Historicizing Anthropomorphic Rationalizations as System Justification Practices in International Law:

A Critical Account of Vitoria's *Jus Gentium*

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Abstract

International law and scholarship tend to ascribe certain perceived human attributes to States and to call upon those attributes as a basis for rationalizing how States conduct themselves in the international system and—particularly—to justify international norms and distributive outcomes. Specifically, like humans, States are presumed to be (1) choice-driven, (2) rational, and (3) predominantly autonomous. These, and other anthropomorphic attributions, pervade social science and, as Professor Jean d'Aspremont confirms, are particularly commonplace in international legal scholarship.[1]

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1. d'Aspremont writes, for instance, that "anthropomorphism is rather commonplace in social sciences. In the thinking about international law it is almost a dominant trait." Jean d'Aspremont, *The International Law of Recognition: A Reply to Emmanuelle Tourme-Jouannet*, 24 Eur. J. Int'l L. 691, 693 (2013).

However, this anthropomorphic conception of the State actor is empirically unsubstantiated and is an incomplete model for understanding why and how States do what they do and for justifying the international legal order. Because much of the international legal order relies on these empirically unsubstantiated ideas, a theoretical discrepancy exists between what international lawyers believe is happening and the actual reality of global law and governance.

These attributions are congenital. They played a key role in how modern international law originated, which explains why they are still operative in how contemporary international law functions. To demonstrate this, I propose a historical account of one of the processes through which international law came to incorporate and depend on these attributions. I start with the explicit assertion often made by the early theorists of international law, in this instance Francisco de Vitoria, that international legal actors must—and in fact do—possess reason. I argue that because these assertions were often made in a throwaway manner, mainstream historical works in international law tend to either miss or underappreciate their significance.

I show that Vitoria's belief that the legal actor is a rational being is not peripheral but rather central to his account of international law for three main reasons. First, Vitoria suggests that possession of reason or rationality is the sole basis of legal subjectivity in the law of nations. Relatedly, because they possess reason, international legal actors are necessarily autonomous. Second, by arguing that all legal actors are similar because they reason, Vitoria suggests that international law can properly apply to them in a fair and neutral fashion. In effect, the attribution of rationality allows Vitoria to legitimize an overarching normative framework within which relations between the legal actors may be assessed from an objective standpoint. Third—and finally—to reinforce this framework, Vitoria characterizes any opposition to the common normative framework as emanating from the actors' self-interest or bad faith and, accordingly, as inherently inimical to the common interest of all subjects of *jus gentium.*

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Introduction

International legal scholarship is overrun by offhand assertions that States are rational or autonomous or that particular international legal rules are rational.[2] Often, these assertions are routine and do not entail any immediate explanatory value. In fact, the statement that the State is rational has come to acquire the same sort of redundancy that is familiar when international lawyers offhandedly refer to the "sovereign State."[3]

However, in other instances, the idea that the State is rational is used as a framework for analyzing the conduct of the State as an international legal actor and especially for justifying international legal outcomes and the relevant sanctions-based regime. Particularly, attempts to make sense of the basis of legal obligation in international law or to understand why States obey international law have historically overstated the presumption that States act rationally and make decisions freely.[4] Professor Louis Henkin's oft-quoted *How Nations Behave* pro-

2. While I focus on States, the attribution of rationality has not been limited to States. Other international legal subjects, including international organizations have also been described either as "rational-legal bureaucracies" or "rational, impartial and [said to possess] technical decision-making." Eduardo Szazi, NGOs: Legitimate Subjects of International Law 233, 235 (2012); Niels Petersen, *Brian D. Lepard. Customary International Law. A New Theory With Practical Applications*, 21 Eur. J. Int'l L. 795 (2010) (book review); Dirk Pulkowski, *Universal International Law's Grammar*, *in* From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (Ulrich Fastenrath et al. eds., 2011); Barbara Koremenos, The Continent of International Law 2 (2016); Bernard H. Oxman, *Territorial Temptation: A Siren Song at Sea*, 100 Am. J. Int'l L. 830, 851 (2006); Joost Pauwelyn, Optimal Protection of International Law: Navigating Between European Absolutism and American Voluntarism (2008); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 Am. J. Int'l L. 715, 759 (2008); Hersch Lauterpacht, *Codification and Development of International Law*, 49 Am. J. Int'l L. 16, 35 (1955).

3. James Crawford, *Sovereignty as a Legal Value*, *in* The Cambridge Companion to International Law 117 (James Crawford & Martti Koskenniemi eds., 2012).

4. *See, e.g.*, Harold Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 1

vides a good example. Henkin contends that "nations act deliberately and rationally, after mustering carefully and weighing precisely all the relevant facts and factors."[5] Thus, "barring an infrequent non-rational act, nations will observe international obligations unless violation promises an important balance of advantage over cost."[6]

In recent years, anthropomorphic assertions of this kind have opened the door to a more brazen type of analysis that applies what has been called the "rational choice theory" in international law.[7] Because this sort of analysis tends to be less affirming of international law—and worse, typically perceives it to be epiphenomenal to order in the international system—it has been "considered alien to international law[]."[8] But proponents of the rational choice analysis in international law cannot be entirely faulted when they insist that "because international law typically presumes unitary and sovereign states, it indulges the rational choice conceit that states single-mindedly address their important interests—including, for example, in deciding whether to enter into (and abide by) international agreements."[9] Similarly, if Professor Benedict Kingsbury's analysis that "any modern theory of international law is bound to place a premium on rationality"[10] is accurate, then surely "it was only a matter of time before international law limped into the wide-angled sights of rational choice theory."[11]

As I see it, international law has always relied on a number of intuitive disciplinary biases that sustain the idea that the State is an

(1997) (book review); Wade M. Cole, *Mind the Gap: State Capacity and the Implementation of Human Rights Treaties*, 69 Int'l Org. 405 (2015).

5. Louis Henkin, How Nations Behave: Law and Foreign Policy 50 (2d ed., 1979).

6. *Id*.

7. *See generally* Niels Petersen, *How Rational Is International Law?*, 20 Eur. J. Int'l L. 1247 (2009); Andrew T. Guzman, How International Law Works: A Rational Choice Theory (2008); Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 Mich. L. Rev. 1129 (2008); Peter Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. Legal Stud. 237 (2002); Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 Vand. L. Rev. 77 (2007); Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. Legal Stud. S307 (2002); Jack Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. Legal Stud. 115 (2002); Richard A. Posner, *Some Economics of International Law: Comment on Conference Papers*, 31 J. Legal Stud. 321 (2002); Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 Va. J. Int'l L. 113 (2003).

8. Edward T. Swaine, *Rational Custom*, 52 Duke L.J. 559, 561 (2008); Jack Goldsmith & Eric A. Posner, The Limits of International Law 8–9 (Jack Goldsmith & Eric A. Posner eds., 2007).

9. Swaine, *supra* note 8, at 561–62.

10. Benedict Kingsbury, *The International Legal Order* 18 (N.Y.U. Public Law & Legal Theory Research Paper Series, Working Paper No. 01–04, 2003).

11. Swaine, *supra* note 8, at 560.

autonomous international legal actor, in that it always has a choice, and that it is reflective and thus capable of acting with reasonable foresight and deliberation. These anthropomorphic biases not only have significant consequences on the content of positive international law but also bear on a range of epistemic methods, hermeneutical techniques, and discursive practices that international lawyers frequently rely on to justify or rationalize international legal outcomes. For instance, the belief that States are rational has increasingly taken on the character of a normative expectation. As a result, rational conduct has seeped into positive international law and has become a standard for assessing State compliance with binding legal obligations. This is particularly prevalent in the area of natural resource management where rational use or rational management are frequently expressed as standards for assessing State practices in relation to fishery and other marine living resources,[12] common heritage of mankind,[13] migratory birds,[14] lunar resources,[15] hydro resources,[16] natural and cultural heritage,[17] and all natural resources.[18]

These disciplinary biases are also relied on to reinforce international law's impartial credentials, thereby legitimizing the international legal project. For instance, these biases shore up the legitimacy of the international legal project by emphasizing that States are willing participants in the international legal order. This derives, for instance, from the fact that State consent is presumed to reflect choices made freely and consciously.[19] As Kingsbury observes, for instance, "positivist international law['s] . . . embrace[] [of] rationality as both a feature and a desideratum of the international legal system. . . . is manifest

12. United Nations Convention on the Law of the Sea (UNCLOS) art. 67, Dec. 10, 1982, 1833 U.N.T.S. 399 [hereinafter UNCLOS]; Convention for the Conservation of Salmon in the North Atlantic Ocean arts. 2, 3, 8, 9, 19, Mar. 2, 1982, 1338 U.N.T.S. 33; Convention on the Conservation of Antarctic Marine Living Resources art. 2, May 20, 1980, 1329 U.N.T.S. 47; Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries art. 2, Oct. 24, 1978, 1135 U.N.T.S. 369.

13. UNCLOS, *supra* note 12, art. 150.

14. Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere art. 7, Oct. 12, 1940, 56 Stat. 1354.

15. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 18, 1979, 1363 U.N.T.S. 3.

16. Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 2, Mar. 17, 1992, 1936 U.N.T.S. 269; Treaty for Amazonian Cooperation art. 5, July 3, 1978, 1202 U.N.T.S. 51.

17. Convention Concerning the Protection of The World Cultural and Natural Heritage art. 24, Nov. 16, 1972, 1037 U.N.T.S. 151.

18. African Convention on the Conservation of Nature and Natural Resources art. 13, Sept. 15, 1968, 1001 U.N.T.S. 3.

19. *See generally* Alain Pellet, *Normative Dilemma: Will and Consent in International Law-Making*, 12 Australian Y.B. Int'l L. 22 (1989).

in the positivist view that international legal obligation is a result of state willing; and also in specific doctrinal structures, such as the rules of attribution in the law of state responsibility."[20] Under the Vienna Convention on the Law of Treaties, for example, State consent is only invalidated where fraud, corruption, coercion, or duress is proved.[21] These doctrines thus act in positive international law as evidence of exceptional instances where the free will of States is compromised. In other words, these exceptions confirm the general rule in international law that States act freely.

These biases fix the perceived ontological character of the State as the primary prism through which interactions in the international system are to be evaluated and accounted for. As a result, the diagnosis and articulation of functional problems in the interactions of international actors—and the vocabulary of legal argumentation and prescription of normative solutions—tend to depend on an analytical framework that prioritizes apparent attributes of States rather than the circumstances they find themselves in. By implication, positive international law often takes insufficient account of the variety of influences within and around States that both constrain and generate State action and ensure that State conduct often owes little or nothing to the perceived anthropomorphic character of the State.

