question that characterizes what a Just War is, are the most concise questions. Given their extent, the two median questions are the center of attention, and they relate to the vindictive power and its ultimate consequence: the capital sentence imposed by a judge. Therefore, the core of the problem lies in the idea of coercive power. The first three questions are of a preliminary nature and discard a fundamental objection; the two median questions cope with the subject itself; the sixth and seventh questions deal with the immediate consequences of the power of repression and the eighth one addresses a particular issue that is the use of weapons by clerics. History also confirms this interpretation of the *Causa XXIII*, since all the leading decretalists of the twelfth century also adopted it in their comments.⁴¹

Still, even if the *Causa XXIII* does not encompass a true Just War doctrine, the specificities of its contents—the fact that it addresses war in itself and assembles a large number of Patristic references on the subject—were decisive in the emergence of the Just War doctrine. From Gratian to Thomas Aquinas, the doctrine of war develops itself in an organic and continuous fashion. If the Church Fathers imprint no depth to the study of the subject, whereas in the Gratian Decree it is part of a larger issue, it succeeds anyhow in gaining autonomy among jurists, canonists, and decretalists.

The collection of decretals that one Spanish Dominican named Raymundo Peñaforte managed to assemble in the first half of the thirteenth century, under the orders of Pope Gregory IX, are worth mentioning. The author establishes five conditions for war to be just (*persona, res, cause, animus* and *auctoritas*), which would later be condensed by Aquinas in only three. Shortly after, two other authors produce their comments to the Gregorian decretals: Pope Innocent IV, one of the greatest jurists to occupy the seat of Peter, in the **Apparatus in quinque libros decretalium**, and Henri de Suse, known as *Cardinalis Hostiensis*, in **Summa Aurea**.⁴²

Then, between the years of 1263 and 1269, St. Thomas Aquinas writes his **Summa Theologica** and introduces the classic formula of the Just War doctrine. His work would exert influence on Theologians, Moralists, and Canonists alike, even though Aquinas was not a lawyer. His research on war is encapsulated in question 40 of the Treaty of Charity *secunda secundae*, and summarized in four

⁴⁰Bauer (2005), pp. 50–54.

⁴¹Haggenmacher (1983), pp. 26–27.

⁴²Haggenmacher (1983), p. 38.

articles. The first article deals with the issue of the lawfulness of war; the second questions whether it would be lawful for clerics to go to war; the third addresses both the legitimacy of using stratagems and the legality of fighting on holy days. But the first article is indeed the core of his theory. For a war to be just, it must satisfy three conditions:

First, the authority of the prince, by whose mandate it is allowed to make war. The private person is not competent to declare war because he can submit his claim to a higher court. (...).

It is required, secondly, a just cause, namely, that those who are deemed guilty deserve for some fault such an impugnation. (...).

Thirdly, it is required a straight intent on the part of the combatants: that they attempt to or promote good or avoid evil. (...)⁴³

In light of the authority that the thought of Aquinas would acquire over time, these three conditions define the Scholastic Doctrine of Just War.

Lay jurists also began turning their interests to the law of war. At the end of the thirteenth century, Cino of Pistoia and many a French jurist of the School of Orléans began studying the subject. At the beginning of the following century, the great Medieval jurist Bartolus of Saxoferrato reinforces the doctrine by incorporating the theories of Innocent IV. A disciple of Bartolus, Iohannes Lignano wrote in 1360 the first book to exclusively address the law of war: **Tractatus de bello, de represaliis et de duello**. Lignano set a tradition that would culminate in Gentili and Grotius. This book would acquire a very practical connotation due to the many a dissemination such as those from Christine de Pisan, William Caxton, and the famous work of Honoré Bonnet, *L'Arbre des Batailles*, all written in vulgar language. From then until the time of Grotius, several works specifically addressing the law of war begin to emerge, such as the treaties of Martin of Lodi, Juan Lopes, Pierino Belli, Balthasar Ayala and Heinrich Bocer. Therefore, a progressive consolidation of the intellectual *corpus* of the Just War⁴⁴ doctrine emerges.

Despite the fact that it is Lignano's book that establishes the Just War doctrine, he does nothing more than compiling the findings of his predecessors. He introduces a period of stagnation in the discipline, dominated by a rather sterile casuistic approach, except for some isolated progresses such as those made by Lucas de Penna or Raphael Fulgosa. From the sixteenth century onwards, although the general interest on the subject only increased, lawyers were not the ones to develop the law of war. The Theologians did. Haggemacher mentions the contributions of

⁴³“*Primo quidem, auctoritas principis, cuius mandato bello est gerendum. Non enim pertinet ad personam privatam bellum movere: quia potest ius suum in iudicio superioris prosequi. (...) Secundo, requiritur causa iusta: ut scilicet illi qui impugnantur propter aliquam culpam impugnationem mereantur. (...) Tertio, requiritur ut sit intentio bellantium recta: qua scilicet intenditur vel ut bonum promoveatur, vel ut malum vitetur.* (Aquino, Santo Tomás de. **Suma Teologica**. Texto latino de la edición crítica Leonina. Trad. Francisco Barbado Viejo, O.P. 2. ed. Madrid: Biblioteca de Autores Cristianos, 1947. 2-2 q. 40 a.1. Henceforth, **ST**).

⁴⁴Haggemacher (1983), pp. 39–40.

Martin Luther and Erasmus,⁴⁵ but they appear to be somewhat eccentric to the Just War tradition. The main writers of this period are in fact the Italian Thomas de Vio—namely, Cajetan—and the Spanish Scholastics. Among these, there is no doubt that Francisco de Vitória and Francisco Suárez occupy a prominent position, especially because they developed the concept of *jus gentium*.

2.2 The Evolution of the Concept of Jus Gentium

Vitória's understanding of the law of war and of the *jus gentium* will be examined separately, in light of the author's relevance to both Suárez and Grotius. For now, it is worth mentioning that in the late nineteenth and early twentieth centuries, there begins to take shape a literature that considers the Jurist of Delft and his Scholastic precursors the legitimate exponents of the Just War tradition. The reason thereof is that this doctrine is henceforth associated with the origin of the International Law. "The Middle Ages saw some elements of the Law of Nations arise, but they were too feeble to be of any relevance. Only the law of war would be really developed; it forms the core of International Law."⁴⁶ Even before the appearance of autonomous works on the Law of Nations, there already existed books on some of its subjects: the law of embassies, the law of trade and slavery. Thus, the law of war would correspond to an early manner of investigating the Law of Nations.

However, the assertion that the contemporary field of International Law originated in its entirety from the Medieval doctrine of the law of war is overstated. Except for Suárez and Grotius (Vitória and possibly Vázquez de Menchaca and Gentili may be included between these two, but not without any controversy), the concept of *jus gentium* in the authors of the Just War tradition does not correspond to a law between nations, but to a common domestic law, still immersed in Ulpian's Roman orbit—as mentioned below. Much of these Christian writers did not even use the expression "*jus gentium*." According to a very suggestive image of Haggenmacher's, it seems possible to compare the evolution of the Just War doctrine towards International Law with the growth of a plant: if the latter corresponds to a flower, the law of war is its stalk.⁴⁷

Suárez and Grotius undeniably take part in the Just War tradition, and were inspired by it when developing their concepts of *jus gentium*, as will be seen in other chapters. However, they did not write solely about law of war. They offer a definition of *jus gentium* in their works that sets them apart from all their predecessors. In order for this innovation to be unveiled in all its contours and thus for

⁴⁵Haggenmacher (1983), p. 42. See, in chapter VI, Grotius' critics to Erasmus' irenism.

⁴⁶"Le moyen âge voit se former quelques institutions du droit de gens, mais elles sont trop chétives pour qu'on puisse en tenir compte. Seul, le droit de la guerre se développe sérieusement; il forme le noyau du droit international." Nys (1894), p. 7. In addition, see, for illustrative purposes, another work that establishes the origin of International Law in the law of war: Vanderpol (1919).

⁴⁷Haggenmacher (1988), p. 77.

these thinkers to have stood out, it is essential to present how the concept of *jus gentium* modified over time.

When Aristotle introduces his famous distinction between Natural and Legal Justice⁴⁸ in Book V of the **Nicomachean Ethics**, he also bequeathed to posterity (especially to Scholasticism) the notion that Natural Law would be unchangeable and that Positive Law would vary from place to place. One has a universal character, the other a particular one. One is based in truth, in the eternal essence of things; the other in opinion, in *doxa*, as ephemeral as human circumstances are.

However, this division is shortlived. A third term would emerge: the Law of Nations. This Law would bring together elements of the other two: it would be positive, yet applicable to all men. For a contemporary Internationalist, the nature of this Law does not constitute a problem: its universality does not derive from the natural reason; it is a mere framework of spatial validity encompassing all States. However, this apparent simplicity is misleading. The truth is that the Law of Nations is a *tertius genus*, a middle ground between Natural Law and Positive Law. There is an ethical content in the core of this legal branch.v

2.2.1 The Roman Notion

Roman Law exerted a profound influence on the authors of International Law. Until the eighteenth century, in addition to the sources, Rome bequeathed to the entire Western civilization, including the United Kingdom, a common legal terminology. Whenever possible, writers would make use of the vocabulary and the Roman sources. In fact, these references said nothing about International Law but constituted a mandatory tradition—as well as a source of inspiration. For example, the rules on private property (*dominium*) applied irrespective of territorial sovereignty; international treaties were born out of the rules on general contracts; the provisions on *mandatum* extended to the functions of diplomatic agents.⁴⁹

Likewise, the concept of the Law of Nations derives from the Romans: it is the literal translation of *jus gentium*. It appeared first in Rome, during the tribal organization, even before the monarchy—which was instituted at the same time of the City, in 754 BC.—bearing a meaning quite different from International Law. The social organization of the Italian peninsula relied on those principles, a system called “gentile” because it formed the right of the “gens,” of the people who belonged to the same clan or to related clans. It was possible to distinguish among the “*jus gentilicium*” that governed the relations between the upper and lower classes within the same people, the *jus gentilitatis* which comprised the laws in force in the senior class of the gentils and the *jus gentium* that governed relations between different ‘gens’.”⁵⁰

⁴⁸Aristóteles (1973), p. 331. book V, 7.

⁴⁹Nussbaum (1953), p. 14.

⁵⁰“(…) le *jus gentilicium* qui gouvernait les relations entre les classes supérieures et les classes inférieures au sein d’une même gente, les *jus gentilitatis* qui comprenait les lois en vigueur aun

Afterwards, the Roman concept of *jus gentium* extended to the relations among foreigners (*peregrini*) and to the relations between them and the Romans *cives*. It was a set of rules addressing human beings, not political organizations. Moreover, the *jus gentium* consisted in an *intra gentes* law, not an *inter gentes* one. From 242 BC. onwards, it was given by a *praetor peregrinus*, an itinerant figure. This enabled the edicts to reconcile cultural proposals and distinct legal traditions. The Praetor needed to focus on actual agreements not formal ties, to favor the substance rather than the form, as the form is proper of one community and not easily universalized. Contracts should emphasize the *volutas*, the *consensus*, even if their form was poor. This feature stands out from the rest of the Roman law, which was formalistic in its essence. Even in its origin, the fundamental task of this field was already outlined: “to govern the relations between ‘outsiders’, between human beings who do not belong to the same tribe, to the same clan, to the same nation, to the same culture, but who share one common humanity.”⁵¹ From the onset, *jus gentium* has within it the requirements of an universal law, a law that should be in principle acceptable to all men; a nonnational branch, open to differences.

This branch belonged in fact to Positive Law, but it resembled Natural Law in many of its elements. As the Roman pride prevented the direct import of external legal rules, the *jus gentium* welcomed and re-elaborated the uses and customs of other peoples. Thus, a body of *jus aequum* was formed, which had little to do with kindness or mitigating the rigors of the law—it had little to do with equity, according to a common definition. It favored actual will instead of an instrumental formula; it was a requirement of universality to facilitate communication. Moreover, the notion of *bona fide*, of loyalty to one’s word, held a key position. Good faith proves to be crucial for the stability and sustainability of commercial relations and constitutes a guarantee of personal credibility. Apart from trade, Rome established with foreigners relations of patronage, *amicitia* and *hospitium*. The *jus gentium* also cared about the preservation of *mores*. These ethical contents made the Law of Nations closest to Natural Law than to Positive Law.⁵²

So, it is hardly surprising that the *jus gentium* was often confused with Natural Law itself, since, as a set of universal rules, its creation relates to that of custom, which can become lost in ancient times. Cicero himself offers no distinction between the *jus naturalis* and the *jus gentium*. In *De Officiis*, he investigates the nature of the obligations that prohibit men from harming others, “Why, of course it is not only by force of nature, that is, by the Law of Nations, but also by virtue of the laws of the different peoples, who hold public affairs in every city. They also set forth that it is not lawful to harm others for their own benefit.” Furthermore, Cicero

(Footnote 50 continued)

sein de la classe supérieure des gentils et le jus gentium qui réglait les rapports entre les différents gentes” (Laghmani 2003, p. 11).

