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UNIVERSALIST CONCEPTIONS OF GLOBAL ORDER: RECONSIDERING CARL SCHMITT'S CRITICISMS OF FRANCISCO DE VITORIA

CONCEPCIONES UNIVERSALISTAS DEL ORDEN GLOBAL: LA RECONSIDERACIÓN DE LAS CRÍTICAS DE CARL SCHMITT A FRANCISCO DE VITORIA*

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Resumen: ***Este estudio reexamina la validez de la interpretación del pensamiento vitoriano presentada por Carl Schmitt (1888–1985). Según él, Francisco de Vitoria justificó la conquista española de América, basándose en el universalismo medieval que imponía los valores cristianos a otras culturas. Ciertamente, como explicó Schmitt, el marco intelectual de Vitoria podría etiquetarse como "medieval" porque él no consideraba el* jus (ius) gentium *(derecho de gentes) como una ley exclusivamente humana. Sin embargo, Vitoria presentó una comprensión más amplia del orden global que la de pensadores como Alberico Gentili y Hugo Grocio –a quienes Schmitt calificó de "modernos" y "neutrales" en valores–, porque, contrariamente a la interpretación de Schmitt, de hecho, éstos excluyeron regiones "bárbaras" de un orden común, considerándolas áreas sin ley.***

Palabras clave: ***Carl Schmitt, Francisco de Vitoria, James Brown Scott, Alberico Gentili, Hugo Grocio, soberanía, localización,* jus (ius) gentium, *guerra justa,* justus hostis.**

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Abstract: ***This study reexamines the validity of the interpretation of Francisco de Vitoria's thought presented by Carl Schmitt (1888–1985). According to Schmitt, Vitoria justified the Spanish conquest of America on the basis of medieval universalism which imposed Christian values on other cultures. Certainly, as Schmitt explained, Vitoria's intellectual framework could be labeled "medieval" because he did not regard the* jus (ius) gentium *(law of nations) as exclusively human law. However, Vitoria presented a broader understanding of the global order than thinkers such as Alberico Gentili and Hugo Grotius –whom Schmitt characterized as "modern" and "value-neutral"–, because, contrary to Schmitt's interpretation, they actually excluded "barbaric" regions from a common order, considering them lawless areas.***

Keywords: ***Carl Schmitt, Francisco de Vitoria, James Brown Scott, Alberico Gentili, Hugo Grotius, sovereignty, localization,* jus (ius) gentium*, just war,* justus hostis.**

1. Carl Schmitt's Attack on Universalism and His Principle of Localization

In the first half of the twentieth century, a large-scale revival of Thomism arose from the attempts to seek a post-war world order by international jurists, historians, and theologians. Following their precursors such as Ernest Nys (1851–1920) and Alonso Getino, O.P. (1877–1946)[1], influential scholars such as James Brown Scott (1866–1943), Vicente Beltrán de Heredia, O.P. (1885–1973), and Lewis Hanke (1905–1993) focused on the Spanish arguments about the relationship between the "New World" and the "Old World," which considered the rights and duties of Native Americans as well as those of Spaniards.[2] In this context, Dominican thought –particularly led by Francisco de Vitoria, O.P. (c. 1483–1546), Domingo de Soto, O.P. (1494–1560), and Bartolomé de las Casas, O.P. (c. 1484–1566)– was broadly referred to as a useful foundation for thinking about the global order in the twentieth century.

Yet negative assessments of Dominican thought also appeared around the same time, most influentially Carl Schmitt. In *The Nomos of the Earth*, written at the height of Germany's war effort but not published until 1950, Schmitt

[1] Cf. Ernest Nys, *Les origines du droit international*, Bruxelles, Castaigne, 1894; Alonso Getino, *El Maestro Fr. Francisco de Vitoria y el renacimiento filosófico teológico,* Madrid, Tip. de la Rev. de arch., bibl. y museos, 1914.

[2] Cf. James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations,* Oxford, Clarendon Press, 1934; Vicente Beltrán de Heredia, *Francisco de Vitoria,* Barcelona, Labor, 1939; Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America,* Philadelphia, American Historical Association, 1949.

analyzed Dominican thought within his examination of the history of modern international law. He did so with a particular intention: to criticize universalist conceptions of global order, such as rationalism, normativism, liberalism, and communism. According to Schmitt, these conceptions lead the world toward "delocalization" (*Entortung*)[3]. He felt that Vitoria's notion of universal Christian values made him a leading figure in establishing this universalism. For Schmitt, Vitoria was a medieval universalist thinker who could not separate religion from politics and, therefore, could not demonstrate a neutral view toward the world[4]. Schmitt argued that, because such universalism tended to force others to accept its values, it would not be suitable as a foundation for a modern global order. Schmitt wished to base such an order rather on the historical and concrete situation, and on the principle of "localization" (*Ortung / Verortung*)[5].

This paper examines the validity of Schmitt's interpretation of Vitoria's thought, his criticism of universalism, and his principle of localization as the foundation of the desirable global order. The next section clarifies the major elements of Schmitt's interpretation of Vitoria's thought and its aim. Section three considers the validity of Schmitt's interpretation by positioning Vitoria's thought within the formation process of modern international law. The fourth section indicates problems in Schmitt's attempt to seek a new global order based on the principle of localization. The final section considers the significance of Vitoria's universalism within our contemporary global society.

2. Schmitt's Criticisms of Vitoria

Schmitt believed that Vitoria failed to distinguish between theological and political arguments when discussing law and politics; and that when discussing war, Vitoria failed to distinguish between the moral question of *justa causa* (just cause) and the juridical question of *justus hostis* (just enemy)[6]. These two points, for Schmitt, clearly distinguished Vitoria as a medieval rather than a modern thinker.

[3] Cf. Carl Schmitt, *The Nomos of the Earth: In the International Law of the* Jus Publicum Europaeum, trans. G. L. Ulmen, New York, Telos Press, 2003, pp. 42–83; Carl Schmitt, *The Concept of the Political*, trans. George Schwab, Chicago, The University of Chicago Press, 2007, pp. 3–7. See also Koji Otake, *Seisen to naisen: Kāru Shumitto no kokusai chitsujo shisō* [Just War and Civil War: International Thought of Carl Schmitt], Tokyo, Ibunsya, 2009, pp. 9–38.

[4] Cf. Carl Schmitt, *The Nomos of the Earth*, pp. 108–112.

[5] Cf, *ibid.,* pp. 113–119.

[6] Cf. *ibid.,* esp. p. 121. In this paper, I use "j" to spell Latin words such as "*jus*" and "*justus*," following Schmitt's usage, although early-modern thinkers whom he cited –Salamancans, Balthazar Ayala, Alberico Gentili, and Hugo Grotius– had generally used "i" for those words ("*ius*" and "*iustus*").