The tendency to emphasize the ontological character of legal actors in order to resolve problems of order in the international system—and, in particular, to legitimize international law and its outcomes—has a long history in international law and is perhaps even congenital. To demonstrate this history, I consider the work of Francisco de Vitoria. I start with the explicit assertion often made by Vitoria and other early theorists of international law that legal actors must, and in fact do, possess reason. I argue that mainstream historical research in international law tends to miss or underappreciate the significance of Vitoria's reliance on rationality as a device to justify the status quo and to emphasize its inherent fairness.

Vitoria's focus on this perceived ontological character of legal actors is central to his account of international law in three main ways. First, Vitoria suggests that the possession of reason is the sole basis of legal personality in the law of nations. I discuss this legally determinant use of reason by Vitoria in Part II. In Part III, which is on the scope and content of reason, I discuss how Vitoria understands reason. There, I

20. Kingsbury, *supra* note 10.

21. Vienna Convention on the Law of Treaties, arts 49, 50, 51, 52, May 23, 1969, 1155 U.N.T.S. 331.

propose that Vitoria's understanding of reason and the way he uses it is significant because it is directly linked to why legal actors were, and continue to be, conceptualized as possessing free will and thus autonomous. The second way in which Vitoria's reliance on reason is central to his account of international law is that it enables him to argue that, because all legal actors possess reason, they are similar. As a result, Vitoria suggests, international law can properly apply to them in a fair and neutral fashion. In effect, the attribution of reason to legal actors allows Vitoria to legitimize an overarching normative framework within which relations between all actors of the law of nations can be assessed. This conclusion is the subject of Part IV, where I show why the identification of reason as the ontological character of legal actors enables Vitoria to resolve the principal question of *jus gentium* of his epoch—that of the basis of jurisdiction over non-European peoples.

Finally, I propose that the third way in which the reliance on reason is useful to Vitoria is that it allows him to defend the fairness of this common normative framework by simply rationalizing any opposition to the framework as being calculated rational moves by actors motivated by parochial self-interest. As a result, any opposition to this common normative framework, or to international law, is seen as subjective and thus inherently inimical to the common interest of all subjects of *jus gentium*. In Part V, where these themes are explored, I refer to this practice—that is, the practice of relying on reason to anticipate and parry away criticisms of Vitoria's *jus gentium*—as system justification practices.

However, before diving into the conversation about the ways in which Vitoria's reliance on reason grounds his *jus gentium*, it is useful to contextualize Vitoria's legacy in international legal scholarship, which I do in Part I. This context is useful in understanding why I focus on Vitoria's work for the purposes of historicizing anthropomorphic rationalizations in international law. It is important to remember, however, that while these disciplinary biases are prominent in Vitoria's work, they are not unique to him. As such, there is room for debate as to whether Vitoria is necessarily the precursor of these rationalizations that are prominent in international law. What is clear in any event is that the perception and conception of international legal actors as rational—and thus reflective and autonomous—have traveled with the discipline. They are manifested throughout its different epochs and are still operative in the functioning of contemporary international law. Because they are primarily intuitive, they have gradually seeped into

the background and become part and parcel of the discipline's "unconscious" self-conception. They come to us naturally. As such, the ways in which they operate are difficult to spot and are effectively concealed.

It is my hope that the disconnect I hint at throughout this Article—between how international law has operated throughout its history and what different epochs of mainstream international legal scholars think is happening—contextualizes and even emphasizes the urgency of revising the erroneous conjectures that undergird how we legitimize the international normative project.

I. Contextualizing Vitoria's Legacy in International Legal Scholarship

As the *prima* professor of theology at the University of Salamanca, Vitoria's main contributions to international legal thought survive in primarily two interrelated lectures on the Spanish conquest of America. Vitoria's posthumously[22] published lectures *De Indis Noviter Inventis*[23] and *De Jure Bellis Hispanorum in Barbaros*[24] analyze—through the prism of scripture, philosophy, and law—the legal status of the Native American population and the conditions under which violence may justly be visited upon them by the Spaniards.[25] In his works, Vitoria contended, quite controversially for his time, that the Amerindians possessed reason and, as such, had a right to their property, their territories, and their self-governance.

The revival in recent decades of interest in the history of international law and in its historiography[26] has contributed to a rediscovery

22. Vitoria himself did not publish anything during his lifetime. His lectures, (relectiones), published posthomously, are preserved in elaborate notes taken down by his students at Salamanca. Arthur Nussbaum, A Concise History of the Law of Nations 79 (rev ed., 1954).

23. Professor James Brown Scott translated this title as "On the Indians Recently Discovered." James Brown Scott, The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations 10a (1934).

24. Translation: "On the Law of War Made by the Spaniards on the Barbarians." Nussbaum, *supra* note 22.

25. Vitoria held the opinion, as Scott notes, that "nothing could be settled without reference to theology; . . . [and] that the jurists by themselves were incompetent to pass judgment upon questions of law because every legal question involved philosophy as well as theology, and the jurists as such were in his opinion not sufficiently familiar with either." Scott, *supra* note 23, at 76; *see also* Antony Anghie, Imperialism, Sovereignty and the Making of International Law 24 (2008).

26. Historiography is understood in the sense of "a study of the methodology, sources, techniques, and theoretical approaches used to narrate these histories and how, in the process of doing so, they construct a discipline and particular fields of study." Liliana Obregón Tarazona, *Writing International Legal History: An Overview*, 7 Monde(s) 95, 96 (2015).

of Vitoria's writings and to the subjection of his jurisprudential thought and peculiar approach to *jus gentium* to closer scrutiny.[27] This renewed interest in Vitoria's work has mainly generated two distinct, and in some respects antithetical, streams of scholarship on how to evaluate and account for the legacy of Vitoria's contribution to international legal thought.

The first stream of scholarship, which is epitomized by the works of Professor Ernest Nys[28] and particularly Professor James Brown Scott, cast Vitoria as the protagonist of international law's congenital humanitarianism.[29] Scott, for instance, viewed his task not only as involving the expression of "justified appreciation"[30] or of paying "homage"[31] to Vitoria but also as consisting in the rehabilitation of Vitoria's reputation, from that "of a jurist and a philosopher"[32] to "that of an internationalist and a humanitarian."[33] At various instances, Vitoria became for Scott "the one person best able to defend democracy for the entire world"[34] and the objective internationalist whose "standard was . . . impersonal, in that it was no respecter of persons or of frontiers; being impersonal, it was universal and therefore it was law."[35] By Scott's account, Vitoria was also a "well informed,"[36] conscientious diplomat. He was "familiar with the doings and undoings of princes,"[37] yet his predisposition to "patience . . . [and] peace"[38] and his characteristic "open mind"[39] allowed him to ground his advocacy for the humane treatment of the Native Americans within a

27. *See* Martti Koskenniemi, *Vitoria and Us: Thoughts on Critical Histories of International Law*, 22 J. Max Planck Inst. for Eur. Legal Hist. 119, 121 (2014) [hereinafter *Vitoria and Us*]; Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View* (2013) 27 Temp. Int'l & Compar. L.J. 215, 226–29 (2013) [hereinafter *Histories of International Law*].

28. Tarazona observes that Nys was the first to resuscitate Francisco de Vitoria's writings and declare him a founding father of international law. Tarazona, *supra* note 26, at 110.

29. Scott, *supra* note 23.

30. *See* James Brown Scott, The Catholic Conception of International Law: Francisco de Vitoria, Founder of the Modern Law of Nations, Francisco Suarez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations, A Critical Examination and a Justified Appreciation (1934).

31. Scott, *supra* note 23, at 69.

32. *Id.* at 68.

33. *Id.*

34. *Id.* at 73.

35. *Id.* at 76.

36. *Id.* at 81.

37. *Id.* at 83.

38. *Id.* at 79.

39. *Id.* at 80.

conciliatory framework that both preserved and justified Spanish colonial pretentions over the Indian.[40]

These insights, for Scott, project Vitoria as a man "of peace and religion, [who] unlike Grotius heroically turn[s] against the colonial violence of his own countrymen, advocating the peaceful enjoyment of rights of property and sovereignty under the rules of natural law."[41] Similarly, they ground Scott's advocacy for Vitoria's classroom at the University of Salamanca to be considered as veritably "the cradle of international law"[42] and for Vitoria to be christened, over Grotius, as the "father of international law."[43]

Scott's wager that "tomorrow" would be even kinder to Vitoria's record has held true and, in part, has become a prophecy he helped fulfill. Discussions of Vitoria's writings have been more devoted to celebration than to critique. To subject Vitoria to any form of postcolonial critique would be, some assert, to commit the sin of anachronism.[44] Many referred in earnest, and still do, to "Vitoria as 'a great jurist' or an 'activist in human rights' from whose humanitarian and 'anti-imperial' positions we would have much to learn."[45] As importantly, Vitoria's work is seen as giving rise to the regime of the international rights of indigenous peoples,[46] racial justice,[47] and even to the right of self-determination.[48] Similarly, tracing the "intellectual history of freedom of movement in international law"[49] leads ultimately to the Dominican's enunciation of an indelible duty of "hospitality" in the law of nations.[50]

40. *Id.* at 79–80.

41. *Vitoria and Us*, *supra* note 27, at 121.

42. Scott, *supra* note 23, at 75.

43. *Vitoria and Us*, *supra* note 27, at 121 n.18.

44. *Id.* at 121–23.

45. *Histories of International Law*, *supra* note 27, at 226.

46. Ignacio de la Rasilla del Moral, *Francisco de Vitoria's Unexpected Transformations and Reinterpretations for International Law*, 15 Int'l Cmty. L. Rev. 287, 291 (2013); Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 Ethics & Int'l Affs. 1, 11 (2004); Elizabeth Rodríguez-Santiago, *The Evolution of Self-Determination of Peoples in International Law*, *in* The Theory of Self-Determination 201, 203 (Fernando R. Tesón ed., 2016); Vicente Marotta Rangel, *The Solidarity Principle, Francisco de Vitoria and the Protection of Indigenous Peoples*, *in* 1 Coexistence, Cooperation and Solidarity 131, 137–38 (Holger P. Hestermeyer et al. eds., 2012); Mattias Åhrén, Indigenous Peoples' Status in the International Legal System 8 (2016).

47. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the U.S.*, 31 Geo. L.J. 1, 11 (1942).

48. *Id.*; Michel Morin, L'usurpation de la souveraineté autochtone: le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord 32–39 (1997).

49. Jane McAdam, *An Intellectural History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12 Melb. J. Int'l L. 1, 1 (2011).

50. Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations:*

No one articulated better the view that anyone "is free to travel and settle wheresoever he would" and "to suggest a foreigner was unwelcome might imply he was an enemy and refusal of admission, or expulsion, could be seen as an act of war."[51] Vitoria, we are again told, anticipated the "formulation of right to a nationality as a human right . . . in the mid-20th century."[52] Relatedly, Scott reminds us that "[s]o reasonable was the enlightened Spaniard that he eliminated by a stroke of his pen, or by a stress of his voice, the stateless person."[53]

Most roads in international legal scholarship lead to the humanitarianism that Vitoria, through his benevolence towards the Native Americans, confers on the discipline as its telos. For as many times as it needed emphasis that international law was a force for good in the world, Vitoria remained the "ideal figure to stand at the origin of international law."[54] His genius lay in the pliability of his account. There was something in it for everyone.

The second stream of scholarship consists of postcolonial readers of Vitoria who, led by Professor Antony Anghie, have faulted these mainstream accounts of Vitoria for sanitizing the law of nations, casting on it a halo of progress, and inaccurately portraying Vitoria's account as uniquely affirming the non-European.[55] They argue that these readings of Vitoria are either overtly apologetic,[56] or worse, obscure the historic complicity of international law in the colonial endeavor and all of its attendant exploitations.[57] While Anghie does not deny that Vitoria was "[a] brave champion of the rights of the Indians in his time,"[58] he argues that Vitoria's work enabled "an insidious justification of their

An Intellectual History of Hospitality From Vitoria to Vattel, 27 Eur. J. Int'l L. 901, 901 (2016).

51. Scott, *supra* note 23, at 141; McAdam, *supra* note 49, at 8.

52. Mónika Ganczer, *The Right to a Nationality as a Human Right ?*, 8 Hungarian Y.B. Int'l L. & Eur. L. 15, 16 (2014).

53. James Brown Scott, The Spanish Conception of International Law and of Sanctions 13 (1934).

54. *Vitoria and Us*, *supra* note 27, at 121.

55. Koskenniemi talks of a wide acceptance of Anghie's assessment of Vitoria. *Id.* at 122.

56. Vitoria's image, Koskenniemi writes, "has been overlain by anachronistic images about international legality and human rights protection." *Histories of International Law*, *supra* note 27, at 228.

57. Anghie, *supra* note 25, at 8; Juan Pablo Scarfi, *Assessing the Historical and Imperial Turn in International Law*, OUPBlog (June 12, 2017), https://blog.oup.com/2017/06/historical-turn-international-law [https://perma.cc/7WXM-MLPU].

58. Anghie, *supra* note 25, at 28.

conquest precisely because it is presented in the language of liberality and even equality."[59]

Without depreciating the utility or elucidatory reach of these two streams of recent historical scholarship in international law, it seems that both accounts set out primarily to investigate the purpose of international law and what it is used for. In the first account, we are given the image of law as an instrument for good that concretizes an ideology of progressive humanitarianism. Purpose presumes ethos: for, in order for international law to have been so critical in expanding the aspiration for global justice, it must itself have been innately good or legitimate. Scott, for instance, claimed that modern international law, as conditioned by its origins, had "a moral and spiritual content" that was "perfect" in form and "adequate in detail."[60] Dr. Miguel Pablo Zapatero confirms that Vitoria "gave birth to a big idea that many others have, since then, have cultivated as a *discipline* and that has proved to be one of the most useful and now pervasive social artefacts of human progress."[61] In the second, more critical account, Anghie invites us to discount the "language of liberality and even equality"[62] that obscures the true purpose that international law serves. In Anghie's estimation, *jus gentium* and its specious universal language "was devised specifically to ensure the disempowerment and disenfranchisement" of the non-European.[63] It follows, he reminds us, that "the regime of international law is illegitimate."[64]

The purpose-driven nature of these two streams of historical inquiries in international law has invited and perhaps even sustained the charge of "anachronism" laid at the feet of their authors.[65] Of the first account of Vitoria, for instance, Professor Martti Koskenniemi contends that—rather than properly contextualizing Vitoria's lectures and taking account of his intellectual influences, of his Salamanca audience and immediate preoccupations—this scholarship has engaged in a "routine projection of present concepts, vocabularies, and biases onto people of

59. *Id.*

60. *See generally* General Correspondence from the American Society of International Law to James Scott Brown, James Brown Scott Papers (on file with Georgetown University Manuscripts).

61. Pablo Zapatero, *Legal Imagination in Vitoria. The Power of Ideas*, 11 J. Hist. Int'l L. 221, 229 (2009).

62. Anghie, *supra* note 25, at 28.

63. *Id.* at 31.

64. Makau Mutua, *What Is TWAIL?*, 94 Am. Soc. Int'l L. 31, 31 (2000).

65. *Vitoria and Us*, *supra* note 27, at 122; *Histories of International Law*, *supra* note 27, at 226–30.

other ages and other concerns."[66] In the end, Koskenniemi is convinced that "Vitoria's image has been overlain by anachronistic images about international legality and human rights protection."[67]

Similarly, Koskenniemi suggests that scholarship critical of Vitoria provides "no understanding of Vitoria in the temporal context in which he lived and taught"[68]—that is, it pays scant attention to the fact that the "proper standards on which a historical work should be evaluated must be taken from the period in which that work was produced"[69] and do not sufficiently elucidate "what the actor may have meant in view of the time and place."[70] As a result, "attacking Vitoria as a legitimizer of colonialism would mean that the standards of historiographical analysis have been abandoned."[71]

I find the suggestion that there is no way to assess the effect of Vitoria's work on the legitimation of colonialism without committing the sin of anachronism to be decidedly simplistic. However, in this Article, I do not set out to interrogate the purposes or hidden agenda of Vitoria's international law. I neither ascribe later developments in the content of positive international law to Vitoria nor impute motives to him or his account. Instead, I interrogate the set of intuitive and commonsensical assumptions that Vitoria makes about the character of international legal actors. I show how the anthropomorphic rationalizations he relies on play a system justification role and thus disable him from spotting and redressing the dissonances created by his vision of *jus gentium*. I consider that this holistic study of Vitoria can allow international legal scholars to be much more cognizant of the full range of anthropomorphic rationalizing that pervades the discipline yet remains obscure to many.

I build on several postcolonial critiques of Vitoria's work that highlight Vitoria's tendency to underestimate the functional asymmetry that pervaded the interactions between the Spaniards and the native population. Particularly, in my discussion of the system justification practices that are prevalent in Vitoria's work (Part V), I find Anghie's observation that Vitoria creates a "schizophrenic" image of the Indians, by portraying them as "rational" yet "ignorant child-like creatures," to be instructive.[72] I propose that by engaging in the politics of conferring

66. *Histories of International Law*, *supra* note 27, at 226.
67. *Id.* at 228.
68. *Vitoria and Us*, *supra* note 27, at 122.
69. *Id.*
70. *Id.*
71. *Id.*
72. Anghie, *supra* note 25, at 21–22.

and holding back reason at opportune times, Vitoria centers the Native Americans, rather than *jus gentium*, as the problem that need fixing. This system justification device, I contend, is a continuing legacy of anthropomorphic rationalizations in international law.

II. Legal Subjectivity in Vitoria's *Jus Gentium*

Vitoria's assertions that the individual possesses reason are relevant to his conception of international legal subjectivity in two significant ways.

First, for Vitoria, rationality situates an actor as a cognizable entity within the realm of the law of nations. Specifically, Vitoria articulates reason as the sole basis of legal personality in the law of nations and—as a result—the sole basis that allows the international actor to possess rights and to suffer legally cognizable wrongs.

Second, even though Vitoria first introduces the concept of reason as a human attribute, his understanding of reason within the law of nations also conveys a collective character. Reason becomes causally significant in Vitoria's *jus gentium* because it is viewed not only as defining the individual in his individual capacity, but also as characterizing the ontological character of the collective or corporate actor: the nation or civil society.

Thus, even though in Vitoria's time the State in its modern conception had not yet become the primary unit of analysis of international law, Vitoria's work reflects two tendencies. First, it is possible to trace here an approach that collectivizes individuals and assigns to that collective a legal personality for the purposes of *jus gentium.* Second, it reflects a transposition of the presumed individual attribute of reason to the collective entity, such that it is apparent that the existence of individual reason is decisive predominantly because it is constitutive of both individuals and polities as international legal actors in Vitoria's *jus gentium*.

A. Reason as the Basis of Jural Capacity

Vitoria starts his analysis of the status of the Native Americans (who he refers to as the "Amerindians") by posing the question of whether, before the arrival of the Spaniards, the "aborigines were true owners alike in public and in private law."[73] In posing this question, Vitoria's interest was two-pronged. First, he sought to determine the nature of the legal relationship that existed between the Amerindians

73. Francisco de Vitoria, De indis et de jure belli relectiones 115 (Ernest Nys ed., John Pawley trans., 1917).

and their territories and other possessions. More precisely, he was interested in whether any basis existed for which the Native Americans may be said to possess ownership or property rights (dominium) over their territories and possessions. Second, Vitoria was interested in knowing whether the Indians could exercise jurisdictional authority over themselves and their lands.

By questioning the capacity of the Amerindians to own property on the one hand and to exercise jurisdictional authority over themselves and their lands on the other, Vitoria's work takes on questions of both public and private law.[74] The answers to these questions determine for Vitoria whether the Amerindians can come into *jus gentium* as legal subjects capacitated with rights and responsibilities both in the public law and private law sense. The answers lie in Vitoria's peculiar version of *jus gentium*, which is a sort of sui generis framework of normative references comprised of a patchwork of elements of Christian theology, human or civil law, and natural law.

Instructively, as Vitoria conceives it, what unites divine law, natural law, and human law within this new system of *jus gentium* is that reason becomes the basis of legal subjectivity in all three instances. Vitoria proposes in turn that the admission of a person or entity to legal subjectivity in the law of nations depends solely on whether they possess reason—that is, whether they are rational.[75] He writes:

> Irrational creatures can not have dominion. This is clear, because dominion is a right . . . . But irrational creatures can not have a right. Therefore they can not have dominion. The proof of the minor is that they can not suffer a wrong and therefore can have no right.[76]

In effect, the true utility of the individual's rationality, Vitoria contends, is that it capacitates her to enjoy "rights" and to suffer "wrong[s]."[77] As Professor Martti Koskenniemi notes, it is "only to rational (human) beings"[78] that "[t]hrough the discussion on *dominium*, Vitoria, Soto, and the subsequent Salamanca scholars . . . [*accord* the exclusive right to] appropriate, use, transfer, or abandon things in accordance with their choice."[79]

Vitoria's proposal that reason is what gives the Amerindians legal capacity in their dealings with the Spaniards shows that he conceives of

74. Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. Toronto L.J. 1, 16 (2011).

75. Vitoria, *supra* note 73, at 125–27; Koskenniemi, *supra* note 74, at 16.

76. Vitoria, *supra* note 73, at 126.

77. *Id.* at 127.