⁵¹“(…) *gobernar las relaciones entre ‘extraños’, entre seres que no pertenecen a la misma tribu, al mismo clan, a la misma nación, a la misma cultura sino que comparten sólo una común humanidad*” (Viola 2004, p. 166).

⁵²Viola (2004), p. 170.

demonstrates the validity of this law in light of the wickedness of customs and the corruption of Civil Law⁵³:

Although I established that similar scam is not considered wicked by virtue of the perversion of the customs, nor is it prohibited by Law or Civil Law, I believe that the Law of Nature forbids it. Indeed, there is a wide society - it has been said many times, but it is worth repeating it many others - the company of all men and a more restricted one, that form part of the same family, and finally an even smaller one, of men that are of the same city. Our ancestors wanted the Law of Nations to exist on the one hand and Civil Law to exist on the other. Civil Law does not necessarily need to be the Law of Nations, but the latter does need to be Civil Law.⁵⁴

It is possible to infer that Civil Law is opposed to the Law of Nations, the law derived from nature, from the wide society of men. All law stems from a society: Civil Law from a small society, which is the city itself, and the Law of Nations from a human *magna communitas*, the society of all men. Influenced by the Stoic philosophy, while confronting Civil Law with the Law of Nations, Roman authors made broad assumptions that significantly altered the essence of the term *jus gentium*. The Roman historical *jus gentium* applied the foreign experience to very particular cases; however, the philosophical *jus gentium* comprised norms and legal elements found everywhere, such as those relating to marriage, to the defense and protection of the property, to the duty to repair a damage. Since it was in fact a universal common law, the task of separating it from Natural Law was challenging.

The great Roman jurists also showed this lack of accuracy. In their compilations, they did not merely list the elements of the Law of Nations, but also sought to define it, and it was Greek Philosophy, not the current legal practice, that served as their matrix. It is worth noting that among the various issues covered by this philosophical *jus gentium*, some were international in nature, such as the law of embassies and the rules on war plunder and spoils of war. However, most subjects were of private law and to a lesser extent of domestic public law, such as the status of the deportees. Therefore, it does not seem possible to establish any correlation with International Law. The initial title of the **Digest** introduces two main definitions of *jus gentium*, one of Gaius and another of Ulpian; both rely on a natural basis. To Gaius,

⁵³“Civil Law” is the law of the city and the citizens (the *cive*). In this book, I will not use this term in the sense of private law.

⁵⁴“*Neque vero hoc solum natura, id est jure gentium, sed etiam legibus populorum, quibus in singulis civitatibus respublica continetur, eodem modo constitutum est, ut non liceat sui commodi causa nocere alteri.*” E, adiante: “*Hoc quancquam video propter depravationem consuetudinis neque more turpe haberi neque aut lege sanciri aut jure civilii, tamen natura elege sancitum est. Societas enim est (quod etsi saepe dictum est, dicendum tamen est saepius), latissime quidem quae pateat, hominum inter homines, interior eorum, qui ejusdem gentis sunt, propior eorum qui ejusdem civitatis. Itaque majores aliud jus gentium, aliud jus civile esse voluerunt. Quod civile, non idem continuo gentium; quod autem gentium, idem civile esse debet.*” (CICERÓN. **De Officiis**. Paris: Garnier, s/d. Liber III, V and XVII.)

In all peoples governed by the laws and customs, both their own law and the common law, applicable to all men, they use those rules them. Indeed, the right that each people have set for themselves is proper to the city itself; but the law which natural reason has established among all men is a rule which conforms to all and is called the Law of Nations, inasmuch as the law used by all peoples.⁵⁵

There are thus two sets of rules: Civil Law and the Law of Nations. The first is proper to each State, which is also its source; the second one is common to all men and manifests itself equally among all peoples. The peoples do not create the Law of Nations, but it derives from a higher principle, the *naturalis ratio*. This is prior to Positive Law, created in a state of primitive innocence. The opposition between the law of a determined nation and the law common to all nations, between the law based on human will and that which results from the right reasoning, between a written law and an unwritten one, is evident. Thus, the expression *jus gentium* may be easily replaced by Natural Law.

In turn, Ulpian adds a third term to the division of sources: the *jus naturale*. He begins his work with this expression, which comprises the most basic and vital functions that nature reserves to all living beings, humans and animals alike: the union of the sexes, procreation and the education of the offspring. This *jus naturale* seems to refer to the Stoics' Natural Law. In contrast, the author defines the Law of Nations: "The Law of Nations is applied to human beings and can be easily deduced from nature by understanding, and, among all the animals, only men shares [this law] with one another"⁵⁶ The Law of Nations constitutes a portion of the Natural Law applicable only to human beings.

This division dates back to a Pythagorean notion that assumes the existence of an age of innocence, a golden age, opposed to an age of sin, an age of iron. In ancient times, all things would have been common; man would have been free and directly ingrained in Nature. Afterwards, man would have followed perversion and selfishness, and the private property, along with other excluding institutions, would have been established. In Ulpian, Natural Law is more related to the idyllic period, while the Law of Nations to the subsequent one.⁵⁷

Despite having included this third term, both Ulpian and Gaius considered Civil Law as the *ius proprium*, opposed to an *ius commune*, following the teachings of Aristotle. Yet, there is a flaw in the comparison with Aristotle, because while Gaius considered the common law the equivalent of the Law of Nations, Ulpian regarded

⁵⁵"*Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.*" (IUSTINIANUS IMPERATOR. *Corpus Iuris Civilis*. ed. Krueger e Mommsen. Berlin: Weidmann, 1908. *Digesto*, 1, 1, 9).

⁵⁶"*Ius gentium est, quo gentes humanae utuntur, quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.*" (IUSTINIANUS IMPERATOR. *Digest*, 1, 1, 1, 4).

⁵⁷Barcia Trelles (1933), p. 424.

the *ius commune* as both Law of Nations and Natural Law. For this author, all that is not Civil Law is common law. Therefore, since Civil Law is specific and changeable, the *jus gentium* would share its immutability with the *jus naturale*. If this feature is a result of a higher principle, such as the natural reason of Gaius, then the Ulpian's Law of Nations would not belong to Positive Law and not correspond to the historical reality of the Roman *jus gentium*. It would only possess a philosophical and Hellenic nature. To avoid this conclusion, the "common" feature of Ulpian's *jus gentium* would need to derive from a coincidence of legal institutions among diverse nations, not from right reasoning. Either Ulpian is a bad jurist, as he did not properly and accurately describe the historical *jus gentium*, or he would be a bad philosopher, by ignoring the fundamentals of the Aristotelian bipartition.

However one interprets this matter, the fact remains that neither the *jus gentium* of Ulpian nor Gaius' resemble contemporary International Law. Even if both concepts may apply to different nations, their true subjects are not the peoples or the *populi* that the authors mention. As in Civil Law and Natural Law as well, the subjects of their *jus gentium* are the individuals. In Ulpian, the emphasis rests on the *humanae* adjective. Employing the noun *gentes* instead of *genus humanum* (a term that is present in the excerpt above, one must notice) is merely for wordplay purposes with the expression *jus gentium* and supposedly to uphold its proof of value. The same happens with Gaius. The *populi* are no equivalent to the subject of the *jus gentium*, either in law nor in syntax, because the *apud* inserted in the end transforms the word into a complement of place. In addition, the term *omnes* appears four times in the sentence. "Far from being *ius inter gentes* or *inter populos*, the Law of Nations of our two authors should be regarded as *inter homines*."⁵⁸ The individuals, more precisely freemen, are the subjects of the *jus gentium*; the *jus gentium* is thus opposed to Civil Law, which addresses men who have, in addition to their freedom, the *status civitatis*.

2.2.2 The Medieval Notion

The authors of the Middle Ages dismissed Ulpian's concept of Natural Law as applicable only to animals. The theme of the autonomy of the Law of Nations would also arise parallel to this rejection. As seen, the **Concordia** of Gratian is a turning point for the law of war. It also sets out a definition of *jus gentium* extracted of St. Isidore that would become famous. In chapter II of the **Etymologiae**, the Archbishop of Seville, St. Isidore, proposes a very interesting distinction between human and divine laws. The latter would arise from nature and the former from the uses. For this reason, human laws vary from place to place, according to the will of the nations, while divine laws are immutable. According to him, *lex* does not mean

⁵⁸"Loin d'être *ius inter gentes* ou *inter populos*, le droit des gens de nos deux auteurs doit s'entendre *inter homines*." (Haggenmacher 1983, p. 318).

jus; *lex*, together with *mores*, constitute a species of the genus *jus*. The *jus* is divided into natural, civil and of nations, as a separate category. Civil law is the Positive law of the city, and Natural Law applies only to men. But the *jus gentium* remains unclear. Without offering a proper definition, the author begins by pointing out the etymological origin of the term and by recalling Gaius' concept thereof. However, he introduces a subtle difference: the Law of Nations presents itself as "almost" universal. Then, he proceeds to list the themes addressed by this branch of *jus*:

The Law of Nations addresses the occupation, the buildings and the fortification of castles and cities, the war, the captives of war, the slavery, the restoration of rights by *postliminium*, the peace agreements, truces, the inviolability of embassies and the prohibition of marriage between people of different religions. And so is the Law of Nations, for it is the law of the uses of all nations.⁵⁹

This definition of *jus gentium* by the enumeration of its themes marks a future trend that would culminate in the autonomy of the *jus gentium* from the *ratio naturalis*. The Medieval way of making Jurisprudence (Science of Law) called *mos italicus* due to the influence of jurists such as Baldo, Paulus Castrensis, and Bartolus of Saxoferrato, consisted of drafting long treaties about everything that there was to know from the Law of the current time. The first books only resurrected Roman law, which was considered the pinnacle of perfection in legal terms. Only later did they begin to combine the Roman legacy with Germanic institutions. Thus, there was an accentuated universalist feature (albeit limited to Europe), and slowly there began to emerge one or other work that would address the subject matters of domestic law. They were addressed by way of *topoi* and from questions raised by authors who had already written thereon. Gradually, there appeared treaties covering specific legal issues, although retaining the old approach.⁶⁰ In the field that would come to be that of the Law of Nations, a considerable number of dissertations on the law of the embassies emerged, not to mention books on the Just War tradition.⁶¹

⁵⁹"*Ius gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera, pacis, indutiae, legatorum non violandorum religio, conubia inter alienigenas prohibita. Et inde ius gentium, quia eo iure omnes fere gentes utuntur.*" (Isidorus Hispalensis Episcopus (1911), V, VI).

⁶⁰That was Rhetoric, considered a true *vir civilis*, a civic virtue. Logic was solely for speculative Philosophy and Theology, which was the *magna* science. Aquinas, e.g., places the Rhetoric at the top of the well-known hierarchy of knowledge introduced by the Stagirite in chapter I of Book I of *Metaphysics*, for Rhetoric was more speculative than practical and superior to other disciplines. Aristotle himself had established the *Metaphysics* at the top of the hierarchy, but the term was used only when it dealt with the *ens commune*; "*‘filosofia primera’, en cuanto considera las causas primeras de las cosas; ‘teologia’, en cuanto considera las sustancias que no tienen materia, Dios, etc.*" (Sciaccia 1976, p. 50). It is the triple aspect of a single discipline. However, practical sciences such as Ethics and Law, which researched on how to live good, are not expressed according to the canons of formal Logic, but according to another logic that seeks conviction and persuasion: the Rhetoric and the Topic.

⁶¹Wijffels, 1995–1996, p. 39.

Some authors⁶² perceive similarities between Isidore's definition and the modern discipline of International Law. Far from being fortuitous, this enumeration marks three major thematic circles: one concerning the institution of political power, other the war and its consequences and the third concerning the law of treaties and embassies. In fact, some subjects already approached Isidore's Law of Nations to the contemporary International Law. However, others such as banned marriages between foreigners would bewilder an Internationalist. Indeed, banned marriages between foreigners do not fall within any of the major issues of today's International Law.

Therefore, other authors⁶³ do not find in Isidore's *jus gentium* any trace of International Law. Although Isidore disputes Ulpian's definition of Natural Law, his imagination does not lead him to other places when addressing the Law of Nations. The Bishop of Seville seemed to have simply "bumped into" the term *jus gentium* because of the authority that the ancient texts had acquired, and thus he would need to dwell on the subject lest he be deemed incomplete.