According to Schmitt, Vitoria drew a sharp line between the Christian and the non-Christian world: "It never occurred to the Spanish monk [sic] that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions"[7]. By contrast, Schmitt praised "modern" thinkers such as Balthazar Ayala (1548–1584), Alberico Gentili (1552–1608), and Hugo Grotius (1583–1645) for minimizing this distinction as they worked to establish the "neutral and human" *jus inter gentes* (law among nations), which later shaped as the *jus publicum Europaeum* (European public law)[8]. In Schmitt's understanding, no matter how neutral, objective, and human Vitoria pretended to be, he ultimately justified the Spanish conquest of the Native Americans for the reason that they infringed the natural rights of Spaniards, natural rights held by all people under the *jus gentium* (law of nations)[9]. According to Schmitt, Vitoria's position was that the legal order and the restriction of war could be maintained only within Christendom under a common faith, principle, and authority (pope); while, outside Christendom, war could be waged legitimately by appealing to universal conceptions of the rights of communication, of mission, of intervention, and the like.

Schmitt's interpretation is closely tied to where he places Vitoria within the history of international law. For Schmitt, the modern legal order was established through the works of jurists from Ayala to Emer de Vattel (1714–1767) and ended with the Treaty of Versailles and the Geneva Protocol. This modern period, argued Schmitt, differed from the medieval in that the legitimacy of war could no longer be judged by its cause (*justa causa* in *jus ad bellum*, or the law to war), but by its procedures (*justus hostis* in *jus in bello*, or the law in war). With the development of a system of sovereign states, it became nearly impossible to judge which cause is just[10]. Schmitt asserted that this shift from medieval just war theory to modern international law had humanized aspects of war, such as the treatment of prisoners of war: enemy countries were no longer "criminals" who could be objects of annihilation, but *justus hostis*. In Schmitt's history, modern international law collapsed after the Treaty of Versailles, and punitive and inhuman war was revived with a new universal conception –the prohibition of war– under the initiative of the USA. In this new system, those countries that start a war again came to be considered criminal, punishable for novel crimes, that is, crimes against humanity[11].

7 *Ibid.*, p. 113.

8 Cf, *ibid.*, pp. 114–115, 126–140.

9 Cf, *ibid.*, pp. 90–92, 110–117.

10 Cf, *ibid.*, pp. 140–171. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies: Barbarism and Political Order,* London, Routledge, 2019, pp. 199–201.

11 Cf. Carl Schmitt, *The Nomos of the Earth*, pp. 259–280.

Schmitt's interpretation of Vitoria fits within his particular version of the history of international law in which the transition from medieval to modern international law progressed along two paths: (1) the separation of politics from religion, and (2) the end of distinction between Christians and non-Christians across the globe. Because Vitoria's thought did not have these two characteristics, Schmitt placed Vitoria as a medieval and nonobjective thinker.

This view of the history of international law, based on Schmitt's general political thought, remains influential but has been criticized in two ways. Some scholars accuse Schmitt of bending the arguments of Vitoria and other early modern thinkers to reinforce his own political theory[12]. Others suppose that Schmitt's intense criticism of the enforcement of specific values by means of universalism did not derive from his own studies, but rather originated in his resentment toward the situation of interwar Germany, which he felt had been imposed by liberal –especially American– internationalism[13]. These criticisms suggest that at the core of Schmitt's assertions lies the claim that the Treaty of Versailles had, in effect, deprived Germany of its sovereignty under the guise of universalism.

These two criticisms helpfully point out an important aspect of his argument's background. Schmitt's major aim was to clarify the danger of coercion under the pretext of universalism, and to rectify what he felt were misinterpretations of Vitoria's theory among internationalist lawyers such as Nys and Scott[14]. In so doing Schmitt established an important position as an anti-liberal, arguing against the creation of international institutions in the post-World War I Vitoria renaissance. The recent renaissance of interest in Schmitt's work by liberals and conservatives alike followed a renewed discussion of the morality and politics of war in the wake of U.S. wars in the Persian Gulf, Afghanistan, and Iraq[15]. Schmitt may have accepted the necessity of international

[12] Cf. Peter Schröder, "Carl Schmitt's Appropriation of the Early Modern European Tradition of Political Thought on the State and Interstate Relations," *History of Political Thought* 33, n. 2 (2012) 348–371; Joshua Smeltzer, "On the Use and Abuse of Francisco de Vitoria: James Brown Scott and Carl Schmitt," *Journal of the History of International Law* 20, n. 3 (2018) 345–372.

[13] Cf. Hans Joas and Wolfgang Knöbl, *War in Social Thought: Hobbes to the Present,* Princeton, Princeton University Press, 2013, pp. 167–170; Koji Otake, *op. cit.,* pp. 10–12, 124–133; Joshua Smeltzer, *op. cit.*

[14] Cf. Carl Schmitt, *The Nomos of the Earth*, esp. 117–125. As to the revival of the School of Salamanca and the Affairs of the Indies, see Natsuko Matsumori, *Civilización y barbarie: los asuntos de Indias y el pensamiento político moderno (1492–1560),* Madrid, Biblioteca Nueva, 2005, pp. 16–19; Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 6–7.

[15] Alain de Benoist and Armin Mohler as conservatives, and Jürgen Habermas and Jacques Derrida as liberals. As to the broad influence of Schmitt in both conservatives and liberals, including the "global Schmitt renaissance," see Chantal Mouffe, ed., *The Challenge of Carl Schmitt,* London, Verso, 1999; Michael Hardt and Antonio Negri, *Empire,* Cambridge, MA, Harvard University Press, 2000; Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, New Haven, Yale University Press, 2003; Giorgio Agamben, *State of*

institutions based on legitimacy and homogeneity of member states, but he seems prescient in his fear that the actual institutions would effectively be under the control of American imperialism[16].

This understanding is also linked to Schmitt's own biography. During the interwar period Schmitt was looking for an alternative to universalizing Catholic thinkers and thought he had found a solution by supporting National Socialism, with its articulation of "Großraumordnung" (greater regional order). The support ended in Nazi rejection as Schmitt's opportunism and dedication to their racial ideology was questioned. His refusal to repent during questioning at Nuremberg –whose authority he denied– led him into academic exile[17]. He ultimately considered that the Nazis had accelerated American imperialism[18].

This first criticism of Schmitt, his so-called "abuse of Vitoria," is not so important here. There's nothing inherently wrong with using former authorities to support one's view: Nys and Scott also employed Vitoria to support their own ideas, partly deviating from his original intentions[19]. Moreover, Schmitt used other well-known thinkers besides Vitoria to elaborate his theories, sometimes straying from the original texts: for example Niccolò Machiavelli (1469–1527) on the separation of the political from the moral; Jean Bodin (1530–1596) on the sovereignty as the principle of localization; Thomas Hobbes's (1588–1679) anthropological pessimism, defense of decisionism,

Exception, Chicago, University of Chicago Press, 2005; Peter Stirk, *Carl Schmitt, Crown Jurist of the Third Reich: On Pre-emptive War, Military Occupation and World Empire,* Lampeter: Edwin Mellen Press, 2005; Benno Gerhard Teschke, "Fatal Attention: A Critique of Carl Schmitt's International Political and Legal Theory," *International Theory* 3, n. 2 (2011) 179–227.