78. Koskenniemi, *supra* note 74, at 16.

79. *Id.*

the possession of reason as having both an inward-looking and an outward-looking significance. With respect to the former, the possession of reason confirms that the Amerindians can exercise rights of ownership and jurisdictional authority over their lands and people. With regard to its outward significance, reason defines for Vitoria whether the Indians can relate externally to the Spaniards as equals in *jus gentium*. As a result, the possession of reason establishes the Amerindians and the Spaniards as "neighbors,"[80] bound together in "natural society and fellowship,"[81] reciprocally consigned by the law of nature to "love" the other as themselves.[82] Similarly, commercial relations between the Amerindians and the Spaniards are made possible and "lawful"[83] by the fact that the former, like the latter, possess the facility of reason. As Anghie describes it:

> The Indians seem to participate in this system as equals. The Spanish trade with the Indians 'by importing thither wares which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance.' The exchange seems to occur between equals entering knowledgeably into these transactions, each meeting the other's material lack and possessing, implicitly, the autonomy to decide what is of value to them.[84]

At the same time, because the possession of reason is a crucial determinant of legal personality in Vitoria's *jus gentium*, it follows that any indication that such reason may be limited or defective seriously impairs an actor's claim or capacity to participate on equal footing or as full legal subjects in the law of nations. This becomes the case of the Indians, who we are told possess reason and yet seem to lack it in substance. For instance, even though Vitoria's account of the Indians as possessing reason situates them as entities to whom the jurisdiction of international law could or should reach, it becomes increasingly clear that Vitoria is uncertain about the completeness of the Indians' reason.

To preserve this uncertainty, or to emphasize that there was perhaps something inchoate about reason when it resided in the Native American, Vitoria routinely evokes their backward and barbaric nature.[85] However, Vitoria does not go as far as expressly denying the general character of the natives as rational as this would have also deprived them of legal personality. Instead, the difference he proposes

80. Vitoria, *supra* note 73, at 126.
81. *Id.* at 151.
82. *Id.* at 152.
83. *Id.*
84. Anghie, *supra* note 25, at 21.
85. *See* Vitoria, *supra* note 73, at 161.

between the Native Americans and the Europeans is "a matter of degree rather than kind and explained by reference to contingent historical factors such as education."[86] The precariousness of the Native Americans' rationality places them "on the brink of legal subjectivity, positioned where they might, with education and guidance, be uplifted, but also might at any moment slide 'backwards' towards insensate or animal status."[87]

In sum, by focusing on—and isolating—the possession of reason as the marker of legal personality in the law of nations, Vitoria enacts reason or rationality as the constitutive character of legal actors and proposes that without that character, or the possibility to attain it, an actor would be incapable of suffering wrongs or vindicating rights. In this sense, a legal actor would not exist in international law if such actor was not first rational. In effect, by attaching existential consequences to rationality, Vitoria's international law reinforced the orthodoxy that international legal actors are demonstrably rational.

B. Positioning Reason as an Attribute of Polities in International Law

Many historians of international law credit Vitoria's work with two main innovations. First, he proposed a secular conception of the law. Second, he conceived *jus gentium* to apply not just to individuals but primarily to polities. The latter view appears to be primarily derived from Vitoria's definition of *jus gentium* as "what natural reason has established among all nations."[88] Vitoria was apparently quoting Gaius (160 AD)'s definition in the Justinian's Institutes of those bound by *jus gentium*.[89] However, crucially, while the Institutes define *jus gentium* as what natural reason has established "among all men" ["*inter omnes homines*"], Vitoria replaced "among all men" with "among all nations" ["*inter omnes gentes*"].[90]

86. Georg Cavallar, *Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?*, 10 J. Hist. Int'l L. 181, 189 (2008). Vitoria writes, for instance, that "[a]ccordingly I for the most part attribute their seeming so unintelligent and stupid to a bad and barbarous upbringing." Vitoria, *supra* note 73, at 127–28.

87. Seuffert writes: "Reason is allocated on the basis of European, or western, criteria, positioning European culture as the universal measure of reason." Nan M. Seuffert, *Vitoria's On the Indians, Legal Subjectivity and the Right to Travel*, Soc. & Legal Stud. 1, 8 (2018).

88. Vitoria, *supra* note 73, at 151.

89. *See* The Four Commentaries of Gaius on the Institutes of the Civil Law art. I (Francis de Zulueta ed., 1946).

90. *Id.*

By modifying the Gaian definition of *jus gentium* in this way, Vitoria appeared not only to minimize its original Roman sense but also to repurpose the expression as a collection of rules exclusive or primarily relevant to relations between polities and not just individuals. Scott, for instance, considered that by applying *jus gentium* to nations, Vitoria had in mind a "true *jus inter nationes*, not merely the law of individuals but of nations composed of those individuals."[91] Pablo Zapatero writes that "Vitoria envisioned the 'rules of the game' for the world as a political community by reengineering the doctrine of the *jus gentium*." In his view, the change in the definition "introduced a second sense to the classical concept of law for all mankind . . . . [and] was instrumental to the development of the idea of international law."[92]

However, the idea that Vitoria's *jus gentium* was specifically conceived as a normative framework for polities has been challenged. For instance, in his authoritative work *A Concise History of the Law of Nations*[93] Nussbaum does not assign to Vitoria's substitution of *inter omnes homines* with *inter omnes gentes* any novelty or importance. Instead, he suggests that the "deviation from the text of the Institutes was only one of language, perhaps [a momentary flash of Vitoria's mind (1st edition)[94] or] a slip of memory" (2nd edition).[95] He regrets that the change in definition has "quite erroneously been taken as a reference to the law among 'States,' hence to international law."[96]

Professor Arthur Nussbaum also contends that "*gens* (pl. *gentes*) does not mean 'state.' It is a vague term approximately equivalent to 'people' . . . . [and in any event] [w]herever Vitoria envisages something like a state, he speaks of *respublica.*"[97] He writes uncharitably of Scott that:

> a grave defect in Scott's writings is the fact that he and his translators invariably render *jus gentium* as 'law of nations' or as 'international law,' terms which he uses indiscriminately. He is not aware that Vitoria invariably and Suárez widely employ *jus gentium* in the ancient

91. Scott, *supra* note 23, at 163; Vitoria, *supra* note 73, at 151.

92. Zapatero, *supra* note 61, at 228.

93. Arthur Nussbaum, A Concise History of the Law of Nations 58–59 (1st ed., 1947).

94. Nussbaum's preeminence as an important thinker of international law has received widespread recognition. His book *A Concise History of the Law of Nations* has been described as a "classic" and "a valuable contribution to the literature of international law, so long lacking an authoritative work of this type." Elliott E. Cheatham et al., *Arthur Nussbaum: A Tribute*, 57 Colum. L. Rev. 1, 6 (1957).

95. Nussbaum, *supra* note 22, at 80–81.

96. *Id.*

97. *Id.*

> and medieval sense of universal or quasi-universal law. As a result of this crude mistake, Scott's exposition of Vitoria's and Suárez's doctrines abounds in erroneous references to their achievements in international law. In other respects, too, the translation is careless and misleading. No attempt is made to clarify such terms as *civitas*, *respublica*, *communitas*, *gens*, *populus*, and *natio*. Scott, as well as his translators, speak indiscriminately of 'state' and employs the term sovereignty in an entirely indefensible way.[98]

In addition, as Nussbaum sees it, Vitoria's "further discussion of *jus gentium* gives not the least indication that he employed *jus gentium* in any novel sense."[99] As such, Nussbaum contends that "Vitoria's significance in the history of international is commonly [and perhaps distortedly] based on verbal grounds."[100]

However, Zapatero disputes the insignificance Nussbaum attaches to the crucial change in *inter homines* to *inter gentes*. He contends specifically that Vitoria "reengineered several legal traditions to produce something new: *ius gentium* as *ius inter gentes*."[101] In Zapatero's view, Nussbaum's contention that the change was the result of "faulty transcription" does not find the textual support he hopes for in Vitoria's work.[102] For instance, Zapatero shows that the sentence in the *Relectio* immediately following the definition contains an "express reference to the phrase *apud omnes nations*" (among all nations).[103]

In addition, Zapatero finds that in Vitoria's Commentary on the *Summa Theologiae* of Thomas Aquinas, the Dominican wrote "and in that way ambassadors have come to be admitted under the *jus gentium*, and are inviolable among all nations."[104] Similarly, Zapatero finds conclusive proof that Vitoria "was transforming the conventional meaning of *ius gentium*"[105] when the latter writes in the Commentary that "a certain kind of *jus* gentium is from the common consensus of all the peoples and nations."[106]

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98. *Id.* at 81.

99. *Id.* at 81, 298 (Appendix II: James Brown Scott on the Superiority of the Sanish Scholastics Over Hugo Grotius).

100. *Id.* at 81.

101. Zapatero, *supra* note 61, at 229.

102. *Id.*

103. *Id.*

104. Translated from "*et isto modo legati admissi sunt de jure gentium, et apud omnes nationes sunt inviolabiles*." Francisco de Vitoria, *App. E: De Jure Gentium et Naturali* to Scott, *supra* note 23, at cxi, cxiii; *see* Zapatero, *supra* note 61, at 229.

105. Zapatero, *supra* note 61, at 230.

106. *Id.* at 229 (translated from "*Ita de iure gentium dicimus quod quoddam factum est ex communi consensu gentium et nationum*").

Without purporting to attach or deny juristic significance to Vitoria's preference for the expression *inter gentes*, I concede that Vitoria, like many early theorists of classical international law, was not particularly pressed to distinguish between individuals and the nation or the State as legal actors in international law. For the purposes of international law, his work pays scant attention to the distinct corporate nature or juridical character of polities and makes no concerted effort to define them legally. Similarly, in many respects, the content of the rights and duties of polities are not always conceived of as dissimilar to that of individuals in Vitoria's law of nations.[107] As Professor James Crawford writes, "it is fair to say that the writers of the naturalist school were not concerned with the problem of statehood."[108] In effect, the exaggerated importance and technisms that later generations of international lawyers, particularly in the nineteenth century, came to bestow on the concept of statehood and sovereignty do not fully take hold in, or even appear to emerge from, Vitoria's account.

However, the reality of polities in Vitoria's time was not entirely lost on him or his work, as shown by even a cursory appreciation of Vitoria's various works, his intellectual influences, and the context in which he wrote.[109] Particularly, in *De potestate civili* [*Reflectio concerning civil power*]—which contains Vitoria's main ideas about the nature of political power and civil administration and which has been described "with due historical caution, as an embryonic Theory of the State"[110]—it becomes clear that in Vitoria's account, the existence of a polity is viewed as a normative consequence of the individual's disposition as a rational being. In other words, for Vitoria, to be rational is to be part of a collective and being part of a collective confirms one's rationality. One reinforces the other. As a result, collectivizing individuals within a polity, and analyzing their rational character from the

107. Despite this, Vitoria appears at certain times to intimate that the authority to make war should be exclusive to a polity. The individual's right to "make war" being thus limited to clear cases of self-defence. He writes: "[a] perfect State or community . . . is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castile and Aragon and the Republic of Venice and the like. . . . Such a state, then, or the prince thereof, has authority to declare war, and no one else." Vitoria, *supra* note 73, at 169.