The vagueness of the text even leaves room for a speculation that Francisco Suárez would make years later with his known division between *jus inter gentes* and *jus intra gentes*, as will be seen in Chapter V. Isidore's Law of Nations would be equivalent to the *jus intra gentes*, as a sort of private law common to many nations. The adjective "common" would be a mere coincidence, and would not imply a provision binding on all States, which, in any event, is no different from the Roman *jus gentium*. Isidore's Law of Nations refer to rules already created by the human intellect—such as the uses, the custom: *eo iure omnes fere gentes utuntur*—much like Civil Law, and applicable to all different nations and men, like Natural Law.

Yet, it appears questionable that Isidore would have completely distanced himself from the Roman orbit, since much of his institutes coincide with those of the Hellenic *jus gentium* of the Roman jurists. Since the Law of Nations was not the author's main concern, it is possible that the term would allude to the legal-political reality of the High Middle Ages: a split European Christianity, ruled by the Pope and the Emperor—a more symbolic than effective authority—united by a vague commonality of interests and a positive common customary law, reminiscent of the Roman law. This could explain the positive character of Isidore's Law of Nations without distancing him from the ancient sources.

So, the issue of the autonomy of the Law of Nations was as follows: some of the themes of this law emerged from the human will, but it shared an (almost) universal character with Natural Law, which bring us to the problem of its philosophical basis. In Ulpian, the Law of Nations is a species of the genus Natural Law, but it encompasses rules of Positive Law.

The glossators tried to solve this issue by splitting either Natural Law or the Law of Nations into several species of law. This coincided with the idea of a progressive

⁶²Rivier (1883), pp. 9–10.

⁶³Walker (1899), v. I. § 85.

development of Natural toward Positive Law within a temporal and genetic framework. Therefore, one may find in the **Summa Institutionum** of Placentin a *prima iura naturalia* and a *secunda iura naturalia*, which correspond respectively to Natural Law and to the Law of Nations. Likewise, Etienne de Tournay, in the **Summa ad decretum**, refers to a *ius naturale primitivum*, prior to the institution of private property—an institute that was proper of the *jus gentium*. Many glosses associated with the *Institutas* distinguish a *jus gentium* created with man from other *jus gentium* created by men: the first is inspired in Gaius, and the second is equivalent to the Positive Law of Nations.⁶⁴

Such way of reasoning would even reach Grotius. While this solution provided substance to a notion that wandered between two extremes, it hid the problem of the autonomy of the positive *jus gentium* from the *jus naturale* and the *jus civile* by creating another superfluous subdivision. This *jus gentium* clearly had nothing to do with International Law.

Contrary to jurists, legists or Medieval canonists, the Theologians ignored the Law of Nations. The Sentences of Peter Lombard, as well as the comments and sums of post-thirteenth century Theologians, are silent on the subject. If, by chance, there is any mention thereof, the *jus gentium* plays only an ornamental function.⁶⁵

The great exception is Thomas Aquinas, who assigns to the *jus gentium* a privileged place in his thinking and brings together all the traditional interpretations in one concept. Like St. Isidore, Aquinas differentiates the Law from the laws. The Treatise on Laws must be read in conjunction with the Treaty of Grace, because both laws and grace are principles external to men, govern their behavior and move them towards righteousness. In Aquinas, the study of the Law is part of the Treaty of Justice; the object of the virtue of Justice is the Law itself, the *iustum* that corresponds to the Aristotelian *dikaion*. In the next chapter, in order to understand Suárez's concept of Law, I will investigate the Thomistic distinction between the Laws and the Law. For the time being, it is sufficient to bear in mind that studying the different kinds of law in Aquinas (Eternal, Natural, Divine and Human Law) means to investigate God's project for Creation, because "the law is a certain rule and measure for the acts whereby one is induced to act or to restrain from doing something."⁶⁶ Laws govern not only human social organization, but also the entire universe. In turn, the entire problem of the Law comes down to Justice. This is an issue that a modern Positivist such as Kelsen or Hart would leave out of the realm of the science of Law, but not a Medieval jurist and much less a Theologian.

Haggenmacher states that Aquinas introduced two different concepts of *jus gentium*: one in the Treatise on Laws and the other in the Treaty of Justice. The difference goes beyond the attention that each receives in its respective treaty. In the first treaty, the Angelic Doctor recovers St. Isidore's definition (according to which

⁶⁴Haggenmacher (1983), p. 326.

⁶⁵Haggenmacher (1983), p. 327.

⁶⁶"(...) *lex quaedam regula est et mensura actuum, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur* (...)" (ST 1-2 q. 90 a.1).

the Law of Nations belongs to Positive Law), while in the second treaty, he reconstructs the definition of the Romans (for whom it is intertwined with Natural Law). Since the two notions are incompatible, the unification proposed by Aquinas would seem ambiguous.⁶⁷ However, Haggenmacher's conclusion does not withstand closer examination. Reversing the order that these two texts are presented (first the Treaty of Justice, then the Treatise on Laws) may help clarifying the Dominican's synthetic proposal.

In Aquinas, as in Aristotle, law (*jus*) may proceed both from the nature of things (Natural Law) as from a convention (Positive Law). Thus, the author's questions set the Law of Nations apart from Natural Law. The natural just is that which is "adjusted" to another thing by its own nature. This may occur in two different ways:

First, taking into account the thing utterly in itself; thus the male, by his nature, accommodates to the female to breed with her, and the parents to their child, to feed them. Second, considering the thing no longer in itself, in its nature, but in relation to its consequences; for example, the ownership of possessions [of land].⁶⁸

In itself, Natural Law presides the relations of things that are already compatible one to another by their own nature: for instance, procreation is just by nature because women and men have reproductive organs that are perfectly compatible, and the care for the offspring proves to be just by nature because the mother feeds the child with her breast milk. The perfect fit is the very evidence of the existence of Natural Law: it requires no further confirmation. Aquinas calls this the Natural Law *primo modo*.

However, something by its own nature may also turn out to be just, even if it is not straight away. The example of the property is quite illustrative. In fact, the land in itself does not imply any need for it to belong to this or that person. Nevertheless, if one is to consider the consequences—the fact that the property may be cultivated—it becomes possible to draw an ownership title: this, and not that other person is gifted to be a farmer, and it is fair that he owns the land. This kind of justice does not escape the realm of the Natural Law, because there is no human convention establishing this or that behaviour. However, virtue does not arise from the thing in itself: human intervention (the cultivation of the land) was necessary for the perfection of justice. Aquinas calls this the Natural Law *secundo modo* or the Law of Nations.

Applying the expressions *primus* and *secundus modus* to Natural Law may remind the glossators' concepts thereof, but the author does not attribute to them any temporal or genetic meaning. They simply constitute forms of adapting one thing to another, according to their nature.

⁶⁷Haggenmacher (1983), p. 328.

⁶⁸“*Uno modo, secundum absolutam sui considerationem: sicut masculus ex sui ratione habet commensurationem ad feminam ut ex ea generet, et parens ad filium ut eum nutriet. Alio modo aliquid est naturaliter alteri commensuratum non secundum aliquid quod ex ipso consequitur: puta proprietas possessionum.*” (ST. 2-2 q.57 a.3).

Men share the Natural Law *primo modo* with other animals. However, the Natural Law *secundo modo* is exclusive to human beings. This is undoubtedly Ulpian's concept. However, Aquinas inserted the *jus gentium* in the realm of Natural Law; thus, he interpreted Ulpian's Law of Nations as belonging in the Natural Law, not as being part of the positive common law, as other interpretations thereof would have it. Either that, or Aquinas reconciled two Roman sources: he used Ulpian to define Natural Law, and Gaius to define the Law of Nations. In both situations, the *jus gentium* seems to belong to the nature of things and to emerge from human reason.

Notwithstanding, the wording of the Third Article of question 57 of the Treaty of Justice seems unclear. By employing the Scholastic method in his inquiries, Aquinas merely mentions the dichotomy Natural Law/Positive Law. Since he does not express the naturalness of the Law of Nations in his response, and given that he clearly distinguishes between two forms of "adjusting" one thing to another, the Law of Nations seems to be something quite distinct from Natural Law. Therefore, Positive Law could only occupy the other side of the equation. For this reason, the hypothesis raised by Peter Haggemacher is apparently true. The fact that this adjustment occurs "according to nature" may be lost due to the lack of clarity in his reasoning.

However, this argument is incomplete. One must seek the definition of Law in the Treatise on Laws to elucidate the issue. In Aquinas, law is not a *sollen*, an "ought to be" judgement, but a measure, a standard of reference, a rational structuring project. Laws are measures by which the movement of the stars, the course of the rivers, the instinct of the animals and human life in society abide. This is no legal command, but a rational design that organizes the different spheres of life in the universe. Each kind of law (Eternal, Natural and Civil) rules over a proper sphere of existence, but they all consist of the same reality: the ordering of reason. For instance, Civil Law is not essentially different from Eternal Law, as both represent commands of the divine reason (although, in Civil Law, there is a co-causality of human reason). One applies to the entire cosmos and the other to human life in the city only. This divine organizational design affects the different domains of reality in a scaled way: Eternal Law is God's plan for all creation and proceeds directly from Him; Natural Law is the very participation of the Eternal Law in rational beings; Positive Law derives logically from Natural Law.

(...) The force of law depends on the extent of its justice. And in the case of human things, their justice is in proportion to their compliance with the rules of reason. And the first rule of reason is Natural Law, as has been said. Thus, all human laws have the status of law in that it derives from the Law of Nature.⁶⁹

⁶⁹“Unde in quantum habet de iustitia in tantum habet de virtute legis. In rebus autem humanis dicitur esse aliquid iustum ex eo quod est rectum secundum regulam rationis. Rationis autem prima regula est lex naturae, ut ex supradictis patet. Unde omnis lex humanitus posita in tantum habet de ratione legis, in quantum a lege naturae derivatur” (ST. 1-2 q.95 a.2).

Not only are the different species of law related, but also human rights (*jus*) derive from Natural Law (*lex*). The *jus* is related to *lex*. The entire Positive Law (which is both Civil Law and Law of Nations) derive from Natural Law, but they do so in different ways. The first stems *per determinationem* and the second *per conclusionem* (1-2 q. 95 a. 4).

But it should be noted that one thing may derive from Natural Law in two ways: first, as the conclusions derive from a principle; second, *per determinationem*, as the determinations of certain common notions. The first method resembles the sciences, which extracts demonstrative conclusions from the principles. The second is similar to what happens in the arts: abstract shapes materialize into something particular; the architect, for example, embodies the generic form of a house in this or that house model.⁷⁰

Natural Law therefore determines the moral limits that Civil Law may not overstep. As an architect keeps in his mind the notion of “house” and uses it as a template to build a concrete house, so does Natural Law determine a model for the construction of Civil Law. The color and texture of the house are not in the original project, and there is hence a certain degree of discretion. But this does not apply to the Law of Nations. It derives from Natural Law as a theorem extracted from a logical axiom. Natural Law is the higher premise, and the Law of Nations the conclusion.

Here we find the element that harmonizes Aquinas’ concepts of *jus gentium*. The derivation *per conclusionem* of the Treatise on Laws corresponds to the suitability *secundo modo* of the Treaty of Justice. Both deal on how Natural Law “creates” the Law of Nations and the manner by which this happens is not according to the thing itself, but to its consequences or its conclusions. The difference in approach lies in the fact that, in the Treatise on Laws, Aquinas aims to distinguish the Law of Nations from Civil Law, while in the Treaty of Justice he seeks to differentiate among the many forms that Natural Law may appear in reality. There are no two distinct concepts of *jus gentium*. There is merely a variety of purposes.

Indeed, Aquinas classifies the Law of Nations as Positive Law and this may be misleading. In a certain sense, the Law of Nations is natural. “First, the Law of Nations is natural to man, because it is something rational, since it derives from Natural Law (...). Yet, it is distinct from Natural Law in the sense that Natural Law is common to all animals.”⁷¹ But why does Aquinas use the word “positive”? Because he does not use it in its usual meaning; the term should be read as “human.” The Law of Nations consists of a natural human law: its foundation is the

⁷⁰“Sed sciendum est quod a lege naturali dupliciter potest aliquid derivari: uno modo, sicut conclusiones ex principiis; alio modo, sicut determinationes quaedam aliquorum communium. Primus quidem modus est similis ei quo in scientiis ex principiis conclusiones demonstrativae produntur. Secundo vero modo simile est quod in artibus formae communes determinantur ad aliquid speciale: sicut artez formam communem domus necesse est quod determinet ad hanc vel illam domus figuram.” (ST. 1-2 q.95 a.2).

⁷¹“Ad primum ergo dicendum quod ius gentium est quidem aliquo modo naturali homini, secundum quod est rationalis, inquantum derivatur a lege naturali (...). Distinguitur tamen a lege naturali, maxime ab eo quod est omnibus animalibus commune.” (ST. 1-2 q.95 a.4.)

natural reason, but natural reason is not always evident. It presupposes a certain human effort to derive it from other axioms that are actually evident. It does not depend on a formal process of positivation to exist, such as Civil Law.