16 Cf. Carl Schmitt, "Der Völkerbund und Europa," in *Frieden oder Pazifismus?: Arbeiten zum Völkerrecht und zur internationalen Politik, 1924–1978*, ed. Günter Maschke, Berlin, Duncker & Humblot, 2005, pp. 240–254, trans. Ryuichi Nagao, "Kokusai renmei to Yōroppa," in *Kāru Shumitto chosaku shū I 1922–1934*, Tokyo Jigakusya, 2007, pp. 175–186; Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, Berlin, Duncker & Humblot, 1996, p. 40; trans. Motoyuki Inaba, *Gendaigikaishugi no seisinshiteki chii*, Tokyo, Misuzushobō, 2000, p. 43. See also Kam Shapiro, *Carl Schmitt and Intensification of Politics,* Lanham, Rowman & Littlefield Publishers Inc., 2008.

17 Regarding the "relationship between the textual and biographical planes" of Schmitt's career, see Carlo Galli, *Genealogia della politica: Carl Schmitt e la crisi del pensiero politico moderno*, Bologna, Il Mulino, 2010, 2 ed.; Claudio Minca and Rory Rowan, *On Schmitt and Space,* London, Routledge, 2015, pp. 10–40.

18 Cf. Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951,* Berlin, Duncker & Humblot, 1991, pp. 31, 147, 228. See also Heinrich Meier, *Die Lehre Carl Schmitts: Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie,* Stuttgart, Metzler, 2004, pp. 115–132; Koji Otake, *op. cit.,* pp. 242–256.

19 Regarding the approbation of Vitoria's thought, see Fernando Gómez, "Francisco de Vitoria in 1934. Before and After," *MLN* 117, n. 2 (2002) 365–405; Ignacio de la Rasilla del Moral, "Francisco de Vitoria's Unexpected Transformations and Reinterpretations for International Law," *International Community Law Review* 15, n. 3 (2013) 287–318; Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 6–13.

and criticism of the indirect power; and Hegel (1770–1831) on the particularity of all historical events[20].

The second criticism –that Schmitt's attack on universalism was based on resentment rather than any theory– however, is worth noting. For, if true, it adds strong ideological colors to his principle of "localization." Schmitt asserted that the transition from the medieval to the modern in the history of international law had been accompanied by the transition from universal order (Christendom) to localized order (the system of sovereign states). Through this transition, the international society changed from value-subjective and unequal order to value-neutral and equal one. Thus, the revival of a certain universalism –such as American imperialism– should be avoided because it would coercively reinstate the values of the powerful[21].

What was Schmitt's alternative to this universal order? It is often interpreted that Schmitt intended to reactivate the modern system of sovereign states in which the concepts of equal actor and *justus hostis* play essential roles[22]. However, Schmitt believed that this modern system was coming to an end on its own in line with his principle of localization, which indicated that no political order could be permanent, but would be effective only in specific circumstances[23]. Schmitt's history tied the emergence of the idea of the modern sovereign state to the specific situation in sixteenth-century France[24]. Since this particular historical situation had passed, an alternative order should be sought[25]. As substitutes for a modern system of sovereign states, Schmitt explored ideas rooted in the principle of localization, such as German Reich (of

[20] Carl Schmitt, "Machiavelli-zum 22. Juli 1927," in *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916–1969*, ed. Günter Maschke, Berlin, Duncker & Humblot, 1995, from Keita Koga, *Kāru Shumitto to sono jidai* [Carl Schmitt and His Historical Background], Tokyo, Misuzu, 2019, pp. 120–126; Carl Schmitt, *The Concept of the Political*, pp. 19–25; Carl Schmitt, "Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff," trans. Ryuichi Nagao, "*Jan Bodan to kindai kokka no seiritsu* [Jean Bodin and the Formation of the Modern State]," in Carl Schmitt, *Leviathan*, trans. Yuichi Nagao, Tokyo, Hukumura Shuppan, 1972, pp. 130–141; Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. George Schwab and Erna Hilfstein, Chicago, The University of Chicago Press, 2008. The following studies show the strong influence of these thinkers on Schmitt: George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936*, Berlin, Duncker & Humblot, 1970; Carlo Galli, *op. cit.*; Peter Schröder, "Carl Schmitt's Appropriation."

[21] Cf. Carl Schmitt, *The Nomos of the Earth*, esp. pp. 101–355.

[22] Cf. Jürgen Habermas, *Die Einbeziehung des Anderen*, Berlin, Suhrkamp Verlag, 1996, trans. Masayuki Takano, *Tasha no juyō* [Acceptance of Others], Tokyo, Hōsei University Press, 2004.

[23] Carl Schmitt, "Die geschichtliche Struktur des heutigen Weltgegensatzes von Ost und West" [1955], in *Staat, Großraum, Nomos*, ed. Maschke, pp. 523–551, from Koji Otake, *op. cit.*, pp. 228–233.

[24] Cf. Carl Schmitt, "Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff"; Carl Schmitt, *The Concept of the Political*.

[25] Cf. Koji Otake, *op. cit.*; Keita Koga, *Shumitto Renaissance: Kāru Shumitto no gainenteki shikō ni sokushite* [Schmitt Renaissance: His Conceptual Ideas], Tokyo, Fūkōsha, 2007.

the 1930s)[26], the greater regional order (of the 1940s)[27], and (in later reflections) the partisan order (of the 1960s)[28]. In all these explorations, Schmitt looked for systems with strong coercive power: in his Hobbesian view of humanity a common order would not naturally arise, so coercion was needed to avoid anarchy[29].

Despite these attempts, no alternative order to the modern system of sovereign states has been established yet. Therefore, if his intimation that the sovereign state is outmoded still has merit, his explorations into alternatives remain relevant. Furthermore, since all of Schmitt's explorations were based on his criticism of universalism and support for the principle of localization, it will be helpful to clarify the precise nature of that universalism –including Vitoria's– to which his proposed localism is an answer. The next two sections examine the validity of two matters in Schmitt's narrative of the transition from medieval to modern: (1) the separation of politics from religion, and (2) the disappearance of the distinction between Christians and non-Christians.

3. Religion and Politics: The Distinction Between the Medieval and the Modern

Schmitt's identification of Vitoria's thought with the medieval is certainly tenable; the Salamancan theologian clearly situated the global order within Christendom, not as a system of sovereign states. In his division of related thinkers, however, Schmitt's typology is too simplistic. When discussing both

[26] Cf. Carl Schmitt, "Nationalsozialismus und Rechtsstaat," trans. Hiroyuki Takeshima, "Nachisumu to hōchikokka [Nazism and Constitutional State]", in *Kāru Shumitto jiji ronbunshū* [Works of Carl Schmitt], eds. Keita Koga and Makoto Sano, Tokyo Fūkōsha, 2000, pp. 157–179. See also Felix Blindow, *Carl Schmitts Reichsordnung: Strategie für einen europäischen Großraum,* Berlin, Akademie Verlag, 1999; Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich,* Princeton, Princeton University Press, 1983.