108. James R. Crawford, The Creation of States in International Law 7 (2d ed., 2007).

109. For instance, he writes that "to omit everything that happened before the flood, the world was certainly divided after Noah into different provinces and kingdom" and that these provinces and kingdoms came about from "colonies" occupying different regions, and from "different family-groups by the common agreement of mankind occupied different provinces." Vitoria, *supra* note 73, at 132.

110. Zapatero, *supra* note 61, at 224.

prism of their collective existence, becomes his default approach to discussing legal subjectivity.

Vitoria's thinking in this respect can be synthesized into three propositions. First, life within a polity is an inevitable consequence of the individual's nature as a "civil and sociable animal."[111] Vitoria argues that civil society is inevitable because even though nature granted "reason" to "man," it also left him "frail, weak, needy."[112] To guard against that frailty, nature made "proper provision" for man to find protection in the form of "civil society."[113] As Vitoria notes, "nothing solitary is acceptable to Nature, and she impels us all to mingle with another."[114] Further, "since civil society is of all societies that which best provides for the needs of men, it follows that the community is . . . an exceedingly natural form . . . that is, a form thoroughly in *accord* with Nature."[115]

Second, in order to confirm his first proposition and to demonstrate the connection between the necessity of human sociability and rationality, Vitoria argues that traits that derive from the individual's existence as a rational being only have meaning if the individual exists within a civil society. Vitoria identifies two main traits that proceed from the individual's makeup or character as a rational being: "understanding" and "will."[116] As to "understanding," he notes that "the understanding of man . . . can have no existence in solitude."[117] To confirm this, Vitoria contends that the sole purpose of "speech" is to act as "the messenger of understanding"[118] and that "wisdom" or "understanding" can have no independent existence without the ability to express or communicate it.[119] However, speech naturally "would be of no value outside human society,"[120] for "if it were possible for wisdom to exist without speech, wisdom itself would, under such circumstances, be neither pleasing nor communicable."[121] In effect, reason, understanding, or wisdom is given meaning only when situated within a polity.

111. Francisco de Vitoria, *App. C: De Potestate Civili* to Scott, *supra* note 23, at lxxi, lxxv.
112. *Id.* at lxxiv.
113. *Id.* at lxxiv–lxxv.
114. *Id.* at lxxv.
115. *Id.* (emphasis added).
116. *Id.* at lxxiv–lxxv.
117. *Id.* at lxxiv.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at lxxiv–lxxv.

As to "will," Vitoria argues that this is most represented by an innate desire for "justice" and "friendship."[122] Vitoria contends that "justice and friendship would of necessity be deformed and, so to speak, crippled, if it were separated from human society: justice, indeed, cannot be practiced except by the multitude; and the same is true of friendship."[123] It is from this idea of "friendship" that Vitoria discovers a contiguous normative proposition that "the sovereign of the Indians is bound by the law of nature to love the Spaniards," for "it appears that friendship among men exists by natural law and it is against nature to shun society of harmless folk."[124]

It is demonstrable then that Vitoria perceives human rationality as being contingent on—or at least intertwined with—life within a polity. For instance, Vitoria refers with approval to Aristotle's uncharitable assessment of an Athenian named Timon who apparently withdrew from the society of men. For his self-isolation, Timon was said to "have been of an inhuman and brutish disposition, persons of this sort being classified as wild beasts." [125] It follows that if a person self-isolates, Vitoria suggests that the person's rationality becomes questionable or even lost and, as a result, the person's existence becomes indistinguishable from wild beasts, that is, irrational beings.

Finally, Vitoria contends that, due to the fact that "man is a civil animal," his legal subjectivity may be lost or "prejudiced," "under both natural law and the law of nations," if he is not a "citizen of any city-state:" "*Si ergo non esset civis illius, non esset civis aliciuius civitatis per quod impediretur a iure naturali et gentium*."[126] This explains why Vitoria's entire assessment of whether the Native Americans possessed reason depends exclusively on his observation that they were organized in a civil society.[127] As he wrote, the Native Americans "have a certain method in their affairs, for they have polities, which are orderly arranged, and they have definite marriage and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason [and] . . . is witness to their use of reason." This implies that the only thing that confirmed for Vitoria that the Native Americans possessed reason was the fact that they lived in a civil society—meaning a polity that collectivized political administration among them.

122. *Id.* at lxxv.

123. *Id.*

124. Francisco de Vitoria, *App. A: De Indis Noviter Inventis* to Scott, *supra* note 23, at i, xxxvii–xxxviii.

125. Vitoria, *supra* note 111, at lxxv.

126. Vitoria, *supra* note 73, at 260.

127. Vitoria, *supra* note 124, at xxxix.

This approach of validating rationality by reference to the existence of political administration emphasizes that Vitoria's international law only works if we imagine that there exist distinct polities, which confirm the rationality of the individuals composing them. As Anghie acknowledges, Vitoria is in fact concerned about "the problem of order among *societies* belonging to . . . different cultural systems"[128] and that "[t]he problem Vitoria identifies and explores is the problem of legally accounting for relations between two radically different *societies*."[129] It also follows that Vitoria apprehends the Amerindians as a distinct and collective polity or society in international law, rather than as itinerant rational individuals lacking social bonds and deprived of a collective character. Similarly, the Spaniards who interact with the Amerindians do so not in their private capacities but as "ambassadors of Christian peoples" and, as such, "are by the law of nations inviolable."[130] In effect, even though it is certainly anachronistic to read refined nineteenth century ideas about "statehood" and "sovereignty" into Vitoria's work, one cannot escape the conclusion that Vitoria's approach depends on a collectivization of individuals into polities and on reflecting on how relations between the resultant different polities may be legally accounted for.[131]

Similarly, it is apparent that the existence of individual rationality is decisive predominantly because it is constitutive of the character of the polities that become legal actors in Vitoria's *jus gentium*. Analytically, rationality becomes a marker of the legal personality of the Indians not only in their individual capacities as men but also in their collective existence as a social unit or polity that is able to entertain relations with the Spaniards. Vitoria takes the view that, in *jus gentium*, the polity is the sum of its rational constituents and explains this by invoking religious authority that: "so we, being many, are one body."[132] In essence, individual rational existence is intertwined with the polity's character and agency. Seen this way, it makes sense why, even though Vitoria discusses the possession of reason or rationality primarily as a human attribute, his assessment of the legal relationship (*dominium*) that exists between Amerindian polities and their territories relies without contradiction on the seemingly human characteristic of rationality.

128. Pekka Niemelä, *A Cosmopolitan World Order: Perspectives on Francisco de Vitoria and the United Nations*, 12 Max Planck Y.B.U.N.L. Online 301, 312 (2008) (emphasis added).

129. Anghie, *supra* note 25, at 30 (emphasis added).

130. Vitoria, *supra* note 73, at 156.

131. Anghie, *supra* note 25, at 30.

132. Vitoria, *supra* note 111, at lxxiii.

In effect, Vitoria's account is intertwined with anthropomorphism, and his view of the legal subjectivity of polities is grounded on anthropomorphic shortcuts.

III. The Scope and Content of "Reason"

As discussed in detail in the next Part, the novelty in Vitoria's approach is that he elevates the possession of "reason" over "religious belief" as the basis of legal subjectivity in the law of nations and as the sole criterion for assessing legal relations between the Spaniards and the Amerindians.[133] However, beyond displacing religious belief as a criterion for assessing rights, Vitoria's reliance on "reason" also allows him to define the ontological character of the legal actor as choice-driven, autonomous, and inherently capable of acting with reasonable foresight and deliberation. This composite image of the legal actor becomes apparent through the understanding Vitoria has of the concept of "reason" and of the nature of a rational being.

Notably, Vitoria derives much of his jurisprudential thinking—both generally and specifically in regard to the nature of a rational being—from the works of Aristotle, St. Augustine, and St. Thomas Aquinas. Of the three, Aquinas is proposed to have held the most pervasive sway over Vitoria's jurisprudential thinking.[134] This is unsurprising. Not only were Salamanca scholars such as Vitoria and Francisco Suárez considered to be the central figures in the revival of Thomism in sixteenth century jurisprudence, but also their teachings about law and society derived mainly from Aquinas.[135] Koskenniemi

133. As he writes, it "follows that the barbarians in question cannot be barred from being true owners, alike in public and private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands." Vitoria, *supra* note 73, at 125.

134. Scott writes:

> [I]t was inevitable that Vitoria should make of Aquinas the guide of his life, for St. Thomas was also a Dominican; he also had studied in the University of Paris, and had even been its Rector. To be sure, the *Sentences* of Peter Lombard were still in vogue, but they were being replaced in matters spiritual by the theology of St. Thomas Aquinas—then and today the doctrine of the Church—and, in matters national and international, by conceptions of St. Thomas, which gave permanent form to the views of Aristotle on the nature of the state, and to the views of St. Augustine on the two great questions which interest and baffle us today—war and peace.
>
> When Vitoria became *prima* professor of theology in Salamanca in *1526*, the conceptions of St. Thomas also made their appearance, and when Vitoria died twenty years later, the doctrine, spiritual and temporal, of St. Thomas remained as a monument of Vitoria's foresight and influence.

Scott, *supra* note 53, at 3.

135. *Id.*; *see generally* Annabel Brett, *Human Rights and the Thomist Tradition*, *in*

writes that Vitoria, like many of the theologians and jurists that formed the School of Salamanca, "followed Aquinas in locating the substance of *jus gentium*"[136] and in outlining his views about the "beneficial nature of private property and the transactions connected with it."[137]

In laying out his view of what it means for a legal actor to be rational, Vitoria makes it abundantly clear that he retains in his use of reason a precise understanding of the concept that connects with the specific meaning that Augustine, Aquinas, and Aristotle confer on the concept and ultimately preserves it.[138] He writes repeatedly that his views were "confirmed by the authority of St. Thomas Aquinas,"[139] were "as St. Thomas says"[140] "proved from St. Augustine,"[141] or derive from "Aristotle."[142] In effect, contextualizing Vitoria's reflection on the content of rational agency requires that we explore in tandem his intellectual influences and account for how much of his own views extends how those authors perceived the concept of rationality.