By assuming an intervention of the discursive reason to deduce what will not appear immediately and entirely to the intelligence, the Law of Nations has something from Positive Law, but taking the term “positive” in a very broad sense, which is not usual in the Theological terminology and current legal thought. The Law of Nations is formed out of conclusions deduced from primary principles of Natural Law, which are entirely obvious. There is hence a positive effort, although very easy, to derive and determine that these findings are very close to those principles and, therefore, are within the reach of **all nations**. However, the strength or validity of the requirement, in these conclusions, stems from the same Natural Law that they contain substantially.⁷²

Take for example an indisputable theme of the Law of Nations: reducing the defeated enemy to slavery. In a sense, it is about a natural precept. Making the captive enemy a slave seems less cruel than murdering him out of combat, and it follows logically from the natural commandment “Thou shalt not kill.” Moreover, as will be seen in the next chapter, until the time of Suárez, it was believed that man could dispose of his own freedom; nothing prevented him from losing it in a war or using it to pay off debts.

The Law of Nations is therefore not immediately natural but derives from natural precepts. This occurs because Natural Law produces in man three types of inclinations: one concerning everything that matters for the preservation of life; another (which he shares with other animals) concerning the union of the sexes, the rearing of children, etc. and the last one is a true rational inclination that refers to man’s natural penchant of living in society and toward seeking the divine truths.⁷³ Natural Rights or the just in itself derive directly from the first two inclinations of the Natural Law, like the male fits the female, according to the excerpt above from the Treaty of Justice. In turn, the Law of Nations stems from the third inclination of Natural Law not directly and organically, but in a comparative and a consecutive manner. It does not spring from the essence of the thing; it requires the intervention of human reason. In this sense, the Law of Nations is human: the conclusions thereof are conditional and hypothetical, given that they depend on the will of men,

⁷²“Al suponer una intervención de la razón discursiva para deducir lo que no aparece inmediata y absolutamente a la inteligencia, el derecho de gentes tiene algo de positivo, pero tomando el término **positivo** en un sentido muy amplio, que no es usual en la terminología teológica y en el pensamiento jurídico actual. El derecho de gentes está constituido por las conclusiones deducidas de los primeros principios, absolutamente evidentes, de la ley natural. Hay, pues, un **positivo** esfuerzo, aunque muy fácil, para deducir y dictaminar esas conclusiones, que están muy próximas a los principios y por eso se hallan al alcance de **todas las gentes**. Pero la fuerza o vigor de obligación, en esas conclusiones, viene del mismo derecho natural, que substancialmente contienen.” (Santiago Ramirez 1947, p. 148).

⁷³ST. 1-2 q.94 a.2.

“even if that will is not that of a particular power or of a concrete society, but in a sense, of all humanity, of all nations.”⁷⁴

The Thomist conception may be confusing and complex, but never ambiguous. The Law of Nations is always Natural Law. It is simply a “less evident” Natural Law. In fact, it does not correspond to a portion of Natural Law, but to a variation thereof. What the term *jus gentium* gained in reasoning and unity with Aquinas, it lost in autonomy.

Aquinas’ considerations regarding the Law of Nations found no echo among the Theologians of his time. It would be necessary to wait until the sixteenth century for Francisco de Vitória to arise. Nevertheless, the Medieval jurists continued to comment on the **Digest** and the **Institutas** and followed the tradition of the glossators in dividing Natural Law or the Law of Nations into *ius primaevum* and *secundum*, according to a chronological order.

Bartolus of Saxoferrato divides Natural Law in two and then splits the Law of Nations in two also. The *ius naturale secundum* coincides with the *ius gentium primaevum*, and it applies to all men following the *ratio naturalis* from Gaius. The *ius gentium secundum* corresponds to a law that is common to all nations and originates from them. This kind of progressive development also appears in the disciples and followers of Bartolus, as Ubaldo, Baldo and Paulus Castrensis. This terminology reaches the young Grotius, who will use it in **De Jure Praedae**.⁷⁵ Though yet to gain autonomy, there begins to grow the idea of a strictly Positive Law of Nations, which proceeds from the *usus* of various nations, not from natural reason.

2.2.3 The Vitorian Notion

From the late thirteenth century and early fourteenth century to the sixteenth century, the question of the autonomy of the *jus gentium* had no progress. Only when the **Summa Theologica** of Thomas Aquinas replaced the **Book of the Sentences** of Peter Lombard as a textbook of Theology, did the Theologians begin to look into the Law of Nations. In particular, in Spain appears a profound renewal of interest for the Scholastic that this period becomes known as neo-Scholastic, or Second Scholastic. This new-found interest coincided with the Great Navigations and Spain experiences its “golden age.”

Europe underwent profound changes. In addition to the discovery of the New World, the invention of the gunpowder and artillery, the rediscovery of Classical Antiquity, the invention of printing (which spread the written word) and of the maritime compass, the development of the idea of sovereignty, and the emergence

⁷⁴“(…) aunque ese arbitrio no sea el de un poder particular o de una sociedad concreta, sino, en cierto sentido, de toda la humanidad, de todas las gentes” (Santiago Ramirez 1947, p. 147).

⁷⁵Haggenmacher (1983), pp. 331–333.

of the first national States, all date back to this very special time. With so many technological advances (which, in fact, changed the very notion of the world as people knew it) Theology began to deal with human issues too.

One of the greatest authors of this epoch was Francisco de Vitória. However faithful to the canons of Thomism he may have been, he lived in a world quite different from that of Aquinas and had to confront new issues, such as the capacity of the Indians and the fall of the universal Christian empire. The Great Discoveries had decreased the size of the planet and revealed a multitude of pagan peoples. For the first time, it seemed possible for a king to become the master of the whole world. In addition, Christianity did not seem as universal as it used to be. So Vitória had to update Aquinas.

The problem of the soul of the Indians brought a delicate legal consequence: the question of whether non-Christian peoples could validly exercise dominion over their territories. According to a highly spread notion extracted from the Old Testament from the idea of “promised land,” many canonists concluded that, as God had given Palestine to a particular nation (the Jews), God had given the entire world for Christians upon the arrival of Christ. Thus, Christianity, the “true” belief, would consist of a requirement for the valid acquisition of a territory, and thus it would be legitimate to deprive the infidels of their lands.⁷⁶

But not all Christians were intolerant. In the first half of the thirteenth century, Pope Innocent IV recognized that the infidels could hold dominion, ownership and jurisdiction.⁷⁷ However, Muslims were the only well-known infidels of that time and they were an even more advanced civilization than Europe. Like Christians, Muslims worshipped one God, also professed a “religion of the book” and, together with the Jews, observed moral principles that a European would find no trouble in recognizing. The relationship between the peoples of monotheistic religion, though far from peaceful, was respectful. However, what can be said of those who worshipped many gods, including personifications of natural forces and those who practiced cannibalism and human sacrifices? The distance to the revealed religions was too great. There was no possible dialogue.

Since Pope Innocent IV’s open-mindedness favored Islamism, it is not surprising that the Church would not bestow the Indians with the same tolerance. On May 14, 1493, in the famous bull **Inter coetera**, Pope Alexander VI donated to the Catholic Kings “remote islands and mainlands” already discovered by Columbus and “those to be discovered later,” so that they could exercise “full authority and jurisdiction” to the west of a meridian known as “Alexandrian line,” which went a hundred leagues west of the Azores islands and Cape Verde. On June 7, 1494, the Treaty of Tordesillas, imbued with the same spirit of dividing the world, altered the prescribed limits.⁷⁸

⁷⁶Stumpf (2005), pp. 71–72.

⁷⁷Tierney (2004), p. 8.

⁷⁸Bathélemy (1904), p. 15.

Yet, even in the sixteenth century, the idea that a papal bull would contain enough authority to transfer full control of these lands (the discovered and undiscovered) was challenged and argued *in lieu* that the papal bull had merely split between two princes the authority to preach Christianity. This would characterize what is called in modern language “spheres of influence.” However, the propagation of the faith would be a prerequisite for the exercise of such power.

Francisco de Vitória would defend this latter thesis. But he would need to overcome almost insurmountable obstacles. The rival theory of donation appears in the **Request** drafted by the Junta de Burgos of 1512, work of the great jurist López Palacios Rubios. After reassembling the creation of the universe, the document states that God had entrusted to St. Peter all men, wherever they lived and under any law, sect, or belief, to serve them as their head and lord, and had given the whole world as his kingdom and jurisdiction. Then, reference is made, explicitly, to Alexander VI’s act as “donation.” In this sense, all major elements of a variant concept of the Medieval imperial monism come into light, establishing the Supreme Pontiff, instead of the emperor, as the lord of the world. Many canonists advocated this theory, such as Cardinal Hostiensis and Innocent III in the decretal **Novit Ille**, as well as some Theologians, especially the Spaniards Alvaro Pelayo and Rodrigo Sánchez Arévalo.⁷⁹ The defense of the opposite theory would not only contradict the official policy of Spain, but would also put its proponent on a collision path with the pope himself.

Vitória held the position of *prima* Professor of Theology in Salamanca, and his views warranted respect. To the chagrin of many, he did not endorse the papal monism or the war against the Indians. According to Vitória, God had distributed its authority to all peoples, not only to the Christians. The Indians could also own land and exercise sovereignty because they were in “peaceful domain of their public and private things. So, (unless there was an obstacle), they shall be considered true lords of their land and, in these circumstances, they cannot be deprived of their possessions.”⁸⁰

Therefore, when published, the *Relecciones* only escaped from the Index of prohibited works due to the unexpected death of Pope Sextus V. However, the King did not even wait for its publication. In 1539, the Prior of the Convent of St. Stephen, Domingo de Soto, *vespera* professor of Theology and a follower of Vitória, received a letter signed by Charles V himself forbidding the clergy of that monastery to express opinions that were against Castile’s overseas policy. Any manifestation to the contrary would be regarded as a personal offense.⁸¹ This was a very specific indisposition, limited to this issue only, because in many previous

⁷⁹Viejo-Ximénez (2004), p. 365.

⁸⁰“(…) *in pacifica possessione rerum et publice et privatim. Ergo omnino (nisi contrarium constet) habendi sunt pro dominis. Neque in dicta causa possessione deturbandi*” (**De Indis**, *Relectio* 1, 5. p. 651).

⁸¹Scott (2003), pp. 84–85. In this book, the author reproduces the letter.

episodes and even later the King expressed his appreciation and admiration for Vitória.

For this reason (Vitória's courage in defending his ideas) and because of the eagerness to find a new father to the field of International Law, the Dominican was portrayed in a pristine and somewhat caricatured fashion. Two exaggerations were made: just like his brother of order Bartholome de Las Casas, Vitória became a champion in the defense of the rights of the Indians and was deemed the first person to present a modern view of International Law. In other words, according to this kind of literature, the Theologian of Salamanca developed an unprecedented concept of *jus gentium*. His *jus gentium* regulated both periods of war and peace; its subjects were sovereign States. However, sovereignty is not absolute, for there would exist a higher constricting principle: the *totus orbis*, an international and organic community established by links of solidarity among men in view of the common good. This world body would be above the particular wills of the States, edit international rules and ensure their implementation. The States themselves, by virtue of a "functional split," would act as members of the *Orbis* and would deploy Just War to vindicate wrongs and to correct mistakes.⁸²

This notion according to which Victoria had already developed a modern definition of International Law is based on the following reasoning. As Aquinas' legitimate heir, Vitória shares the idea of natural solidarity of man and the consequent spontaneity of the State. The international society would form a community akin to a State: "And the whole world, which somehow forms a republic, has the power to prescribe, to all subjects, just laws, as are the Law of Nations."⁸³

Just as the republics consist of natural groupings of individuals, there is another natural community made up of republics and that exercises authority over them, in analogy with the State itself; such would be the meaning of the statement *aliquo modo est una republica*. The orb is a natural and organic *corpus*, whose members are all republics. Like any political community, it promulgates true laws: "the Law of Nations does not have power only by the pact and the covenant of men, but it has real force of law."⁸⁴ Thus, the *jus gentium* is independent from the will of the States. The *totus orbis* is a legislative instance above the mere sum of all its members.

Therefore, the sovereignty of States remained limited by a higher power: the common good, the reason by which the orb was created. The natural solidarity of individuals becomes a valid principle for international relations. A political event that interests a certain State affects them all. Thus, the justice of this event should bear a global assessment. "As each republic is a part of the whole world, and

⁸²This corresponds to the institutionalism conception from Delos (1950), pp. 187–228. To the traditional thesis, more pure, see the whole book Scott (2003).