[27] Cf. Carl Schmitt, "Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte," trans. Izumi Okada, "Ikigai rekkyō no kanshō o tomonau kokusaihō teki kōiki chitsujo [Greater regional order under international law with a ban on intervention by non-territorial powers]," in *Nachi to Shumitto* [Nazi and Schmitt], trans. Heiji Hattori, Tokyo, Bokutaku, 1976, pp. 83–167. See also Louisa Odysseos and Fabio Petito (eds.), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order*, London, Routledge, 2007.

[28] Cf. Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, trans. G. L. Ulmen, New York, Telos Press, 2007. See also Andreas Behnke, "Terrorising the Political: 9/11 within the Context of the Globalisation of Violence," *Millennium: Journal of International Studies* 33, n. 2 (2004) 279–312; Wouter Werner, "The Changing Face of Enmity: Carl Schmitt's International Theory and the Evolution of the Legal Concept of War," *International Theory* 2, n. 3 (2010) 351–380.

[29] Cf. Carl Schmitt, *The Concept of the Political*, pp. 58–68. See also Heinrich Meier, *Carl Schmitt, Leo Strauss und "Der Begriff des Politischen": Zu einem Dialog unter Abwesenden*, Stuttgart, J.B. Metzler, 2013, 3rd ed.; Johan Tralau (ed.), *Thomas Hobbes and Carl Schmitt: The Politics of Order and Myth,* London, Routledge, 2011; Nicholas T. Hiromura, "The Concept of Human in the Works of Carl Schmitt" (PhD diss., University of Bonn, 2020).

the separation of the political from the religious, and the transition from a *justa causa* to a *justum hostis* theory of war, for example, Schmitt divided theorists into medieval (Vitoria, Soto, Diego de Covarrubias, and Francisco Suárez [1548–1617], S.J.) and modern (Ayala, Gentili, Grotius, and Bodin). As we shall see below, however, there is no easy dichotomy, and these thinkers should rather be situated as transitional between medieval and (early) modern.

Let us look at how Schmitt's medieval thinkers understood the commonwealth. Early Salamancan thinkers, such as Vitoria, Soto, and Covarrubias, believed that royal power (*regia potestas*) came from God, but authority (*auctoritas*) –which exercises the power– was derived from each commonwealth[30]. Later Salamancans, such as the Jesuits Luis de Molina (1535–1600) and Francisco Suárez, refined this kind of secularized theory of commonwealth by introducing a clear distinction between the respective powers of commonwealth and government. The authority of the commonwealth itself is broader and more universal: it comes from God. Governmental power, however, is more limited and temporal, based on the consent and support of commonwealth members[31].

This distinction allowed these Salamancan thinkers to modify classical just war theory in two ways. First, by excluding lack of Christian faith and violations of *jus naturale* (natural law) from the category of *justa causa*, they attempted to eliminate religion's role in just war[32]. A war was no longer just

30 Cf. Francisco de Vitoria, *De potestate civili*, ed. Jesús Cordero Pando, *Relectio de potestate civili: estudios sobre su filosofía política*, Madrid, Consejo Superior de Investigaciones Científicas, 2008, pp. 35–37; Domingo de Soto, *De iustitia et iure*, eds. Venancio Diego Carro and Marcelino González Ordóñez, 5 vols., Madrid, Instituto de Estudios Políticos, 1967–1968, pp. 162–163; Diego de Covarrubias, *Practicarum quaestionum liber unus* in *Opera omnia*, vol. 1, Venetia, Graspare Bindoni, 1588, pp. 371^{r}–372^{r}. See also Natsuko Matsumori, *Civilización y barbarie*, pp. 161–171; Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 135–140.

31 Cf. Luis de Molina, *De iustitia et iure*, 6 vols., Venetia, Sessa, 1614, vol 1, pp. 106, 114–115; Francisco Suárez, *De legibus*, eds. L. Pereña et al., 8 vols., Madrid, Consejo Superior de Investigaciones Científicas, 1963–1981, vol. 5, pp. 36–50. See also Natsuko Matsumori, "Kindai Supein kokka keisei to kōki Saramanka gakuha: Ruisu de Morina no kenryoku ron o chūshin ni [The Formation of the Modern Spain and the Later School of Salamanca: the Concept of Power as Given by Luis de Molina]," in *Tagenteki sekai ni okeru "Tasha"* ["Others" in the Pluralistic World], Osaka, Kansai University Press, 2013, pp. 239–260; Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 140–142.

32 Cf. Francisco de Vitoria, *De iure belli*, in *Relectio de iure belli o paz dinámica*, eds. L. Pereña et al., Madrid, Consejo Superior de Investigaciones Científicas, 1981, pp. 122–127; Francisco de Vitoria, *De indis*, in *Relectio de indis o libertad de los indios*, eds. L. Pereña et al., Madrid, Consejo Superior de Investigaciones Científicas, 1967, pp. 69–71; Domingo de Soto, *An liceat civitates infidelium seu gentilium expugnare ob idololatriam*, in Jaime Brufau Prats, *Relecciones y opúsculos*, vol. 1, Salamanca, San Esteban, 1995, pp. 242–255; Diego de Covarrubias, *Regulam Peccatum*, in *Opera omnia*, vol. 1, Venetia, Graspare Bindoni, 1588, p. 542^{l}; Diego de Covarrubias, *Practicarum quaestionum liber unus*, in *Opera omnia*, vol. 1, Venetia, Graspare Bindoni, 1588, pp. 535^{r}–537^{l}; Diego de Covarrubias, *De iustitia belli adversus indos*, in *Relectio de iure belli o paz dinámica*, eds. L. Pereña et al., p. 353; Luis de Molina, *De iustitia et iure*, pp. 372–377, 388–392; Francisco Suárez, *De triplici virtute theologica: Fide, spe et charitate*, in *Opera omnia* 12,

simply because it was holy. Second, by emphasizing certain requirements for *justa causa* –especially whether a war could be just for both parties– and by defining permissible acts in war, they opened the way to develop *jus in bello*[33]. Therefore, Salamancans from Vitoria to Suárez oversaw the beginnings of just war theory's transition from focusing on the cause of war (*jus ad bellum*) to the conduct of war (*jus in bello*).

Neither does the simple dichotomy hold for Schmitt's modern theorists, Ayala, Gentili, and Grotius. While these thinkers further refined secular theories of the sovereign state and developed the notion of *jus in bello*, their considerations of the justice of war remained within the scholastic framework[34]. We can see this by examining the contrast Schmitt draws between the just war theories of the archetypical medieval, Vitoria, and the archetypical modern, Gentili.

Gentili sought to de-theologize legal theory, urging theologians to "keep silent about matters that belong to others"[35]. He further formulated the concept of relative justice, considerably separated from the church and closely entrusted to the judgment of state sovereignty. According to Gentili, only

ed. Charles Berton, Paris Vivès Suárez, 1858, pp. 743–748. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp.158, 209–213.

33 Francisco de Vitoria, *De iure belli*, pp. 138–161; Domingo de Soto, *Quaestio 40 de bello*, in *Relectio de iure belli*, eds. Pereña et al., pp. 304–305; Diego de Covarrubias, *Regulam Peccatum*, p. 544[1]; Luis de Molina, *De iustitia et iure*, pp. 377–384, 403–406; Francisco Suárez, *De triplici virtute theologica*, pp. 748–752. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 213–214.