Vitoria's references to reason integrate three interrelated attributes that he believes are inherent to actors that possess reason. First, rational actors have free will and are thus autonomous. Second, rational actors possess the capacity to deliberate. Third, their capacity to deliberate also confirms their ability to make choices. As to the first, he surmises by quoting Aquinas that reason grants the legal actor "dominion over their acts."[143] As Vitoria writes, "wild beasts have not dominion over themselves . . . . only rational creatures have dominion over their acts."[144] Here, Vitoria uses the term "*dominium*" in the sense of "mastery over one's own acts" (*dominus suorum actuum*),[145] dominion over

Revisiting the Origins of Human Rights 82 (Pamela Slotte & Miia Halme-Tuomisaari eds., 2015); Thomas F. O'Meara, *The School of Thomism at Salamanc and the Presence of Grace in the Americas*, 71 Angelicum 321 (1994); Oliver P. Rafferty, S.J., *The Thomistic Revival and the Relationship Between the Jesuits and the Papacy, 1878–1914*, 75(4) Theological Stud. 746 (2014).

136. Koskenniemi, *supra* note 74, at 15.

137. *Id.* at 18.

138. *See id.* at 7; J.G. Merrills, *Francisco de Vitoria and the Spanish Conquest of the New World*, 3 Irish Jurist 187, 187–89 (1968); *cf.* İlham Dilman, Free Will: An Historical and Philosophical Introduction 94 (1999).

139. Vitoria, *supra* note 73, at 126.

140. *Id.*

141. *Id.* at 122.

142. *Id.* at 126.

143. *Id.*

144. *Id.*

145. *Id.* at 230.

oneself (*dominium fui*),[146] or "dominion over one's acts" (*dominium fui actus*).[147]

In effect, Vitoria's view of rationality also presumes autonomy. This way of understanding reason is consistent with Aristotle and Aquinas' reality of what it means for a being to be rational. For instance, Aristotle describes the rational being as a "man of self-control."[148] By this, Aristotle understands that the rational being is "one who is apt to abide by his resolution."[149] Like Aristotle, Aquinas and Augustine argue that individual rationality confirms in the human an awareness of what moves him.[150] Augustine writes: "[w]hen I willed or did not will something, I was wholly certain that it was not someone other than I who willed or did not will it."[151] Similarly, in illustrating the co-extensiveness of the idea that man's rational nature endows him with free will, Aquinas writes: "For Damascene . . . says that *free-will straightaway accompanies the rational nature*. But reason is a cognitive power. Therefore free-will is a cognitive power."[152] Together, Vitoria and Aquinas' concept of "*dominus suorum actuum*" and Aristotle's understanding of the "man of self-control" buttress their conviction that rational agency confirms in the actor the ability to act without being subject to causality or to interferences that do not derive from the actor's own will.

Vitoria's second contention is that rationality conveys the ability to deliberate or act intentionally. This is *dominium naturale*, which Vitoria argues, makes man God-like.[153] As he writes "*dominium* is founded on the image of God; but man is God's image by nature, that is, by his reasoning powers."[154] In effect, Vitoria's view of rationality not only presumes autonomy of the actor, but also frames, as the basis of the law of nations, a belief in the actor's God-like nature. This nature, Vitoria clarifies, refers to the actor's innate capacity to access God's reasoning powers. In other words, the character of the legal actor as a

146. *Id.*

147. *Id.*

148. Aristotle, The Nicomachean Ethics of Aristotle Book VII (D.P. Chase trans., 1949).

149. Dilman, *supra* note 138, at 59 (internal quotation marks omitted).

150. *Id.* at 73; Anthony J. Lisska, Aquinas's Theory of Natural Law: An Analytic Reconstruction 100 (1996).

151. Dilman, *supra* note 138, at 73; Jonathan Hecht, *Freedom of the Will in Plato and Augustine*, 22 British J. for Hist. Phil. 196, 200 (2014).

152. 4 St. Thomas Aquinas, The Summa Theologica 152 (Fathers of the English Dominican Province trans., 2d ed., 1922).

153. Vitoria, *supra* note 73, at 122, 225.

154. *Id.*

rational being encapsulates the idea that the actor is able to act intentionally through reflection.

Augustine, who Vitoria cites in support of this view, confirms this. He argues that "human beings possess the capacity of reasoning and when reason is master in human life men have mastery over themselves."[155] He also writes that "man excels beasts through reason and understanding"[156] and that "reason's rule makes humans superior."[157] This understanding of rationality is perhaps closest to the natural and contemporary meaning of the word as "[t]he quality of being able to think sensibly or logically"[158] or "[t]he quality of being endowed with the capacity to reason."[159]

Finally, Vitoria contends that rationality confers the power of choice on the rational actor. As he notes, "only rational creatures have dominium over their acts, the test of a man's being master of his acts being (as St. Thomas says . . .) that he has the power of choice."[160] In effect, Vitoria and Aquinas propose an inseparable relationship between choice and rationality. Also, Vitoria's idea of the coincidence that exists between the possession of reason and the capacity to act or to choose freely reflects both St. Augustine and Aristotle's thinking in this regard. For his part, Augustine argues that all rational beings are equally endowed with the freedom of choice, "*liberum arbitrium*."[161]

Similarly, Aristotle's central point is that rationality is expressed through man's exclusive capacity to choose. The connection between choice and rationality is stated as the fulcrum of Aristotle's view of what it means to possess reason or to be rational. When Aristotle writes that "choice is not shared by irrational creatures,"[162] he also confirms that the proof of the individual's rationality resides in his exclusive capacity to choose. As he explains, "[i]t seems that choosing is willing, but that the two terms are not identical, willing being the wider. For . . . other

155. Dilman, *supra* note 138, at 77.

156. Aurelius Augustin, The Problem of Free Choice 18 (Dom Mark Pontifex trans., 1955).

157. Hecht, *supra* note 151.

158. *Rationality*, Lexico, https://en.oxforddictionaries.com/definition/rationality [https://perma.cc/HUJ2-825V].

159. *Id.*

160. Vitoria, *supra* note 73, at 126, 230 (translated from "*per hoc aliquis est dominus suorom actuum, quia potest hoc vel illud eligere*").

161. Hecht, *supra* note 151, at 199.

162. Aristotle, The Nicomachean Ethics of Aristotle 66 (Frank Hesketh Peters trans., 10th ed., 1906); Scott, *supra* note 23, at 165; *see also* Coleman Phillipson, International Law and Custom of Ancient Greece and Rome 79 (1911); *see generally* J.A. Fernandez-Santamaria, The State, War and Peace: Spanish Political Thought in the Renaissance 1516–1559 (J.H. Elliott & H.G. Koenigsberger eds., 1977).

animals have will, but not choice or purpose . . . ."[163] Aristotle's view is that, while both the rational creature and the irrational creature are animated by will, reason or rationality radically distinguishes the rational will from that of the irrational.[164]

Both Aquinas and Aristotle's conception of rationality also demonstrates an inextricable connection between choice and intentionality. For instance, Aristotle's argument is that the rational being's capacity to choose confirms that its choices, and thus conduct, are deliberate and informed. Aristotle writes that, "choice or purpose implies calculation or reasoning. The name itself, too, seems to indicate this, implying that something is chosen before or in preference to other things."[165] As such, Aristotle is inclined to the belief that individual choice is always deliberative, and that "what is chosen or purposed is [always] willed," and "when we say 'this is chosen' or 'purposed', we mean that it has been selected after deliberation."[166] As importantly, "deliberation and decision are *par excellence* the exercise of [individual] will."[167] Similarly, it has been suggested that in Aquinas's conception "[f]reedom of choice or free will and 'rational agency' are inseparably linked."[168]

Vitoria clearly transfers these insights about the reality of human rationality into his vision of the law of nations and proposes this as the most appropriate benchmark for determining legal capacity within the law of nations and, by extension, the status of the Native Americans recently discovered. Thus, Vitoria's conception of *jus gentium* drew on and reinforced the fiction that legal actors are autonomous and choice-driven. Also, by relying on this ontological view of the legal actor, Vitoria grounds the new normative project's essence and legitimacy on the belief that legal actors were definitely reflective and autonomous.

Consequently, even when the corporate form of the State came—through the industry of later scholars, mainly positivists—to displace disparate polities as the sole subject of international law, international lawyers ascribed Vitoria's caricature of the nature of a legal actor to the State. Thus, even though the expressly human constituent of the legal subject disappeared, the essence of the human—from which legal

163. Aristotle, *supra* note 162.
164. *Id.*
165. *Id.* at 68.
166. *Id.* at 68, 72.
167. Dilman, *supra* note 138, at 51.
168. *Id.* at 94.

subjectivity was developed—endured and become reified in a corporatized form.

IV. Reason as a Basis of Legal Jurisdiction in Vitoria's Normative Framework

One of the main problems that confronts Vitoria's attempt to resolve the pressing question of the status of the native population was that of jurisdiction. As Anghie surmises, Vitoria needed to create and demonstrably justify "a system of law to account for relations between societies which he understood to belong to two very different cultural orders, each with its own ideas of propriety and governance."[169]

In order for Vitoria to convincingly propose that the Spaniards and the Native Americans—separated as they were by history, culture, and geography—belonged to a common normative order, it became imperative that he demonstrate this in two concrete ways. First, he needed to point to a situation, characteristic, or trait that was common to the Spaniards and the Native Americans and would thus narrow the cultural gap that existed between the two distinct communities. Second, Vitoria needed to somehow show that this situation, characteristic, or trait not only had jural consequences but created or legitimized law itself. In other words, the shared characteristic must be both a criterion of legal subjectivity and a basis of legal jurisdiction.

For instance, if Vitoria had found the Native Americans to be Christians, this would have situated the Spaniards and the Native Americans as alike or similar in some legally determinative respect. Following Vitoria's logic, their religious belief would then justify the application of divine law to them and by extension the exercise of papal authority over them. The proof of this is that their being Christian, in Vitoria's view, would have made them just like the Spaniards, that is, "friends and allies of Christians."[170] By extension, considering that papal authority extended naturally over all believers, the Pope would have been habilitated to exercise jurisdiction over them.[171] Vitoria says as much when he writes: "[s]uppose a large part of the Indians were converted to Christianity . . . the Pope might for a reasonable cause, either with or without a request from them, give them a Christian sovereign ["*principem Christianum*"] and depose their unbelieving rulers."[172]

169. Anghie, *supra* note 25, at 16.
170. Vitoria, *supra* note 73, at 158, 265.
171. *Id.* at 136–39.
172. *Id.* at 158, 265.