⁸³"*Habet enim totus orbis, qui aliquo modo est una republica, potestatem ferendi leges aequas et convenientes omnibus, quale sunt in iure gentium.*" (De potestate civili, 21. p. 191).

⁸⁴"*Quod ius gentium non solum habet vim ex pacto et conducto inter homines, sed etiam habet vim legis*" (De potestate civili, 21. p. 191).

especially as a Christian province is part of a republic, if war were useful to a province or republic but harmful to the world or to Christianity, I think by that fact that it would be unjust.”⁸⁵

However, the main argument was yet to come. The literature that sought to establish Francisco de Vitória as the new father of International Law found in the famous passage in which the Theologian of Salamanca quotes Gaius’ definition of *jus gentium*: “But what natural reason has established among all **peoples** is called the Law of Nations.”⁸⁶ It is worth recapping the above definition of the Roman jurist: “But the law which natural reason has established among all **men** is a rule that also conforms to all and is called the Law of Nations, inasmuch as it is the law that all men make use of.” Vitória replaces the word *homines* in the original text by *peoples* and such a replacement was no error in quoting the **Institutas** by heart. Vitória does this on purpose: the subject of International Law would no longer be men—a view that associate *jus gentium* and *jus naturale*—but the peoples.

This innovation has a major relevance. Because, with the replacement of *homines* with the word peoples, the old Roman law, which served to govern relations among all men of all parts of the world, is converted into a law that governs the relations of the various peoples considered as nations, or better, as States.⁸⁷

Therefore, Vitória would have surpassed the Roman context permanently and would have been the first to present a concept of *jus gentium* akin to the contemporary International Law. Furthermore, to corroborate this interpretation, the sentence that follows such passage begins with *Apud omnes enim nationes*, which permitted to identify the peoples of Vitória with “nation,” and no longer with “men,” as it were in Gaius’ text.

However, this literature produced a somewhat biased version of Vitória’s work. Early twentieth-century Internationalists were looking for someone to replace Grotius and decided to make Vitória say more than he intended to. A reading from Vitória’s own premises, rather than permeated by post dated preconceptions, reveals a thinker worried in promoting the “Christian values and in justifying the thing that Spaniards candidly call conquest.”⁸⁸

The very structure of the **Relecciones**’ on the Indians shows Vitória’s purpose. In the first *relección*, the first section seeks to demonstrate that the Indians validly possessed their land. This demonstration, irrespective of the profound legal

⁸⁵“Imo cum una respublica sit pars totius orbis et maxime christiana provincia pars totius reipublicae, si bellum utile sit uni provinciae, aut reipublicae, cum damno orbis aut christianitatis, puto eo ipso bellum esse iniustum.” (**De potestate civili**, 13. p. 168).

⁸⁶“Quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium” (**De Indis**, I, III, 2, p. 706).

⁸⁷“Esta innovación tiene una importancia fundamental. Pues, con la substitución de gentes en lugar de homines, el antiguo derecho romano que servía para regir las relaciones entre todos los hombres por todas las partes del mundo, queda convertido en un derecho que rige las relaciones de los varios pueblos considerados como naciones, o bien, como estados.” (Scott 1938, p. 20).

⁸⁸“(…) des valeurs spécifiquement chrétiennes et à justifier ce que les Espagnols appelaient sans ambages une conquête.” (HAGGENMACHER 1993, p.215).

consequences thereto, served a bigger purpose: to prove that the infidels could have the domain of things. To profess other religion that is not the true one gave no cause to depose the heretics of their goods. Ownership, property, domain, and sovereignty represented institutes independent of religion. With this, the author prepares to attack the idea that the pope could exercise jurisdiction over the whole world.

This lesson plays the role of introducing the second section, in which Vitória disputes the illegitimate titles by which the Spaniards have conquered the “barbarians of the New World” (*barbari novi orbis*). Those are the titles set forth in the Burgo’s Requirement. The first title affirms that the emperor is the lord of the world. Vitória could not accept this because he no longer lived in a feudal environment. The Roman-German Emperor already boasted a more symbolic than effective power. Thus, Charles V could not claim the Indian lands on his own authority. Regarding the second title, the author rejects the papal monism. The pope does not exercise temporal jurisdiction over the orb, because God had never made this donation. The third title corresponds to the discovery of the New World. However, those lands were not devoid of owners, so there was no new acquisition. The fourth title refers to the refusal of the Indians to receive the faith of Christ. Vitória does not accept this because he denies the legitimacy of forced conversions. Concerning the fifth title, the Spaniards could declare war on the Indians because of their sins; which went against not only divine Positive Law, but also Natural Law. The Indians would eat human flesh and would practice incest. This reason was quite serious, but the pope did not exercise spiritual jurisdiction over nonconverted people and hence could not delegate the authority to correct them. The sixth title is the voluntary submission of the Indians to the Spaniards. In addition to the fact that fear and ignorance corrupted this type of submission, the heretics already had a sovereign. So this title must be void. Finally, the last title would confer to the Spanish rights over all the barbarians by a special donation from God. Vitória does not dwell much on this title because this argument was not proven either in the Scriptures or by miracle.

So far, the writings seem to be in line with the image of Vitória as a humanist saint; however, the *relección* continues. In the third section, the author proceeds to analyze the legitimate titles by which the Spaniards could conquer the barbarians. The first title concerns the natural communication that exists worldwide. The Spaniards have the right to visit and to settle in the land of the Indians, without suffering any damage. Should they come to any harm, they would be entitled to start a war. From this title derives the legitimacy of the trade, the use of common things and migration. All these institutes would belong in the Law of Nations, and the noncompliance thereof was just cause for war. The second title refers to the propagation of the Christian religion. The Indians are not obliged to convert, but they must withstand evangelization. This duty does not derive from the Law of Nations, but from the true faith, and it seems unlikely that Vitória admitted reciprocity. The third and fourth titles also correspond to matters of faith. If some of the barbarians were to convert, their princes could not use force to bring them back to idolatry, under penalty of a Just War. In addition, after their conversion to Christianity, the pope could rightfully grant a Christian prince to the Indians. The fifth title derives from the tyranny of the barbarians’ masters who enacted inhuman

laws providing for the sacrifice of innocents. This may be described as the embryo of a humanitarian intervention. In the sixth title, Vitória resumes the idea of voluntary submission of the Indians to the King of Spain, but stressed that their consent must be valid. The seventh title refers to the alliances that some tribes could establish with the Spaniards against others. In this case, Spain would be entitled to assist its allies. Finally, should there be a community unable to rule itself; the Spaniards could (by charity) govern it. However, they should not do it for their own advantage, but for the sake of the barbarians.

The entire **Second Lesson on the Indians** provides for the Spaniards' right to go to war against the Barbarians.

Thus, Vitória offers new grounds to support all that he had previously refuted. The fact that the Indians possess domain does not exclude the possibility of interdiction. The pope cannot exercise jurisdiction over them, but he has an indirect power. The Spaniards may settle there in virtue of society's natural communication. Forced conversions are prohibited, but the Indians should endure evangelization. Barbaric practices, such as sodomy and cannibalism, do not justify intervention, but the intervention may take place in the defense of the innocents. These arguments do not bode well with the image of a defender of the rights of the Indians.

Vitória was a man of principles. He did not accept the official doctrine of the **Request** for the conquest of the Indians, nor the idea that the pope could exercise authority over the entire world, even over the non-Christian world. However, he was as much a patriot as a defender of the Christian faith, although his doctrine led him far from the ordinary arguments of his time. In the debate between Bartolomé de Las Casas and Juan Ginés de Sepúlveda on the rights of the Indians, Francisco de Vitória stood in the middle.

What to say about Vitória's statements regarding the existence of an international society limiting the sovereignty of States and governed by law? In fact, the Theologian of Salamanca frequently uses the expression *totus orbis* or even the variant *totus mundus*. There is no doubt that the expression works as a frame of reference, but it is strange that the author never defines it. Hagenmacher analyzes all the passages in which the words appear in Vitória's works. In some cases, they have a purely factual meaning and describe the "world" as a geographical reality. In other rarer passages, they denote a moral authority, invested with *auctoritas* or *potestas*. In these fewer cases, the *totus orbis* appears as the source of the Law of Nations or as the source of the law of war only, used by the sovereigns as a sanction.⁸⁹ Was Vitória introducing an original notion, akin to that of the international society?

On commenting Aquinas' Treaty of Justice, Vitória examines question 57, which, as seen, considers the *jus gentium* a Positive Law. Aquinas' ambivalence on the nature of the International Law reflects on Vitória's work: at certain times, the *jus gentium* belongs to Natural Law, at others to Positive Law. In this text, Vitória opts for the latter. However, it is a rather unique Positive Law due to the apparent

⁸⁹Hagenmacher (1988), p. 39.

absence of legislative power. Positive Law manifests in two ways: by *conducta privata* (in ordinary contracts between private individuals) and by *conducta publica* (in conventions adopted by an entire community).⁹⁰ These usually appear in the form of laws, which ensures their publicity. But when referring to an agreement among all peoples and nations of the world, publicity is an implicit element. According to Haggenmacher, Vitória wanted to apply a Civil Law subtlety to the Law of Nations. The public aspect stems from the universality of the convention. Therefore, the author's language remains within the contractual sphere, and the *Orbis* does not designate an autonomous and superior entity. It is merely a convenient way of referring to the sum of States.⁹¹ So, in this text, despite resembling a legislative source, the *totus orbis* does not represent a moral person.

But how to explain the passage in *Relectio de potestate civili*, the aforementioned *aliquo modo est una republica*, in which the *totus orbis* enacts true laws? Indeed, the passage is a corollary of the preceding statement. Vitória questions whether Civil Laws also bind legislators and kings (*"An leges civiles obligent legislatores et maxime reges?"*). Some believed those persons were above the republic and thus there would be no higher power constricting them. According to the Theologian of Salamanca, the sovereigns are also part of the republic and, such as the law is valid for the whole of the community, they too should abide by it. The same dynamics of the contracts apply to them: before entering into an agreement, the person is free, but once he does, he becomes bound to the terms thereof. Vitória thus infers the corollary: "the Law of Nations is enforceable not only by result of the covenant and agreement of men, but has real force of law. And the whole world, which somehow forms a republic, has the power to prescribe to all subjects just laws, such as the laws of the Law of Nations."⁹²

With this statement, the author wishes to emphasize the legal character of the Law of Nations. However, this character does not conflict with the contractual nature outlined above, because the *conducta publica* enables such assimilation with law. The emphasis on the legal character derives from a previously developed logic. Vitória argues that Positive Law, unlike Natural Law, focuses on actions that were once morally neutral. However, after the enactment of Positive Law, the action prescribed therein becomes prohibited or required by Natural Law itself. "From that, it can be understood that all who violate the Law of Nations mortally sin."⁹³ Vitória did not seek to contradict a previous finding and to change the conventional source of the *jus gentium*, but he emphasized the notion that this law also obliges in conscience.

⁹⁰Vitória (2003), *De Jure Gentium et Naturali*, p. cxii.

⁹¹Haggenmacher (1988), p. 41.

⁹²"*Quod ius gentium non solum habet vim ex pacto et conducto inter homines, sed etiam habet vim legis. Habet enim totus orbis, qui aliquo modo est una republica, potestatem ferendi leges aequas et convenientes omnibus, quales sunt in iure gentium.*" (De potestate civili, 21, p. 191).

⁹³"*Ex quo patet quod mortaliter peccant violantes iura gentium*" (De potestate civili, 21, p. 191).

In his Lecture on the Indians, Vitória offers a double ground of validity for the Law of Nations: in some cases, it is Natural Law, in others, the human consent. “But what **natural reason** has established among all nations is called the Law of Nations.” Or: “And since [the Law of Nations] not always derive from Natural Law, it seems that the **consent** of the major part of the world is sufficient, especially if it is for the common good of all.”⁹⁴ The fact that Vitória gave this lecture one decade after the previous one is significant. If he decided to look into the nature of the *jus gentium*, he has changed his opinion with the years; once Positive Law, the Law of Nations became part Natural, part Positive Law. There is also the possibility that Vitória was never worried about the *jus gentium*, and that the double basis thereof implies indifference. In both possibilities, Vitória distances himself from a more modern notion of International Law.

In the last excerpt above, the validity of the *jus gentium* does not derive from the *totus orbis*, but from the *majoris partis totus orbis*. Without any doubt, this change follows the larger frame of reference imposed by the discovery of the “barbarians of the New World.” It produced very interesting consequences. The consent of the majority of mankind is enforceable on the entire world, even against the will of a minority (which is not elaborated).