34 Balthazar Ayala, *De jure et officiis bellicis et disciplina militari libri III*, ed. John Westlake, 2 vols., Washington, D.C., Carnegie Institution of Washington, 1912; Alberico Gentili, *De iure belli libri tres*, ed. Thomas Erskine Holland, Oxford, Clarendon, 1877; Hugo Grotius, *De iure belli ac pacis libri tres*, eds. R. Feenstra and C. E. Persenaire, Aalen, Scientia Verlag, 1993 [trans. Richard Tuck, *The Rights of War and Peace*, 3 vols., Indianapolis, Liberty Fund, 2005]. In spite of Schmitt's interpretation of Ayala, Gentili, and Grotius as "modern" thinkers, a considerable number of studies point out their middle position between scholastic thought and theory of sovereign state: John Westlake, "Introduction," in Balthazar Ayala, *De jure et officiis bellicis*, pp. xiii–xiv; Benedict Kingsbury and Benjamin Strauman (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire,* Oxford, Oxford University Press, 2011; Centro Internazionale di Studi Gentiliani (ed.), *Alberico Gentili: giustizia, guerra, impero,* Milan, Giuffrè Editore, 2014; Claire Vergerio, "Alberico Gentili's *De iure belli*: An Absolutist's Attempt to Reconcile the *jus gentium* and the Reason of State Tradition," in *Journal of the History of International Law* 19, n. 4 (2017) 429–66; Peter Haggenmacher, *Grotius et la doctrine de la guerre juste,* Paris, Presses universitaires de France, 1983; Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150–1625,* Atlanta, Scholars Press, 1997, pp. 316–342; Yoshiki Ohta, *Gurotiusu no kokusai seiji shisō: shuken kokka chitsujo no keisei* [International Political Thought of Grotius: The Formation of the Sovereign State System], Kyoto Minerva, 2003; Pärtel Piirimäe, "The Westphalian Myth and the Idea of External Sovereignty," in *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, eds. Hent Kalmo and Quentin Skinner, Cambridge, Cambridge University Press, 2010, pp. 64–80; Terence Irwin, *The Development of Ethics: A Historical and Critical Study*, 3 vols., Oxford, Oxford University Press, 2007–2009, vol. 2, pp. 88–99.

35 Cf. Alberico Gentili, *De iure belli libri tres*, p. 55.

sovereign states could be lawful belligerents; no superior authority judged justice beyond the sovereign state[36]. Both sides of a war could engage justly because they both equally possess the right to wage war. Schmitt appropriately understands that Gentili's just war theory refined the law of war on the basis of the concept of *justus hostis*, rejecting a punitive view of war based on the concept of *justa causa*[37]. On this point, Gentili arguably contributed more to the development of the law of war than Vitoria and other later scholastics.

Despite these differences, Gentili remained greatly influenced by scholastics, especially on the following three points. First, his assertion that sovereign states are the only justifiable belligerents was an extension of the scholastic argument of the authority of prince, drawing on traditional just war theories from Cicero through Augustine and on to Thomas Aquinas[38]. Secondly, Gentili seems to draw upon later scholastics who also argued for the possibility that both belligerents may be just, though their framework of absolute justice based on objective criteria limited such exceptions to cases of invincible ignorance. Though Gentili's notions of relative justice and the subjective judgment of the sovereign are by no means scholastic, because both sides of a war could frequently be just without such ignorance. Yet, the above scholastic casuistry seems to have prompted a development of the law of war promoted by Gentili and later legal thinkers[39]. Thirdly Gentili's just war theory still argued for *justa causa*, depending on Vitoria and other scholastics: while denying that difference in religion constituted *justa causa*, he acknowledged the justice of belligerence for reprisal of injury and for punishment of offenses against *jus naturale* and *jus gentium*[40].

In discussing these three issues, Gentili identified –as did the scholastics– *jus gentium* with *jus naturale* in its broad sense. That is to say, *jus gentium* was

[36] Cf. *ibid.*, pp. 1–31.

[37] Cf. Carl Schmitt, *The Nomos of the Earth*, pp. 123–276.

[38] Cf. Alberico Gentili, *De iure belli libri tres*, pp. 10–28. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 194–201.

[39] Cf. Francisco de Vitoria, *De iure belli*, pp. 156–159; Melchor Cano, *Quaestio 40 de bello*, in *Relectio de iure belli o paz dinámica*, ed. L. Pereña et al., Madrid, Consejo Superior de Investigaciones Científicas, 1981, pp. 329–332; Domingo de Soto, *Quaestio 40 de bello*, pp. 304–305; Diego de Covarrubias, *Regulam Peccatum*, p. 544[1]; Alberico Gentili, *De iure belli libri tres*, pp. 28–31. Regarding the difference between Vitoria's just war theory and Gentili's, see Fujio Ito, "Aruberikus Gentiriusu no sensō no gainen [Alberico Gentili's Concept of War," *Hōsei Kenkyū* 24, n. 1 (1957) 21–40; Peter Schröder, "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations," in *The Roman Foundations of the Law of Nations*, eds. Kingsbury and Straumann, ch. 9.

[40] Cf. Alberico Gentili, *De iure belli libri tres*, pp. 35–122. It should be noticed here that Vitoria did not accept an "offense against *lex naturae*" itself as *justa causa* of war, although he considered that war could be waged, as a rescue of innocent people, to sanction those who carry out, for example, human sacrifice and anthropophagy. Gentili does not seem to distinguish these two so clearly. Cf. Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 158, 161–162, 211–212.

not exclusively human but essentially natural, and established as a part of *jus divinum* (divine law) after original sin[41]. Gentili implicitly distinguished fundamental and derivative *jus naturale* –as did the scholastics between *jus naturale secundum primum modum* and *jus naturale secundum secundum modum*– and regarded the *jus gentium* as the latter, or second *jus naturale*. We can see this in several of his distinctions: that custom, not nature, distinguished friend and enemy; that *jus belli* was not derived from *jus naturale* but *jus gentium*; that commerce was right in accordance with *jus gentium*, but security had higher priority in accordance with *jus naturale*[42].

In emphasizing the importance of the people's consent of the establishment of *jus gentium* and by truly expanding its scope of application to all people including "barbarians," Vitoria played a particularly crucial role in the development of this distinction[43]. Vitoria's inventiveness opened up a firmer secular space between divine and human law which greatly influenced Gentili and other later thinkers, including those qualified by Schmitt as modern[44].