However, seeing that the Amerindians were, from the perspective of Spaniards, "unbelievers," the Pope had "no power over them" in Vitoria's account.[173] As a result, Vitoria contends that writers who assert that "Christian princes can . . . by the authorization of the Pope, restrain the Indians . . . . build on a false hypothesis, namely, that the Pope has jurisdiction over the Indian aborigines."[174] Further, being unbelievers, divine law itself would have no meaning for, or reach over, the Amerindians.[175] The effect of Vitoria's conclusion was that it showed the prevailing orthodoxy which relied primarily on divine law to regulate the interactions and confrontations between Christendom and the heathen world to be incapable of justifying Spanish colonial pretentions. As such, divine law was ultimately incapable of providing a basis for assessing the relations between the Native Americans and the Spaniards.[176]

Vitoria turns then to natural law, where he finds that the criterion of legal subjectivity and the basis of legal jurisdiction is not religious belief but the possession of reason. The possession of reason is particularly crucial to natural law because, unlike divine law where the primary source of norms is God and the Bible, natural law depended almost entirely on the possession of reason as the way to access its norms. As Professor Robert Araujo writes:

> it is in considerable part a means by which the human mind formulates legal principles . . . that can then be applied to govern a specific subject matter or jurisdiction. In essence, the natural law is planted within the objective reasoning process innate to the human person which enables and equips the person to develop . . . law.[177]

In effect, to become subjected to natural law, it makes sense that the putative subject must come, or become, equipped with the ability to access its normative content. For Vitoria, then, reason not only capacitates the actor as a cognizable jural entity but also equips legal actors to discover the law to which they are to be subjected.

It follows logically within the framework of Vitoria's approach that his next line of inquiry would be to determine whether both contenders for legal subjectivity share or separately possess reason and

173. *Id.* at 136, 146–47.

174. *Id.* at 146.

175. It follows for Vitoria that the Pope "may not excommunicate them or forbid their marriage within the degrees permitted by the divine law." *Id.* at 136.

176. *See* Scott, *supra* note 23, at 163; Vitoria, *supra* note 73, at 121–23; Anghie, *supra* note 25, at 17–18.

177. Robert J. Araujo, *Our Debt to de Vitoria: A Catholic Foundation of Human Rights*, 10 Ave Maria L. Rev. 313, 321 (2012).

are not irrational. However, in Vitoria's analysis, the rationality of the European actor is taken for granted.[178] Further, European rationality, so presumed, becomes the unit for measuring native competence and thus for assessing their eligibility for legal subjectivity. With much relief, the Native Americans are assessed to possess reason and thus are similar in character to the rational Spaniards.[179] This supposed discovery of Indian rationality resolved at once the question of their jural capacity and the basis for which their conduct can be legally assessed in all matters.

Having resolved the problem of jurisdiction that is key to his analysis, Vitoria then asserts that natural law is coextensive with the law of nations.[180] Particularly for Vitoria, natural law constitutes the origin and source of the law of nations such that "the law of nature was a part of international law, and indeed was the general source from which its special rules would be derived."[181] Vitoria's assertion of natural law as being coextensive with the law of nations, or at least as being the basis of it, allows him first to convey two points. First, it fills the void left by his repudiation of divine law and, second, it establishes in its place a new system of international law—his own—which consisted of a *bric-à-brac mélange* of natural law and elements of divine law and human law as the primary inspirations for international law's normative authority.[182] Of these three normative inspirations, natural law assumes a pseudo-constitutional role as the primary "source of this phase of the law of nations"[183] and of the nature and extent of obligations it imposes. Even when Vitoria relies on biblical exhortation to found an obligation, he tries to demonstrate, or simply asserts, that the same obligation exists under natural law.[184] For example, he writes, "there is the passage (*St. Matthew*, ch. 25): 'I was a stranger and ye took me in.' Hence, as the reception of strangers seems to be by natural law, that judgment of Christ will be pronounced with universal application."[185] Similarly,

178. Vitoria's first sense is that "the whole of the business has been carried on by men who are alike well-informed and upright." Vitoria, *supra* note 73, at 119.

179. Koskenniemi, *supra* note 73, at 13; Anghie, *supra* note 25, at 22.

180. Vitoria, *supra* note 73, at 126.

181. Scott, *supra* note 23, at 164. Vitoria writes that the law of nations "either is natural law or is derived from natural law." Vitoria, *supra* note 72, at at 151.

182. Scott, *supra* note 23, at 164.

183. *Id.* at 163.

184. For instance, Anghie notes the "astonishing metamorphosis of rules, condemned by Vitoria himself as particular and relevant only to Christian peoples, into universal rules endorsed by jus gentium is achieved simply by recharacterizing these rules as originating in the realm of the universal *jus gentium*." Anghie, *supra* note 25, at 23.

185. Vitoria, *supra* note 73, at 152.

he wrote "the Gospel law forbids nothing which is allowed by natural law . . . . Therefore, what was lawful under natural law and in the written law is no less lawful under the Gospel law."[186]

Further, Vitoria's approach of originating international law from natural law deprives the former of any real juristic autonomy and impresses on Vitoria's vision of international law the distinct tone and method of doctrinal argumentation that was peculiar to natural law.[187] Because Vitoria's law of nations derives from—or as he says himself, "*is* natural law,"[188]—the facility of reason similarly enables legal actors within his law of nations to access the content of *jus gentium*. In addition, Vitoria's claim that the facility of reason enables legal actors to access the content of *jus gentium* denotes a belief that international law itself issues from reason—or is rationally constructed—and thus always apparent or self-evident to rational legal actors.[189]

In effect, Vitoria's reliance on rationality confirms his law of nations as a normative framework within which only the conduct of actors possessing reason would be assessed. Similarly, it attaches legal consequences to the presumption that the international legal actor is rational and thus free regarding the choices it makes. Thus, this iterative assertion of rationality becomes the adhesive that holds together Vitoria's approach to resolving the Indian question and makes the whole of Vitoria's jurisprudence possible.

As I demonstrate in the next Part, the fact that the legal actors in Vitoria's *jus gentium* are innately rational and thus are subject to law by reason of this ontological character becomes crucial in how Vitoria justifies his *jus gentium* as being neutral or objective. He achieves this primarily by analyzing the conduct of legal actors through the prism of their ontological character. In other words, Vitoria expects rational actors to act rationally and, where this does not happen by his own standards, the deviation is explained away as being peculiar, momentary, or curable. As a result, the validity of a legal framework which only works if all actors are rational is never truly disturbed or questioned.

V. System Justification Practices in Vitoria's Account

One of the key concerns for Vitoria, in elaborating his vision of *jus gentium*, was his desire to show that the legal framework he proposed

186. *Id.* at 166.
187. David Kennedy, *Primitive Legal Scholarship*, 27 Harv. Int'l L.J. 1, 18–19 (1986).
188. Vitoria, *supra* note 73, at 151 (emphasis added).
189. *Id.* at 152.

was inherently good,[190] neutral, or objectively fair and did not compromise the Indian unfairly in favor of the Spaniard.[191] Despite the fact that several of the issues Vitoria proposed to resolve had become, by his own admission, *fait accompli*,[192] it was important for him to demonstrate that—when violence is visited by the Spaniards on the Indians, when Indian properties are claimed by the Spaniards, and when the Indians come under the trusteeship of the Spaniards—these outcomes proceed logically from the routine application of legal rules that are objectively and neutrally established for both the Spaniards and the Indians.[193]

To achieve this, Vitoria focuses less on the nature of the normative framework system and more on the nature of the legal actors. The normative framework or legal order is definitively valid because it is the product of rational and free willed actors. However, whenever Vitoria confronts any evidence that casts doubt on the free will and rationality of the legal actor, he does not revise his assertions of the validity of the legal order. Instead, he rationalizes such evidence and doubles down on the idea that any sign that the legal actor's rationality may be specious—or that its choices may not emanate from the exercise of free will—is peculiar or specific and, by effect, remediable or transient. For instance, in order to anticipate any critique that might suggest the unfairness or lack of neutrality of the normative framework he devised, Vitoria minimizes the specious nature of the autonomy of Native Americans. This allows Vitoria to shield the legal system, which only works if all actors are truly autonomous, from real scrutiny.

For context, the basis of Vitoria's entire approach to resolving the so-called Indian question depends on accepting that the actors within

190. Wright-Carozza writes that "Vitoria expanded the Thomistic notion of the common good to incorporate explicitly into it the *ius gentium* (the law of nations). In his *relecciones* Vitoria repeatedly analogized the whole world to a single commonwealth in which all of humanity shares in a single common good." Paolo Wright-Carozza, *The Universal Common Good and the Authority of International Law*, 9 J. Cath. Thought & Culture 28, 32 (2006); *see generally* John F. Morris, *The Contribution of Francisco de Vitoria to the Scholastic Understanding of the Principle of the Common Good*, 78 Mod. Schoolman 9 (2000).

191. Tarik Kochi, The Other's War: Recognition and the Violence of Ethics 40 (2009); Araujo, *supra* note 177, at 327–28.

192. He acknowledges for instance that "now, each of these things has been done. For first, the Supreme Pontiff granted the provinces in question to the Kings of Spain. Secondly, the aborigines were notified that the Pope is the vicar of God and His vicegerant on earth and it was claimed that they should, therefore, recognize him as their superior." Vitoria, *supra* note 73, at 116, 135.

193. Kochi, *supra* note 191; Vitoria, *supra* note 73, at 125; Anthony Pagden, *Introduction* to At the Origins of Modernity: Francisco de Vitoria and the Discovery of International Law (José María Beneyto & Justo Corti Varela eds., 2017). Pagden observes that Vitoria's framing presupposed the existence of "a universal rule of justice" and that "his view of the law of nations was uncompromisingly universalistic." Pagden, *supra*, at 2–3.

that legal framework possess and evidence reason. As a result, Vitoria's jurisprudence crumbles if it is shown that a legal actor demonstrates, by Vitoria's own standards of what amounts to rationality, a pattern of behavior that departs from or controverts his assertions of rationality. As explained, because the concept of rationality englobes in Vitoria's proposition a belief in the ability to exercise free will, a demonstration that such exercise of free will is altogether impossible undermines both the contention that such actor is rational and the actor's claim to legal subjectivity. As he himself wrote, "if the aborigines had not dominium, it would seem that no other cause is assignable therefor except that they . . . were witless or irrational."[194] It is important then to interrogate how Vitoria deals with patterns of irrational conduct and any evidence of lack of autonomy in the choices made by actors. I am particularly interested in determining whether, from Vitoria's point of view, these patterns and evidence undermine or reinforce his insight that legal actors are rational actors and that the legal framework is itself rationally derived.

A. Rationalizing the Specious Reflective Capacity of the Legal Actors

Vitoria's work treats the ontological character of the Europeans as rational actors as a given and only arbitrates the rationality of the Amerindians. Because of this, in Vitoria's account, contestations around the eligibility of an actor to legal subjectivity, as well as the consideration of patterns of nonrational behavior, focus exclusively on the character and practices of the native population.