It is on such enforcement that Vitória based the legitimacy of the war waged by the Europeans against the Indians, as addressed in his Second Lecture on the Indians. All the princes exercised authority not only over their subjects, but also over foreigners in order to prevent them from making wrongdoings. Their power emanated from the authority of the entire orb.⁹⁵ It is possible to draw another consequence in addition to Vitória’s defense of the Spanish colonialism. In the two lessons on the Indians, the orb does seem to constitute a legislative source, sometimes of the all the *jus gentium*, others only of the vindictive power of the sovereigns.

However, Haggenmacher remarks that in no moment does Vitória investigate the figure of the orb itself. It appears always in relation to other issues (the Law of Nations and the vindictive power of the sovereigns), but never at the core of the discussion. For this reason, its notion remains unclear. As a result, in the rare occasions in which the *totus orbis* appears as an organic whole, superior to the sum of the States, the author could not be referring to a new reality that might call for a careful scrutiny. In fact, he was referring to something quite old that would require no introduction and was probably lost in an immemorial past: the *orbis christianus*.⁹⁶ The *Respublica Christiana* corresponded to an old framework, of which every European was fully aware. The *totus orbis* is a marginal abstraction of a notion that was no longer real. It means the update of a past reality (though not

⁹⁴“*Quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium*” and “*Et dato quod non semper derivetur ex iure naturali, satis videtur esse consensus maioris partis totius orbis, maxime pro bono communi omnium.*” (*De indis* I, 3, 2. p. 706 and I, III, 4. p. 710).

⁹⁵Vitória (2003) *De Jure Belli*, p. lvi.

⁹⁶Haggenmacher (1988), pp. 45–46.

entirely forgotten) due to the discovery of non-Christian people who somehow found themselves under the jurisdiction of the Christians.

The distinction between Christians and non-Christians is essential to the comprehension of Vitória's Law of Nations. Such as the Roman *jus gentium* ruled the relations between Romans and foreigners, so does Vitória's *jus gentium* govern the relations between Christians and non-Christians. In addition, just like the former bore no resemblance to the contemporary International Law, since it applied within the Roman Empire, the later focuses on a European empire expanded by the Great Discoveries. It is the Civil Law of a multi-religious community under Christian (Spaniard) jurisdiction.

Vitória developed this thesis of Spanish aggrandization of the *orbis christianus* and selected the examples accordingly. What he did was to derive consequences from the old European Christian *aliquot modo* Republic to all mankind. Thus, just like each Christian province integrated the European Christianity, so each republic was part of the orb. The example used by the author in the lecture on the civilian *potestate* to prove that each State has an organic connection with the entire world is quite revealing. Even if a State has a just cause to go to war, it may not do so at the expense of the *totus orbis*: "(...) if the war were between the Spanish and the French should cause greater damages and rupture to Christianity, with the risk of the Turks occupying Christian provinces, however just may be the reasons and however advantageous may be for Spain, it must give up on that war."⁹⁷ The author's illustration does not refer to the *totus orbis*, but only to the *Respublica Christiana*.

According to Haggenmacher, Vitória chose an example that would certainly convince his viewers, because it appealed to a general concern that hovered over the political reality of that time. However, such an example suited poorly the whole orb since the idea that the entire world would become Christian was still very remote. In Vitória's time, to imagine that the *totus orbis* could form a republic could only be *aliquo modo*. It was a distant and elusive notion, evoked only to serve as background explanation regarding other issues that were crucial to Vitória's reasoning. Different altogether was the situation within the center of Christianity, where Vitória could conceive universal monarchy without any difficulty.⁹⁸

What to say regarding the alleged adaptation of Gaius' definition of the *jus gentium* (*Quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium*) made by the Theologian of Salamanca? If this was intentional, Vitória wished to argue that the subject of the Law of Nations would be the State, not the individual. However, even without analyzing what Vitória's concept of State was, it is possible to demonstrate that such an issue was never on the author's mind.

⁹⁷"(...) ut si bellum hispaniarum esset adversus gallos alias ex causis iustis susceptum et alioqui regno hispaniarum utile, tamen cum maiore malo et iactura geritur christianitatis, puta qui turcae occupant interim provincias christianorum, cessandum esset a tali bello." (*De potestate civili*, 13, p. 168).

⁹⁸Haggenmacher (1988), p. 46.

When Vitória questions whether the Indians had the public and private property of their lands before the arrival of the Spaniards, he does not investigate the international legal personality of the Indians, only their legal personality at all. Otherwise, those conquerors could not deprive them of their possessions, and the Laws of Burgos would not apply. Vitória's attention was not focused on an alleged difference between private and public properties, but on the legal capacity of the Indians. He does not seek to prove the State-like character of the barbarian communities of the New World, but the human nature of the individuals that compose it. Moreover, when the author examines the just titles for the Spanish intervention, the focus is always on the barbarity or on the infidelity of the individuals. Vitória looks for souls to convert and to save.⁹⁹

The Theologian from Salamanca worries about men, not States; he even blurs the distinction between the Law of Nations and Natural Law. The reference to Gaius appears in the first of the fourteen arguments that aim to prove that the Spaniards could visit the Indians. In the very definition thereof, the *jus gentium* stems from natural reason. In addition, his reasoning begins with "it is proved, in first place, by the Law of Nations, which is Natural Law or derives from it."¹⁰⁰

Contrary to his prior understanding (according to which the *jus gentium* derived from a tacit covenant), Vitória here sets forth a natural basis for the *jus gentium*. There was no other way. There was nothing in common between the Spaniards and the Indians, except for nature itself.

Therefore, by addressing the definition of Gaius, Vitória does not want to underline *the inter omnes gentes*, but the *naturalis ratio*. However, why did the author substitute *homines* for *gentes* (peoples)? Although Gaius refers to *homines* in the excerpt above, he also uses the words *populi* and *gentes*, and this explains the etymologic origin of the expression *jus gentium*. Vitória attempted to invoke Gaius' formula, which he quotes in an approximate manner. To the Dominican, *inter omnes gentes* does not differ from *inter omnes homines*. The extension of one, *apud omnes enim nationes habetur inhumanum* directly reflects on the extension of the other *apud omnes populos peraeque custoditur*. So Vitória wanted to evoke the Roman notion of *jus gentium*, an internal common law that is based on some kind of natural intrinsic necessity.

Even the choice of the term *nationes* does not seem random. It appears that Vitória channeled the definition of Natural Law from Saint Isidore de Sevilla: "Natural Law is common to all nations and comes from a natural instinct."¹⁰¹ Following the inclination of his work, Isidore produces an etymological wordplay that may go unnoticed for a modern reader. Since **Natural** Law applies to all **nations** and originates from a **natural** instinct, there must be something common to

⁹⁹Haggenmacher (1988), pp. 50–56.

¹⁰⁰"*Probatur primo ex iure gentium, quod vel est ius naturale, vel derivatur ex iure naturale*" (**De indis** I, III, 2. p. 706).

¹⁰¹*Ius naturale commune omnium nationum, et quod ubique instinctu naturae*" (Isidorus Hispalensis Episcopus (1911), V, IV, 1).

all these words, the common root, the verb “*nasci*.” Thus, Natural Law is a law “of birth,” which is “born” with man, and not by a legislative convention. Vitória (who knew very well the **Etymologies**) wanted to insinuate that meaning and inserted the word nation to match the *ius naturale* referred at the beginning of the passage as a direct or indirect source of his *ius gentium*.¹⁰²

There is no doubt that here the author turns his efforts into setting forth a foundation to the Law of Nations. Nonetheless, such a foundation lies in nature, which separates the Law of Nations from International Law. It is curious that the first Vitória (the one who based his *jus gentium* on a convention) did not seem as concerned with finding the basis thereof: “first the dispute relates more to the name than the thing itself, because it matters little if someone affirms one thing [that the Law of Nations belongs to Positive Law] or another [that it belongs to Natural Law].”¹⁰³ When Vitória is concerned with foundations, the Law of Nations stems from nature, but when he considers it a matter of less importance, its origin lies on Positive Law.

Vitória is not able to overcome the Roman concept of *jus gentium*. The *jus gentium* remains the internal law of an empire that is common to different peoples (but not between those peoples) and sometimes merges with Natural Law. However, paradoxically, the weakness in Vitória’s arguments regarding the law among political societies constitutes the strength of his legacy. Even if he had not conceived a law among political societies, Vitória actually replaced the word *homines* for the word *gentes*. Although he never offered a clear basis for the Law of Nations, at one point he considered it part of Positive Law. Albeit he defended the Spaniards’ right of intervention on the Indians, he granted the “barbarians of the New World” the possibility of domain. Whatever mindless abstraction may have occurred, the term *totus orbis* was indeed often used. Vitória laid the groundwork for someone else to discuss a law between peoples, positive in nature, inserted into an international society that is above the States’ sovereignty.

2.3 The Humanist Law of Nations: Alberico Gentili

The last character in this evolution of the concept of *jus gentium* is the jurist Alberico Gentili. Italian-born, he fled his hometown because his family embraced the Protestantism. Then, in 1581, he began teaching at Oxford, where he became *Regius* Professor of Civil Law. It seems likely that both Selden and Hobbes had attended his lessons, for he remained at that university until 1605.¹⁰⁴

¹⁰²Haggenmacher (1988), p. 61.

¹⁰³“(…) first of all the dispute concerns the name more than the thing, for it matters little whether one says this or that” (Vitória 2003, *De Jure Gentium et Naturali*, p. cxi).

¹⁰⁴Nézar (1904), pp. 39–43.

Even though he held the Civil Law chair, Gentili always dealt with the Law of Nations and wrote important books on the subject, such as the **De Iure Belli**, **De Legationibus** and **Advocatio Hispanica** (the first on the law of war, the second on diplomatic law, and the last one on the law of naval warfare).

Alberico Gentili greatly influenced Hugo Grotius. His name appears ten times in the **De Jure Praedae** and a dozen times in the **De Jure Belli ac Pacis**. Haggemacher believes that, because of the confiscation of his library, Grotius would have made use of references from the Italian to compose his masterpiece. The Dutch Lawyer even repeated several quotation mistakes made by the Italian Jurist.¹⁰⁵ Undoubtedly, among his contemporaries, Gentili deserves a place of honor. When explaining the purpose of his work, Grotius ignores those who preceded him, but expressly acknowledges that he made use of Gentili.¹⁰⁶

Due to his education at the University of Perugia, Gentili received a classic formation of an Italian Humanist: he was a true follower of *the mos italicus* and disciple of authors such as Bartolo and Baldo. This is what Richard Tuck called the “Oratoric tradition,” opposed to the “Theological tradition” of the Spanish Scholastics. While the former is based on the literary and rhetorical writings of the ancient world (especially on Romans speakers who were clearly skeptical of much philosophy), the latter was inspired by Christian literature, in combination with Greek Philosophy and the legal systematizations of the Romans.¹⁰⁷

Gentili embodied not only a distinct tradition, but also one that conflicted with Vitória’s. Jurists and Theologians delved into the same subject (the law), each claiming preeminence of their own perspective. On the one hand, since Cicero (who is an obligatory reference for all Humanists) the “Jurisprudence” corresponded to the *magna* science and encompassed Legal and Political Philosophy, Ethics, Economics, and Social Sciences in general. On the other hand, the Theologians had placed their Theology at the summit of human knowledge and considered it the “queen of the sciences.” The issue was no mere corporate jealousy, because the Theologians also studied Law. To Vitória, “the Theologian’s craft is so vast that no argument, no dispute, no matter is outside his profession.”¹⁰⁸ Thus, raids were inevitable, and Gentili could only answer: “On matters that are none of your concern, Theologians be silent!”¹⁰⁹

As expected, even when addressing the *jus gentium* and the law of war, Gentili’s conclusions differed greatly from those of the Scholastics. The difference was so

¹⁰⁵Haggemacher (2002), pp. 146–149.

¹⁰⁶GROTII, Hugonis. **De Iure Belli ac Pacis libri tres**. In quibus ius naturae et Gentium: item iuris publici praecipua explicantur. Parisiis: Nicolaum Buon, 1625. prolegomenom 38. Henceforth, **DJBP**.

¹⁰⁷Tuck (1999), p. 16.

¹⁰⁸“*Officium ac munus theologi tam late patet, ut nullum argumentum, nulla disputatio, nullus locus alienus videatur a theologica professione et instituto.*” (**De potestate civili**, Prologue, p. 150).

¹⁰⁹“*Silete theologi in munere alieno!*” (GENTILI, Alberico. **De Iure Belli Libri Tres**. Hannover: G. Antonius, 1612, I, 12, 4. Henceforth, **DIB**).

deep that if Alfred Vanderpol is right and indeed the Medieval Law of War consists of the **Scholastic** Doctrine of Just War, then Gentili does not belong to this tradition. His position is closer to political realism and far from a doctrine that seeks to determine the justice in war.