41 Cf. Alberico Gentili, *De iure belli libri tres*, pp. 3–6.

42 Cf. Alberico Gentili, *De iure belli libri tres*, pp. 52–55, 21, 97. Regarding the scholastic distinction between the two types of *jus naturale*, see Thomas Aquinas, *Summa theologiae*, ed. Francisco Barbado Viejo et al., *Suma teológica*, 16 vols., Madrid, Biblioteca de Autores Cristianos, 1950–1964, I-II, q.95, a 4, and II-II, q.57, a.3. Some scholars focus on this scholastic aspect of Gentili's thought: e. g., James Brown Scott, *Law, the State, and the International Community*, 2 vols., New York, Columbia University Press, 1939, vol. 1, p. 372; Fujio Ito, "Aruberikus Gentiliusu no kokusaihō no kannen [Alberico Gentili's Idea of International Law]," *Hōsei Kenkyū* 22, n. 2 (1955) 143–160. Others emphasize the humanistic aspect of Gentili's thought, which oppose the scholastic discourses: e.g., Anthony Pagden, "Gentili, Vitoria, and the Fabrication of a "Natural Law of Nations," in Kingsbury and Straumann (eds.), *The Roman Foundations of the Law of Nations*, ch. 16; Ian Hunter, "Law, War, and Empire in Early Modern Protestant *Jus Gentium*: the Casuistries of Gentili and Vattel," in Centro Internazionale di Studi Gentiliani (ed.), *Alberico Gentili*, pp. 151–168.

43 Cf. Francisco de Vitoria, *De indis*, p. 82; Francisco de Vitoria, *Comentarios a la Secunda Secundae de Santo Tomás*, ed. Vicente Beltrán de Heredia, 6 vols., Salamanca, 1932–1952, q.57, a.3, vol. 3, pp. 12, 14.

44 Cf. Domingo de Soto, *De iustitia et iure*, vol. 2, pp. 196–198; Melchor Cano, *An ius gentium distinguatur a iure naturali,* in Francisco Suárez, eds. Pereña et al., *De legibus*, vol. 4, pp. 247–250; Diego de Covarrubias, *Regulam Peccatum*, pp. 546^{r}–547^{l}; Francisco Suárez, *De legibus*, vol. 4, p. 125; Fernando Vásquez de Menchaca, *Controversiarum Illustrium*, ed. Fidel Rodríguez Alcarde, 4 vols., Valladolid, Cuesta, 1931–1934, II 89, pp. xxiv–xxvii; Hugo Grotius, *De iure praedae commentarius*, eds. Gwladys L. Williams and Walter H. Zeydel, Oxford, Clarendon Press, 1950, pp. 5–14 (in these thinkers' texts, *jus naturale* is sometimes called *jus naturae*). Nevertheless, it should be noted that the distinction between the first *jus naturale* and the second *jus naturale* in Vásquez de Menchaca and Grotius differs from the distinction of *lex naturalis* and *jus naturale* in Thomas Aquinas and Salamancans. The first *jus naturale* described by Vásquez de Menchaca and Grotius is similar to *lex aeterna* in Thomas's theory, and the distinction between the first *jus gentium* and the second *jus gentium* described by them corresponds to Thomas's distinction between the first *jus naturale* and the second *jus naturale*. I avoid getting too deeply involved in the discussion of whether Thomas and late scholastics revived the classical distinction between *jus* and *lex*. On the concept and classification of *ius* and *lex*, see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625,* Atlanta, Scholars Press, 1997, pp. 22–27; Natsuko Matsumori,

Following this scholastic discourse –influenced by Roman usage, Gentili considered *jus gentium* to be based on the common consent of all human beings as rational beings, not necessarily the actual agreement of all nations[45].

Moreover, following stoic discourse, Gentili thought that *jus gentium*, as the law of global, natural society of all human beings, pointed to universal values. He opposed wars waged for differences in religion but approved of wars waged to defend and rescue neighbors[46]. For Gentili, sovereign states were obliged nonetheless to observe higher moral requirements for entering into, as well as carrying out war. Schmitt's understanding of Gentili's theory ignores this moral aspect.

In the separation of politics from religion, the difference between medieval (scholastic) and modern thinkers (theorists of national sovereignty) is not so sharp as Schmitt insisted.

4. Harmful Effects of Localization: The Distinction Between "We" and "They"

An additional characteristic of modern legal discussions concerning the global order, Schmitt argued, was the disappearance of the distinction between Christian and non-Christian. But a close analysis of Schmitt's modern thinkers in this regard reveals them to be even more medieval than the so-called medieval late scholastics.

According to Schmitt, although Vitoria criticized the titles conventionally used to justify the conquest of the New World, his *De Indis* ultimately justified the conquest with a new set of alternative titles[47]. In these alternative titles Schmitt located the ongoing centrality of Christendom for Vitoria.

Schmitt lists Vitoria's seven possible legitimate titles for establishing the Spanish dominion over the New World. Using Vitoria's terms, they are as follows: (1) natural communication, (2) spreading of the Christian religion, (3) protection of Christian converts, (4) liberation of [imprisoned or enslaved] Christians, (5) defense of the innocent, (6) true and voluntary election/choice

Civilización y barbarie, pp. 179–191; Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 151–156.

45 Cf. Alberico Gentili, *De iure belli libri tres*, pp. 3–8. See also Cicero, *Tusculanae disputationes*, ed. J. E. King, *Tusculan Disputations*, Cambridge, MA., Harvard University Press, 1971, p. 37.

46 Cf. Alberico Gentili, *De iure belli libri tres*, pp. 10–13, 25–28, 35–39, 50–75. See also Seneca, "Epistula 96," in *Ad Lucilium epistulae morales*, 3 vols., ed. E. H. Warmington, Cambridge, MA., Harvard University Press, 1971, vol. 3, pp. 105–107; Seneca, *De beneficiis*, in *Moral Essays*, 3 vols., ed. John W. Basore, Cambridge, MA., Harvard University Press, 1975, esp. vol. 3, pp. 454–525.

47 Cf. Carl Schmitt, *The Nomos of the Earth*, pp. 102–115.

by the Native Americans, and (7) protection of allies[48]. We can divide these titles into the rights (1–2) and duties (3–7) of Spaniards, according to *jus gentium*[49]. Schmitt rightly explained that the alternative titles proposed by Vitoria were hypothetical, for Vitoria never claimed whether the Spanish conquest of the Americas satisfied them or not[50]. Nevertheless, Schmitt opined that Vitoria's legal foundation for the justice of the conquest was, in practice, the missionary mandate given by the papacy, itself derived from the natural right of communication. According to Schmitt, Vitoria never thought that "non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions"[51]. Vitoria, for Schmitt, held a medieval Christian worldview, which saw the principal difference between the Old World and the New World as religious. For Schmitt, "[t]his is the limit of the absolute neutrality of Vitoria's arguments, as well as of the general reciprocity and reversibility of his concepts"[52].

Schmitt is correct to point out that, while Vitoria doubted the legitimacy of conduct in the wars carried out by the conquistadors, he ultimately accepted the continuation of Spanish dominion over the Americas. But Schmitt was wrong to imply that this acceptance was due to the satisfaction of any new legitimate titles –including the right of mission–. Rather, Vitoria based his acceptance on the fact that the conquest was already accomplished and undoing it would negatively impact the interests of both Spaniards and Native Americans alike. According to Vitoria:

> [T]he barbarians are our neighbors and we are obliged to take care of their goods. […] with the limitation that only applies if everything is done for the benefit and good of the barbarians, and not merely for the profit of the Spaniards. […]
>
> [I]f all these titles were inapplicable, that is to say if the barbarians gave no just cause for war and did not wish to have Spaniards as princes and so on, *the whole Indian expedition and trade would cease*, to the great loss of the Spaniards. And this in turn would mean a huge loss to the royal exchequer, which would be intolerable.
>
> My first reply is that *trade would not have to cease*. […]

48 Cf. Francisco de Vitoria, *De indis*, pp. 77–96. The conventional titles which Vitoria rejected are the following: (1) Native Americans' characteristics of natural slaves, (2) universal power of emperor, (3) universal authority of pope, (4) the right of discovery, (5) Native Americans' refusal to convert to Christianity, (6) their violations against *lex naturae*, (7) their voluntary choice, and (8) God's gift. Cf. Francisco de Vitoria, *De indis*, pp. 33–75.

49 Cf. Natsuko Matsumori, *Civilización y barbarie*, pp. 191–197; Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, p. 159–166.

50 Cf. Carl Schmitt, *The Nomos of the Earth*, pp. 108–110.

51 Cf. *ibid.*, p. 113.

52 *Id*.

> My second reply is that *royal revenues would not necessarily be diminished*. […]
>
> My third reply is that it is clear that once a large number of barbarians have been converted, it would not be neither expedient nor lawful for our princes to abandon altogether the administration of those territories.[53]

As Schmitt himself recognized, Vitoria never definitively judged, in his texts, whether the Spanish conquest was legitimate or not[54]. Above all, for Vitoria, Native Americans' "violations against *lex naturae*" (or as Schmitt put it, "religious fallacies") such as idolatry and sodomy, could never be just causes for the establishment of the Spanish dominion over them[55]. Vitoria thought that customs such as anthropophagy and human sacrifice could be just causes, but for humanitarian, not religious reasons[56].

Schmitt was also wrong to interpret Vitoria as denying equal legal subjectivity for non-Christians. In fact, Vitoria's position was that non-Christians, because created in the image of God, were equal legal subjects[57]. Based on his understanding of the *imago Dei*, Vitoria applied common principles, such as *jus gentium* and just war theory, to non-Christians as well. Vitoria never considered the non-Christian world as lawless, but as an integral part of the global order. He may have thought non-Christians were inferior to Christians in ability, but this was due not to their lack of true faith, but lack of civility and good education[58].

Vitoria's view of non-Christians thus has a dual character: while recognizing the equal legal status of non Christians, he also regarded them as less capable, because less educated. This double character has resulted in a dualistic interpretation of his position: he is praised as the pioneer of peaceful universal order while criticized as the founder of imperialist ideology. Likewise, Vitoria's doctrine of natural communication is praised as the foundation for peaceful trade and interaction while criticized as the basis for the conquest on the pretext of the Christian mission[59]. Whatever can be said about reality on

53 Cf. Francisco de Vitoria, *De indis*, pp. 98–99; translation from Francisco de Vitoria, "On the American Indians," in *Francisco de Vitoria: Political Writings*, ed. and trans. Jeremy Lawrance, Cambridge Texts in the History of Political Thought, Cambridge and New York, Cambridge University Press, 1991, pp. 291–292.

54 Cf. Carl Schmitt *The Nomos of the Earth*, pp. 109–110.

55 Cf. Francisco de Vitoria, *De indis*, pp. 67–72.

56 Cf. *Ibid.*, pp. 93–94.

57 Cf. *ibid.*, pp. 4–31. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 79–83 and 143–145.

58 Cf. Francisco de Vitoria, *De indis*. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 79–90.

59 Cf. Natsuko Matsumori, "Hospitality or Property? The Natural Right of Communication and the 'New World'," in *The Transatlantic Las Casas: Historical Trajectories, Indigenous Cultures,*

the ground (in the Indies), Vitoria's view of the relationship between Christians and non-Christians is one of reciprocity: Spaniards could not possess the lands of the New World by the right of discovery, just as the Native Americans could not possess the lands of Spain if they had discovered them[60]. This argument is premised on the assertion that Native Americans, too, had the same right of communication in Spain, even though in practice they were unable to exercise it.

These aspects of Vitoria's argument are quite different from those of Gentili and Grotius, for example, whom Schmitt gave high marks for trying to conceive of a neutral, reciprocal, and non-religious common international order. These "modern" political theorists sought to separate the sovereignty of the commonwealth and its law from any notion of the divine. Grotius in particular ultimately reached an understanding that law was derived from the needs of the society, apart from any belief in or participation of God in human affairs: neither *jus gentium* nor *jus naturale* was divine[61]. For Schmitt, these "modern" views of commonwealth and law contributed to the development of the international order of secular, mutually equal sovereign states.

The views of Gentili and especially Grotius, however, can be used to limit the area to which a theoretically global common order applies. If *jus gentium* is not based on any objective justice (Gentili), nor derived from *jus naturale* (Grotius), it cannot be considered applicable to all human beings, nor universal. *Jus gentium* may only exercise coercive power only over those who have the opportunity and ability to agree to it. Grotius wrote that *jus gentium* "received its binding power from the will of all, or at least of many, peoples." The "many" is of utmost importance. He continued: "I added 'of many,' because hardly any law is found, except that of nature, which is also called *jus gentium*,

Scholastic Thought, and Reception in History, eds. Rady Roldán-Figueroa and David Thomas Orique, Leiden, Brill, 2023, pp. 267–282.

60 Cf. Francisco de Vitoria, *De indis*, p. 54.

61 Hugo Grotius, *De iure belli ac pacis libri tres*, pp. 5–12. As mentioned above in note 44, in his earlier work, Grotius offered a different interpretation of *jus naturale* and *jus gentium*. He divided *jus naturale* into two parts: the first (*jus naturae primarium*), that is *Dei voluntas* or God's will, is common to all creatures; and the second (*jus naturae secundarium*) is derived from the first through agreement and common only to rational people. In his earlier theory, *jus gentium* is also classified into two parts: the first (*jus gentium primarium*) corresponds to the second *jus naturale*, and the second (*jus gentium secundarium*) is mixed law between the first *jus gentium* and *jus civile*, which is the human law based on the will of a commonwealth. Cf. Hugo Grotius, *De iure praedae commentarius*, pp. 5–14. In this understanding, neither *jus gentium* nor *jus naturale* are purely artificial but based on God's will (unlike *jus civile*, which is clearly distinguished from *jus naturale*). Later, in his main work, *The Law of War and Peace*, Grotius strictly distinguished *jus gentium* from *jus naturale*, secularizing both and eliminating their subdivisions, although, like Suárez, Grotius still thought that *jus gentium* was more similar to *jus naturale* than to *jus civile*. See Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 154, 184–185.

common to all peoples"[62]. By using the word "many", Grotius emphasized that *jus gentium* was not applied to all peoples. His argument suggests that the subject of *jus gentium* is limited to those nations who sufficiently exercise the ability to reason and can build a consensus with other peoples. "Barbarians," lacking in reason, would be excluded because they are regarded as insufficiently competent to maintain such a social order.