For instance, Gentili is concerned with the balance of power: "This is what the distinguished Lorenzo de Medici, an eminent scholar of peace and father of peace, always looked for, ensuring that the States of Italian princes always remained balanced among them." That is why it should come as no surprise that he devoted an entire chapter to defend the legality of the preventive defense: "to ensure that men do not grow in excessive power is safer than chasing the medicine [*sic*] after they become powerful."¹¹⁰ Fear plays an important role and replaces injustice as the determinant reason. To all Scholastics, war is just if the enemy inflicts an actual injury; without actual aggression, the simple fear that the adversary would grow in power, could never justify the conflict.

Gentili widens the notion of legitimate defense: "The defense is also needed to protect our things and we have just cause to defend them during war, even if the war that endangers our things has been unjustly caused by us."¹¹¹ Within this author's law of war, injury becomes a secondary issue.

Another fundamental difference between Gentili's and the Scholastic's Doctrine of Just War lies in the problem of bilateral justice in a war: whether there could be a just cause legitimizing both sides in battle. Theologians dismiss this hypothesis because the will (or reason) of God is indivisible. The only concession possible is if one side incurs in an error of fact, which might become an invincible ignorance. As will be examined in Chapter IV, in this case, one party would be subjectively and objectively right, while the other would have no legitimate grounds to go to war despite believing otherwise. This issue was subject of careful examination, with many advices and urgings for the prince to act prudently and to know his case in depth, in order to reduce the likelihood of an error.

Yet, the Italian Jurist does not share these qualms. Chapter VI of **De Iure Belli** is dedicated in its entirety to prove the possibility of bilateral justice. This opinion could be the cause of much terror to all writers subsequent to Gratian, but not to the classical spirit. Many Romans expressed sympathy for the patriotic fight put up by their own enemies. Caesar recognized that the Gauls defended their country, because they "naturally" loved their freedom.¹¹² Gentili metaphorically describes war as a judicial procedure: just as law cannot be known before the award, so it was not possible to access justice in abstract before the battle came to end. In principle,

¹¹⁰"*Et id illud est, quod sapientissimus, et pacis studiosissimus, ac pacis pater, Laurenus ille edicis procuravit semper, ut res Italorum principum paribus libratae ponderib. forent.*" and "*Obsistendum igitur. Et cauere fatius est, ne homines augetur nimium potentia, quam contra potentiores postea remedium quaerere.*" (DIB, I, 14, 3).

¹¹¹"*Res etiam ut nostras defendamus, necessaria (quod et diximus) defensio haec est et iusta haec causa, etiam si bello petiti bellum promeriti nos essemus.*" (DIB, I, 13, 5).

¹¹²**De Bello Gallico**, III, 10, 3, p. 62.

both sides have standing to litigate, so that the *cause probabilis* should replace the requirement of “just cause.”¹¹³

To this we are forced, by the infirmity of human nature, by which everything appears veiled before us and we are not granted with that reliable perception of absolute justice that would not allow for two to truly contend between themselves and both be right, that the just should be offended by one or the other.¹¹⁴

The idea of absolute justice may even exist, but it can be perceived only by God (or gods). The weakness of the human condition does not allow man to argue coherently about it; therefore, men can only investigate possible causes.

Because he professed the Lutheran faith, Gentili did not harbor any illusions regarding the idea of a moral unity of Christendom. This disenchantment, added to his cultural heritage, approached the Italian from Oxford one step closer to ethical relativism. Had Machiavelli been committed to the study of the law of war, he would have been named Alberico Gentili.

This realistic tone of Gentili’s arguments led many¹¹⁵ into seeing a secularist essence in his admonition to the Theologians (*Silete theologi in munere alieno!*). Given that this is a typically modern notion, Gentili (and not Grotius) would be the real “father” of International Law.

However, this claim that the Oxford Professor would have laicized the *jus gentium* after centuries of Catholic obscurantism is at best controversial. Like any Reformer of his time, Gentili believes that the Law of Nations proceeds from the will of God, which makes for a feeble secularist theory: “a small part of the divine law is the Law of Nations, with which God has left us after sin.”¹¹⁶ To Haggemacher, the admonition to the Theologians implied merely a separation between the jurisdiction of the *jurisconsulti* (which always appeared in Gentili’s work as *nostri*) and that of the *theologi*. This jurisdictional distinction required the author sometimes to abandon an entire issue to the Theologians, especially when related to the first three commandments of the Decalogue.¹¹⁷

Therefore, Gentili is very careful in advocating the possibility of investigating alliances with peoples of different religions, since “this issue is in part Theological and examined by the Theologians, and in part civil, and examined by us.” When addressing the issue of the legality of the duel between princes for the kingdom, he bumps into the problem of the origin of the sovereign domain of power and whether

¹¹³Panizza (2005), p. 18.

¹¹⁴“*Huc adigit nos humanae nostrae conditionis infirmitas: per quam sunt nobis in tenebris omnia: et purissimum illud, atque verissimum iustum ignoratur, quod non serret duo litigare iuste.*” (DIB, I, 6, 1).

¹¹⁵See the introduction from Diego Panizza (2004), p. 30 to the *De Iure Belli* of the Brazilian edition. This author insists on a distinction between *res religionis* and *ius humanum* in the Italian Jurist’s thoughts.

¹¹⁶“*Et quamquam ius gentium particula est divini iuris, quam Deus nobis post peccatum reliquam fecit*” (DIB, I, 1, 4).

¹¹⁷Haggemacher (2002), p. 171.

the prince may dispose of it. For fear of having to delve into the Theory of the Divine Right of the Kings and of the popular origin of sovereignty (which were a warhorse between Reformed and Catholic Theologians, as will be seen in chapter V) the Italian Jurist bluntly accepts his incompetence: “this issue, on the other hand, belongs to the first table [of the Ten Commandments] and transcends the office of a Legal Adviser.”¹¹⁸

In addition, Gentili’s concept of *jus gentium* is even less modern. In fact, it is older than Vitória’s. While Vitória’s Law of Nations came to be part of Positive Law, at times hastily so, in Gentili, there is no doubt that it belongs to Natural Law. He even uses the redundant expression *iure naturali gentium*. Gentili expressly incorporates the definitions of the Roman jurists when he states that “the Law of Nations is one that is in use among all peoples, that natural reason has established among all men and is observed by all. That is the Law of Nature.”¹¹⁹

References to custom and consensus should not evoke Positive Law. They only mean that Gentili is an empiricist in his efforts to prove the existence of the Law of Nations.¹²⁰ Custom does not serve as a basis for the *jus gentium*, but as its phenomenological manifestation. Consensus and the uses of the various peoples prove the existence of Natural Law. As a Humanist, Gentili never intended to leave the Roman orbit.

2.4 Summary

Before the publication of the work of Antoine Pillet, **Les fondateurs du droit international**, academics urged to find a father for International Law. The legend of a single founder of the discipline coincided with the creation of a myth around Hugo Grotius by the School of Law of Nature and of Peoples. For 300 years, this author bore such title. However, when his innovativeness was questioned and the Spanish Scholastic rediscovered, it was found that Grotius himself had his sources, and thus the idea of a law between the peoples appeared older than him.

An old Christian tradition of universal value came to the rescue: the Just War doctrine. War corresponds to the most extreme form of contact between two peoples; then, rules of war would clearly mean an expression of International Law. Furthermore, all prospective fathers of the discipline, Grotius and the Spanish Scholastics, belonged to this tradition, which reinforces the notion that it represents the source of such law. So, one must look into the first author to defend this theory.

¹¹⁸“*Atque est quaestio partim theologalis, tractataque theologis; partim et nostris tractata civilis*” and “*Fortetamen hic quaestio est prioris tabulae: quae supra iurisconsultum est*” (DIB, III, 19, 1 and III, 15, 2).

¹¹⁹“(…) *ius esse gentium, quo gentes humanae utuntur: quod naturalis ratio inter homines constitui, et apud omnes peraeque custoditur. Hoc ius naturae est.*” (DIB, I, 1, 5).

¹²⁰Haggenmacher (1983), p. 355.

Yet this task is not simple. The influences of the Medieval Law of War are lost in Antiquity. There are reminiscences, both Hebrew and Hellenistic, and several affinities with the Roman *jus fetiale*. But it seems to be a consensus in Historiography that the first writer of this tradition was St. Augustine. Despite this agreement, the nonsystematic references in the work of the Bishop of Hippo do not seem to imply a concern over the issue of justice in war. In fact, St. Augustine was preoccupied about the legitimacy of a public service: the military service. The other authors of the High Middle Ages also failed to consider the law of war as an autonomous issue.

Only in the twelfth century did this doctrine begin to take shape. Although it was not the main concern of the monk Gratian, the **Gratian Decree** holds a prominent position in the history of Just War. In this Decree, there is a range of references and quotations somewhat out of context from the Patristic, but organized around specific issues, among which war appears as *Causa XXIII*. Since then, the succeeding writers were able to investigate war by itself. Canonists, Theologians, and Decretists turned their attention to the subject.

In the following century, Thomas Aquinas, one of the most important thinkers of all time, turned his attention to the issue of the legitimacy of war. In order to be just, war must fulfill three conditions: competent authority, just cause and right intention. Although there is no further analysis of these requirements, Aquinas' conception became a mandatory reference for subsequent thinkers, due to the authority that his work acquired in the Middle Ages. Aquinas thus eventually provided the classic formulation of the doctrine. His followers claimed it in such a way that it became impossible to separate the doctrine from the Scholasticism, albeit lay jurists have also written about the law of war.

Nevertheless, the influences of the Scholastic Just War doctrine on International Law is much too fleeting for it to be possible that this law would have originated, in its entirety from this tradition. Most of the Just War authors do not even offer a definition of *jus gentium*. To infer that justice invariable leads to the existence of a law between the peoples is to neglect the role played by a universal, rational, and Natural Law. Since the time of the Romans, Natural Law provided the basis for the common law among peoples and individuals that did not emanate from the legislative will of a *civitas*. Only when the concept of the Law of Nations acquires autonomy from Natural Law may we infer that there is a modern notion of International Law.¹²¹

It turns out that the Romans were not good Philosophers and found it difficult to formulate nonnatural grounds for their *jus gentium*. In Rome, this law ruled the relations among foreigners located within the Empire. It did not correspond to a Law of Nations, but of the *gens*. It corresponded to law *intra gentes*, not *inter gentes*.

¹²¹ Autonomy does not mean exclusion. As will be seen later, all the positive law (including the *jus gentium*) of Suárez and Grotius had to be in accordance with Natural Law.

The authors of the Middle Ages inherit the tripartite division of Natural Law, Civil Law and Law of Nations, but they too could find no distinct basis for the Law of Nations. In fact, the *jus gentium* was of no significant concern in the Middle Ages. It was more an annoying legacy, one people did not know what to do with or where to place it. Indeed, St. Isidore of Seville considered the *jus gentium* to be a Positive Law, but the absence of a clear definition undermines the originality of his intent. It seems likely that, influenced by the Christian imperial notion of the time, the author conceived this law as an almost universal common law, but one that did not govern the relations between the peoples.

Thomas Aquinas seems to infer the *jus gentium* from Natural Law, as if it corresponded to the very Natural Law applied to one of the many aspects of human society. The confusion with the existing law is a product of a deviant definition of the word “positive.” For Aquinas, positive means human. Unlike Civil Law, man does not create the *jus gentium*. However, the *jus gentium* requires a “positive” effort of man’s intellect to derive it from natural principles. It is an inclination that Natural Law arouses in men. It is a distinct inclination and exclusive to humans. It is a “human” law not because it is man-made, but because men do not share this (natural) impulse with other beings.

The literature that was looking for a father of International Law then turned to the Dominican Theologian Francisco de Vitória. In his lectures, the *jus gentium* seems to apply to the most distinct peoples of the world. This literature argued that Vitória limited the sovereignty of the State by the notion of an international community: an organic whole, greater than the sum of its parts, a legislative source of the Law of Nations. In addition, the literature concluded that he defended the rights of the Indians against the Spanish conquerors and proclaimed their international legal personality. Finally, it considered that the Spanish Theologian overthrew Gaius’ definition of *jus gentium* to adapt it to the current notion thereof.

However, under a more detailed analysis, these conclusions are proven hasty. The very structure of Vitória’s lectures on the Indians evidences a supporter of the Spanish conquest, though his reasons differed from the official rationale. In the rare occasions that the *totus orbis* designates a legislative body, the author conceives it according to the moral unity of the European Christendom. In addition, his alleged subversion of Gaius’ definition of *jus gentium* is a mere quotation from memory. Vitória did not leave the Roman context.

Even if Francisco de Vitória cannot be called the “father” of International Law, his relevance is not to be underestimated, because he left elements that others were able to work from. Nevertheless, for the *jus gentium* to become International Law, the idea of imperial monism or *Orbis christianus* had to be buried. The emergence of the idea of “internationality” walks hand in hand with the decline of the Universal Empire.

Reformation destroyed the Christian unity of Europe and, with it, the notion of *Respublica Christiana*. Succeeding authors were then able to write about a *jus gentium* of positive nature and applicable between peoples. However, the destruction of the Christian unity would also erode a universal moral framework. This would deprive this new Positive Law of Nations and the basis thereof of any

ethical claim other than the will of the States. Only authors who had experienced the Reformation, but foresaw and refused ethical relativism at all costs could conceive a positive nonvoluntary *jus gentium*. There were only two jurists to walk this narrow path: Francisco Suárez and Hugo Grotius.

References

- Agostinho. **Obras de San Agustín**. Trad. José Moran *et alii*. Madrid: BAC, 1993. t. XVI. *La Ciudad de Dios*; t. XXXI. *Escritos antimaniqueos. Contra Fausto*.
- Aquino, Santo Tomas de. **Summa Teologica**. Texto latino de la edición crítica Leonina. Trad. Francisco Barbado Viejo, O.P. 2. ed. Madrid: Biblioteca de Autores Cristianos, 1947.
- Aristóteles. **Ética a Nicômaco**. Translation. Leonel Vallandro and Gerd Bornheim. São Paulo: Abril Cultural, 1973.
- Barcia Trelles, Camilo. Francisco Suárez: les théologiens espagnols du XVI^e siècle et l'école moderne du Droit International. **Recueil de Cours de l'Académie de Droit International de Le Hague**, n. 1, t. 43, pp. 386–503, 1933.
- Barthélemy, Joseph. François de Vitoria. In: PILLET, Antoine. **Les Fondateurs du Droit International**. Paris: V. Giard & E. Brière, 1904.
- Bauer, Dominique; Lesaffer, Randall. Ivo of Chartres, the Gregorian Reform and the Formation of the Just War Doctrine. **Journal of International Law**, n. 7, pp. 43–54, 2005.
- Bourquin, Maurice. Grotius est-il le père du droit des gens? (1583–1645). In: **Grandes figures et grandes oeuvres juridiques**. Genève: Librairie de l'Université, Georg & Cie., 1948. Bruxelles: Académie Royale de Belgique, 1883.
- Bull, Hedley. The Grotian Conception of International Society. In: Butterfield, Herbert & Wight, Martin (ed.). **Diplomatic Investigations**. London: George Allen & Unwin Ltd., 1966.
- César, Júlio. Comentários sobre a Guerra Gálica (De Bello Gallico). Trad. Francisco Sotero dos Reis. Rio de Janeiro: Ediouro, s/d.
- Cícero, Marco Túlio. **Dos Deveres**. Translation Angélica Chiapeta. São Paulo: Martins Fontes, 1999.
- Cicerón. **De la République—Des Lois**. Trad. Charles Appuhn. Paris: Garnier Frères. 1954.
- Delos, J. T. **La Société Internationale et les Principes de Droit Public**. 2. ed. Paris: Pédone, 1950.
- Dinstein, Yoram. **Guerra, Agressão e Legítima Defesa**. Trad. Mauro Raposo de Mello. 3.ed. Barueri: Manole, 2004.
- Fusinato, G. Le droit international de la République Romaine. **Revue de droit international et de législation comparée**, pp. 270–310, 1885.
- Gentili, Alberico. **O Direito de Guerra**. Tradução de Ciro Mioranza. Ijuí: Unijuí, 2004.
- Gentili, Alberico. **De Iure Belli Libri Tres**. Hannover: G. Antonius, 1612.
- Grotii, Hugonis. **De Iure Belli ac Pacis libri tres**. In *quibus ius naturae et Gentium: item iuris publici praecipua explicantur*. Parisiis: Nicolaum Buon, 1625.
- Grotius, Hugo. **De Iure Belli ac Pacis libri tres**. In *quibus ius naturae et Gentium: item iuris publici praecipua explicantur*. Parisiis: Nicolaum Buon, 1625.
- Grotius, Hugo. **De Iure Belli ac Pacis libri tres**. In *quibus ius naturae et Gentium: item iuris publici praecipua explicantur*. Amsterdã: I. Blaeu, 1646. Edited by James Brown Scott. Oxford, London: Clarendon Press, Geoffrey Cumberlege, 1925. (The Classics of International Law).
- Grotius, Hugo. **De Iure Belli ac Pacis libri tres**. In *quibus ius naturae et Gentium: item iuris publici praecipua explicantur*. Cum Annotationibus Auctoris, ejusdemque Dissertatione de *Mari Libero*; Ac Libello singulari *De Aequitate, Indulgentia et Facilitate*: Nec non Joann. Frid. Gronovii Notis in totum opus de Jure Belli ac Pacis, Ex altera recensione Joannis Barbeyracii. Amsterdã: apud Janssonio-Waesbergios, 1735.

- Grotius, Hugonis. **De Jure Praedae Commentarius**. La Haye: Hamaker, Nijhoff, 1868.
- Grotius, Hugues. **Le droit de la guerre et de la paix de Hugues Grotius**. Trad. J. Barbeyrac. Amsterdam: Pierre de Coup, 1724.
- Haggemacher, Peter. Grotius and Gentili: a reassessment of Thomas E. Holland's inaugural lecture. In: Bull, Hedley; Kingsbury, Benedict; Roberts, Adam (ed.). *Hugo Grotius and International Relations*. Oxford, New York: Oxford University, Clarendon Press, 2002.
- Haggenmacher, Peter. 1492 Le choc de deux mondes. **Actes du Colloque. COMMISSION NATIONALE SUISSE POR L'UNESCO**. Genève: La Différence, 1993.
- Haggenmacher, Peter. **Grotius et la doctrine de la guerre juste**. Genève, Paris: Heige, Presses Universitaires de France, 1983.
- Haggenmacher, Peter. La place de Francisco de Vitoria parmi les fondateurs du droit international. In: Truyol y Serra, Antonio et al. **Actualité de la Pensée Juridique de Francisco de Vitoria**. Bruxelles: Bruylant, Centre Charles De Visscher pour le droit international, 1988.
- Hinojosa, Eduardo. **Influencia que tuvieron en el Derecho Público de su patria y singularmente en el Derecho penal los filósofos y teólogos españoles, anteriores a nuestro siglo**. Madrid: Reus, 1890.
- Holland, Thomas E. Alberico Gentili: an inaugural lecture delivered at All Souls College, November 7, 1874. In: **Studies in International Law**. Oxford: Clarendon Press, 1898.
- Iustinianus Imperator. **Corpus Iuris Civilis**. ed. Krueger and Mommsen. Berlin: Weidmann, 1908.
- Isidorus Hispalensis Episcopus. **Etymologiarum sive Originum Libri XX**. ed. W. M. Lindsay. Oxford: Clarendon Press, 1911.
- Laghmani, Slim. **Histoire du droit des gens: du *jus gentium* impérial au *jus publicum europaeum***. Paris: Pedone, 2003.
- Nézar, Henri. Albericus Gentilis. In: Pillet, Antoine. **Les Fondateurs du Droit International**. Paris: V. Giard & E. Brière, 1904.
- Nussbaum, Arthur. **Historia del Derecho Internacional**. Trad. Francisco Javier Osset. Madrid: Revista de Derecho Privado, 1953.
- Nys, Ernest. **Le Droit de la Guerre et les précurseurs de Grotius**. Bruxelles et Leipzig: Murquardt, 1882.
- Nys, Ernest. **Les Origines du Droit International**. Bruxelles, Paris: Alfred Castaigne, Thorin et fils, 1894.
- Panizza, Diego. Introduction. In: Gentili, Alberico. **O Direito de Guerra**. Tradução de Ciro Mioranza. Ijuí: Unijuí, 2004.
- Panizza, Diego. **Political Theory and Jurisprudence in Gentili's *De Iure Belli***. The great debate between "theological" and "humanist" perspectives from Vitoria to Grotius. IILJ Working Paper 2005/15 [History and Theory of International Law Series]. New York: New York University School of Law, 2005.
- Pillet, Antoine. **Les Fondateurs du Droit International**. Paris: V. Giard & E. Brière, 1904.
- Reale, Miguel. **Horizontes do Direito e da História**. 3. ed. São Paulo: Saraiva, 2000.
- Rivier, Alphonse. **Note sur la littérature du droit de gens avant la publication du *Jus Belli ac Pacis* de Grotius 1625**.
- Santiago Ramirez. Introducción a las cuestiones 95-97. In: Aquino, Santo Tomas de. **Suma Teologica**. Texto latino de la edición crítica Leonina. Trad. Francisco Barbado Viejo, O.P. 2. ed. Madrid: Biblioteca de Autores Cristianos, 1947, Tome VI.
- Sciaccia, Michele. **Perspectiva de la metafísica en Sto. Tomas**. Madrid: Speiro, 1976.
- Scott, J. B. **The Catholic Conception of International Law**. Washington D.C.: Georgetown University Press, 1934.
- Scott, J. B. **The Spanish Origin of International Law**. Francisco de Vitoria and his law of nations. 2. ed. New Jersey: The Law Book Exchange, 2003.
- Scott, J.B. Conferencias del Presidente del Instituto Americano de Derecho Internacional preparadas en homenaje a la Universidad Mayor de San Marcos, Lima, Universidad Mayor de San Marcos, 1938.

- Stumpf, Christoph A. Christian and Islamic Traditions of Public International Law. **Journal of the History of International Law**, n. 7, pp. 68–80, 2005.
- Suárez, R. P. Francisci. **Opera Omnia. Editio Nova. Parisiis: Ludovicum Vivès**, 1858. *Tomus XII. De Fide, Spe et Charitate. Tractatus de Charitate. Disputatio XIII. De Bello*.
- Suarez, R. P. Francisci. Granatensis è Societate Jesu, Doctoris Eximi. **Tractatus de legibus, ac Deo Legislatore in decem Librus distributus**. Venetiis, apud Sebastianum Coleti, 1740.
- Tierney, Brian. Vitoria and Suárez on Ius Gentium, Natural Law and Custom. In: **The Nature of Customary Law: Philosophical, Historical and Legal Perspectives**. Centre for Research in the Arts, Social Sciences and Humanities: University of Cambridge, 2004.
- Truyol y serra, Antonio. **El Derecho y el Estado em San Agustín**. Madrid: Revista de Derecho Privado, 1944.
- Truyol, Antonio. **Noções Fundamentais de Direito Internacional Público**. Trad. Ehrhardt Soares. Coimbra: Arménio Amado, 1952.
- Tuck, Richard. **Natural Rights Theories: their origin and development**. New York: Cambridge University Press, 1979.
- Tuck, Richard. **The Rights of War and Peace: political thought and the international order from Grotius to Kant**. New York: Oxford University Press, 1999.
- Vanderpol, Alfred. **La Doctrine Scolastique du Droit de Guerre**. Paris: Pédone, 1919.
- Viejo-Ximénez, José Miguel. “Totus orbis, qui aliquo modo est una republica”. Francisco de Vitoria, el Derecho de Gentes y la expansión atlántica castellana. **Revista de Estudios Histórico-Jurídicos**, n. 26, Sección Historia del Pensamiento Jurídico, Valparaíso, pp. 359–391, 2004.
- Viola, Francesco. **Derecho de Gentes Antiguo e Contemporáneo**. Trad. Isabel Trujillo. **Persona y Derecho**, n. 41, pp. 165–189, 2004.
- Vitória, Francisco de. **Obras de Francisco de Vitória. Relecciones Teologicas**. Editadas por Teófilo Urdanoz. Madrid: Biblioteca de Autores Cristianos, 1960.
- Vitória, Francisco de. **De Jure Gentium et Naturali**. In: Scott, J. B. **The Spanish Origin of International Law**. Francisco de Vitoria and his law of nations. 2. ed. New Jersey: The Law Book Exchange, 2003., Appendix E.
- Vitória, Francisco de. **De Jure Gentium et Naturali**. In: Scott, J. B. **The Spanish Origin of International Law**. Francisco de Vitoria and his law of nations. 2. ed. New Jersey: The Law Book Exchange, 2003., Appendix B.
- Walker, Thomas Alfred. **A History of the Law of Nations**. Cambridge: Cambridge University Press, 1899. v. I.
- Wight, Martin. **International Theory: the three traditions**. Leicester & London: Leicester University Press, 1991.
- Wijffels, Alain. Early-Modern Literature on International Law and the Usus Modernus. **Grotiana**, v. 16–17, pp. 35–54, 1995–1996.
- Yasuaki, Onuma. When was the Law of International Society Born?—an inquiry of the history of international law from an intercivilizational perspective. **Journal of the History of International Law**, n. 2, pp. 1–66, 2000.

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2017, X, 309 p., Hardcover

ISBN: 978-3-319-59402-6