Even before Grotius, for example, the late-scholastic Suárez also presented a similar interpretation, separating *jus gentium* from *jus naturale*. He claimed that *jus gentium* "is not necessarily applicable to all peoples, […] but it is sufficient to be used by almost all well-established peoples", emphasizing the particle "almost" (*fere*) in Isidore's traditional definition of this law: "*jus gentium* is not always common to all peoples, but to almost all peoples"[63]. Nevertheless, for Suárez, *jus naturale* derived from natural precepts common to all peoples on the basis of *lex aeterna*, so common order exists even in areas where *jus gentium* is not applicable. For Grotius, however, who left a place for *jus naturale* as the "dictate of right reason," common to all peoples, its applicable rules were very few[64]. He assumed a considerably limited common global order based on *jus naturale*.

And what is more, for Grotius "barbarians" who have committed "crimes against nature" may be legitimately deprived of their rights by "civilized" people because such "brutality" deserves punishment[65]. If this argument is extended, war may be waged against such barbarians, "as… against beasts," because they do not necessarily even have the rights ensured by *jus gentium*. Before Grotius, Gentili had already written something similar: "I believe that war can be used in the case of those who evidently break *jus naturale* and human law. […] War is waged against these people as if waged against beasts"[66]. Grotius articulated the same point further:

[62] Hugo Grotius, *De iure belli ac pacis libri tres*, p. 41. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 155–156.

[63] Francisco Suárez, *De legibus*, vol. 4, pp. 126, 132; Isidore, *Etymologiae*, eds. José Oroz Reta and Manuel-A. Marcos Casquero, *Etimologías*, 2 vols., Madrid, Biblioteca de Autores Cristianos, 1982, vol. 1, pp. 512–513.

[64] The rules are: (1) inviolability of property, (2) restitution, (3) obligation to fulfill promises, (4) reparation, and (5) merit of punishment. Cf. Hugo Grotius, *De iure belli ac pacis libri tres*, p. 9. See also the "thinner" concept of human society or moral minimalism described in Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant,* Oxford, Oxford University Press, 1999; Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice Since Vitoria,* Aldershot, Ashgate, 2002.

[65] Cf. Hugo Grotius, *De iure belli ac pacis libri tres*, p. 511. See also Natsuko Matsumori, *The School of Salamanca in the Affairs of the Indies*, pp. 151–156.

[66] Alberico Gentili, *De iure belli libri tres*, pp. 197–199.

> For, of such barbarians, rather beasts than human beings, […] war against them is natural, and […] we follow the opinion of Innocent and others who hold that war could be waged against those who offend nature and oppose the opinion of Vitoria, Vázquez, Azor, Molina, and others who seem to require, to wage a just war, that he who undertakes it be injured in himself or his commonwealth[67].

In their secularizing shift, Gentili and Grotius considered non-Christian regions, such as the "New World," differently from the "civilized world", not because of their lack of Christian faith, but because of their "barbarism." Accordingly, if "barbarians" such as the Native Americans commit crimes against *jus naturale*, ignoring the universal law of human beings, they are not subject to the same rules as people who observe *jus naturale*.

In this interpretation, *jus gentium*, including the law of war, does not, in fact, cover the whole world. *Jus gentium* is nothing but public law among civilized [i.e., European] commonwealths. Among the commonwealths that observe this law, neither popes nor princes can exercise their jurisdiction beyond their borders; but this principle is not applied to "barbarous" regions. Grotius's main concern, therefore, is the establishment and maintenance of order and law among "civilized" peoples. Grotius's definition turns out to be quite limited: Islamic "civilization" might theoretically share in the *jus gentium*, but in practice lived outside of the moral principles of the common order. The surprising conclusion is that, despite his supposed secularism, the "modern" Grotius drew an even clearer line between Christendom and the world outside than had the "medieval" Vitoria, urging all Christians to defend each other against attacks by non-Christians, as members of one unified entity[68]. In effect, Grotius limited the scope of *jus gentium* to European countries. The same can be said of Gentili, for whom there was no equal order between Christians and non-Christians[69]. These so-called modern understandings of order are, in fact, quite in line with the conventional view since Augustine, who considered that true justice, law, and order could exist only in a secularly conceived Christendom[70].

Vitoria, by contrast, derives *jus gentium* from natural precepts, which therefore apply to all peoples, "civilized" or "barbarian." It can even bind those who do not give their clear consent. Vitoria may have regarded the Native Americans as "barbarians," but he never claimed that war could be waged against them for this reason alone: both barbarism and civilization

67 Hugo Grotius, *De iure belli ac pacis libri tres*, p. 511.

68 Cf. *Ibid.*, pp. 8, 169, and 402.

69 Cf. Alberico Gentili, *De iure belli libri tres*, pp. 380–387.

70 Cf. Augustine, *De civitate Dei*, eds. S. Santamarta del río et al., *La Ciudad de Dios*, 2 vols., Madrid, Biblioteca de Autores Cristianos, 1998–2000, vol. 2, pp. 622–623.

share a common order under the same rules. A close reading reveals, contrary to Schmitt's interpretation, that Vitoria had a more neutral and equal understanding of global order than so-called modern thinkers.

5. The Significance of Universalist Conceptions of Global Order

Based on this exposition, I argue against Schmitt's criticisms of Vitoria in the following two points.

First, because Vitoria did not regard *jus gentium* as human law alone but as a part of divine providence, Schmitt criticized his thought as medieval and embodying the centrality of Christendom. Schmitt, though he identified as a Catholic, felt that Vitoria's position was too Christian and too theological to be a reference for our "secularized" age. It is true that Vitoria, in one respect, aimed at the Christianization and cultivation of non-Christians under the pretext of establishing the common order. But Vitoria's universalism was not a "medieval" one based on religion, even if it was closely connected with Christian values. If we focus on outcomes rather than intentions, Vitoria's understanding of the global order was broader and more neutral than that of "modern" thinkers such as Grotius, including so-called barbarians. The legal order described by these "modern" thinkers was not progress, as suggested by Schmitt's typology. For, in effect, limitation of war and the equality of sovereign states could be effectively guaranteed only within the "non-barbarian" world, which in practice meant the Christian states of Europe. "Barbarian" regions had to become civilized states before they could become members of this order. The unexpected consequence of "modern" legal proposals for international law was the creation of vast areas of lawlessness available to tame from outside.

Secondly, Schmitt criticized any universalism's imposition of its own values upon others, and warned, as seen above, against the logic of might makes right in both the unsecularized (e.g., scholastic) and the secularized (e.g., liberal) universalist conceptions of political order. It is certainly true that all universalisms have tended, by definition, to impose specific values upon others in the name of universality. After the age of Vitoria, however, and just as much after the age of Schmitt, globalization has only grown. Within this reality, when considering a desirable common order for today, Schmitt's notion of localization is increasingly difficult to sustain. In our interdependent world peace and security cannot be maintained by attention only to a single area, expelling war and anarchy outward. We can no longer consider, as localization does, any place as lawless. And so once again, because they sought ethics and justice beyond borders, past universalist conceptions of order such as Vitoria's offer fruitful possibilities for imagining global order. So despite

Schmitt's severe criticisms, it is still possible to find a certain significance for universalism in conceiving global order.

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