Despite his conclusion that the Amerindians possess reason, Vitoria appears to entertain significant doubts about native capacities for reflection and deliberation. By Vitoria's own admission, the Native Americans are seemingly "unintelligent and stupid."[195] By this he means that "the aborigines in question are . . . not wholly unintelligent, yet they are little short of that condition."[196] Further, Vitoria writes that "dullness of mind which is attributed to them [the natives] by those who have been among them and which is reported to be more marked among them than even among the boys and youths of other nations."[197] Vitoria agrees that they "are unfit to found or administer

194. Vitoria, *supra* note 73, at 120.
195. *Id.* at 127–28.
196. *Id.* at 160–61.
197. *Id.* at 161.

a lawful State [*Rempublican*][198] up to the standard required by human and civil claims,"[199] the proof being that the Amerindians were "people of defective intelligence; and indeed they are no whit or little better than such so far as self-government is concerned, or even than the wild beasts, for their food is not more pleasant and hardly better than that of beasts."[200] Finally, Vitoria writes that "some are by nature slaves, for all the barbarians in question are of that type and so they may in part be governed as slaves are."[201] By concluding that the natives were of the type of "slaves," Vitoria was using the term to mean people whose "strength lies in their body rather than in their mind"[202] and "who have not sufficient *reason* to govern even themselves."[203] In essence, Vitoria undermines his own contention that the Amerindians possess *dominium naturale* that confers God-like reasoning powers.

However, despite the deep-seated reservations Vitoria appeared to entertain regarding the reflective capacities of the Amerindians, Vitoria does not accept that the basis of his legal framework had become impracticable *ab initio*. Instead, he situates these vivid descriptions of patterns of deviations from his perfect rationality assumption as being particular and inherently remediable. Anghie notes that Vitoria offers us a "child-like"[204] and "socially, historically, 'particular' Indian,"[205] who does not in any way undermine the previous image of the "ontologically 'universal' Indian,"[206] but whose "particularity" can and "must be remedied by the imposition of sanctions which effect the necessary transformation."[207] The particularity of the Indian is framed as deriving from explicable and logical factors. Vitoria contends that these are, for instance, the result of "a bad and barbarous upbringing" or education[208] and derive from the fact that their rationality may have become rusty from lack of use.[209] Vitoria writes, "it is through no fault of theirs that these aborigines have for many centuries been outside the pale of

198. *Id.* at 236.
199. *Id.* at 161.
200. Vitoria, *supra* note 73, at 161.
201. *Id.*
202. *Id.* at 120.
203. *Id.* (emphasis added).
204. Anghie, *supra* note 25, at 21.
205. *Id.* at 22.
206. *Id.*
207. *Id.*
208. Vitoria, *supra* note 73, at 127–28; Cavallar, *supra* note 86, at 189.
209. *Id.*

salvation, in that they have been born in sin and void of baptism and the use of reason whereby to seek out the things needful for salvation."[210]

By particularizing patterns that he admits undermine rationality, Vitoria continues to confirm rationality as the default character of legal actors and to stress that these patterns only exceptionally arise. Also, because irrationality is the exception, it can be avoided and remedied. In the case of the Amerindians, Vitoria proposes two related ways in which their defective nature can be corrected or fixed.[211] First, because irrational conduct issues from their "bad and barbarous upbringing," it follows naturally that by fixing their education, we can eliminate this exceptional defect.[212] Second, and in order to fix their defective education, the natives must come under Spanish administration. This can be achieved either as of right,[213] through the voluntary consent of the Amerindians,[214] or through benevolent forcible intervention.[215] The right of the Spaniards to administer the Indians, proceeds from the fact that by "virtue of their [the Spaniards] superior wisdom, . . . nature has given them capacity for rule and government."[216] However, this right is also apparently a burden that is "founded on the precept of charity"[217] and binds the Spaniards, as regards the Amerindians, to "look after their welfare"[218] and "not merely for the profit of the Spaniards."[219] The voluntary consent of the Amerindians to Spanish administration, which allows the right of the Spanish to rule the Indians to be realized, is expected to come about democratically once the Indians are made "aware alike of the prudent administration . . . of the Spaniards."[220] To make this possible, it is proposed that a majority of the Indians would accept the King of Spain as their sovereign over the objections of the minority and "even if it meant the repudiation of [their] unbelieving rulers."[221]

However, the Spaniards are also burdened with the duty of intervening to stop all practices they consider "nefarious" or "tyrannical."[222]

210. Vitoria, *supra* note 73, at 127; Cavallar, *supra* note 86, at 189.
211. Vitoria, *supra* note 73, at 127–28.
212. *Id.* at 128.
213. *Id.*
214. *Id.* at 159.
215. *Id.*
216. *Id.* at 128.
217. *Id.* at 161.
218. *Id.*
219. *Id.*
220. *Id.* at 159.
221. *Id.* at 160.
222. *Id.* at 159.

This right or duty of intervention derives from their charge or responsibility to protect and defend their neighbors from "tyrannical and oppressive acts."[223] In the exercise of this right or duty of intervention, however, native agency or consent is ineffectual. As Vitoria writes, "it is immaterial that all the Indians assent to rules and sacrifices of this kind and do not wish the Spaniards to champion them,"[224] Vitoria's reason being that the Amerindians are not of such "legal independence"[225] to make these decisions for themselves and their children.

To conclude, by framing conceded patterns of irrationality as being exceptional and remediable, Vitoria confirms rational agency as the default prism through which the conduct of legal actors ought to be assessed and thus leaves little room for the possibility that this view of legal actors may itself be unfounded.[226] Also, because if the Amerindians were to oppose Spanish administration it would only serve as proof that their reason was defective and in need of fixing, an inverse relationship is established between their ability to oppose Spanish administration and, by extension, Vitoria's *jus gentium* and the assessment that they possessed reason.

B. Minimizing the Chimerical Autonomy of the Amerindians

Vitoria's caricature of rational legal actors, as shown, encompasses the idea that their actions are undictated and thus derived from their free will and autonomy. In Vitoria's framework, legal actors are proposed to exist as masters of their own will (*dominus suorum actuum*) and thus unhampered in their choices by external control or perceptions of it. Because relations of private ordering—principally trading, ownership, and cession of property and migration—form a considerable part of Vitoria's analysis, the exercise of free choice grounds Vitoria's jurisprudence in an epistemic way.[227]

This is due to the fact that by emphasizing that interactions between legal actors—and the arrangements that result from these interactions—proceed from the free-willed conduct of the actors, these interactions are framed as being inherently legitimate. For instance, Vitoria writes regarding the legitimacy of voluntary choice, quoting the Justinian Institutes: "[n]ow, there is nothing so natural as that the intent of an owner to transfer his property to another should have effect given

223. *Id.*

224. *Id.*

225. *Id.*

226. Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective in the Human Animal*, 93 Geo. L.J. 6, 18 (2015).

227. Koskenniemi, *supra* note 74, at 18.

to it."[228] It follows then that the legitimacy of Vitoria's law of nations becomes deprived of essence if the relations he accounts for are invincibly tainted by projections of power that compromise the autonomy of their legal actors.

However, Vitoria does not set out to investigate the conditions under which the Spaniards and the Indians are brought into proximity with each other. Although the entire basis of his project is to unearth or construct a legal framework that regulates the relations of reciprocity between the different cultural orders, he is not particularly attentive to the question whether such relations are even possible at all. Similarly, there is no consistent reflection on the material situations of the Spaniards and the natives and whether either party, the natives especially, are desirous of the proximity into which they have been brought.

This is, however, not particularly surprising. Vitoria's work is addressed to the Spanish audience. His assessments concern the validity of Spanish colonial pretentions and his framework for references are curated to appeal to European epistemological practices. As a result, the native viewpoints are not considered, and they are presumed to want these relations as much as their Spanish homologues. Also, as we see, an inverse relationship is drawn between the non-European's ability to oppose the law of nations and her possession of reason. Because of this, the non-European equals becomes confined in the role of disinclined devotees of a normative project that others them in any attempt to criticize or reform it.

Despite this, and without always meaning to, Vitoria's work routinely concedes the clear asymmetry that frames Spanish-Indian relations and paints the picture of relations that are constructed in the background of obvious military superiority and projections of force, "of so many massacres, so many plunderings of otherwise innocent men, [and of] so many princes evicted from their possessions and stripped of their rule."[229] By Vitoria's own account, Spanish demands on the natives were routinely made with the former "in armed array."[230] Similarly, that the Native Americans were always confronted with "the sight of men strange in garb and armed and much more powerful than themselves."[231] Ultimately, it was Vitoria's own conclusion that Spanish projections and exercise of force in their relations with the Indians are so pervasive that any title to Indian lands that are purportedly based on

228. Vitoria, *supra* note 73, at 148 (internal quotation marks omitted).
229. *Id.* at 119.
230. *Id.* at 148.
231. *Id.* at 154.

"voluntary choice"[232] are "utterly inadequate and unlawful."[233] Similarly, Vitoria emphasizes that the relations are deeply steeped in "fear and ignorance"[234] and that such fear and ignorance are "markedly operative in the cases of choice and acceptance under consideration."[235] As a result, the arrangements purportedly "reached" are only so in name and completely irremediable.

Vitoria evidently alludes to the impracticality of the belief that Amerindians could be truly "autonomous" in their interactions with the Spaniard. Seeing however that "reflection and deliberation" and "free willed conduct" are crucial components of Vitorian rationality, these concessions undermine—or ought to undermine—the very claim that the Amerindians are rational actors. In other words, to stay true to the logic of Vitoria's own frames of references, the indication that the will of the Amerindians was so overwhelmingly compromised and that their choices were not authentically made should defeat the claim that natives were rationally situated in their dealings with the Spaniards. Relatedly, this would have forced the conclusion that perhaps law itself was only epiphenomenal to what was going on in the colonies and that natural law was especially inapposite for legitimizing Spanish incursions into the territory of the Native Americans.

Vitoria does not reach this conclusion, however. His whole analysis strays off repeatedly from the centrality of the violence that marked the colonial relations and attempts severally to project a certain parity in the ability of the Amerindians to restrain the Spaniards. As a result, it is the natives that are found in violation of the law of nations to use force, often inexplicably, against the Spaniards. It follows that it is the latter that must act to protect themselves from the former.

For instance, we are told that it is the "Indian natives [who may] wish to prevent the Spaniards from enjoying any of their above-named rights under the law of nations,"[236] that they may "causelessly prevent the Spaniards from making their profit,"[237] or "unite their efforts to drive out the Spaniards or even to slay them."[238] Similarly, we discover astonishingly that the natives are in fact capable of exercising free will after all, and that voluntary choice is still possible. For instance,

232. *Id.* at 148.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 154.
237. *Id.* at 152–53.
238. *Id.* at 154.

they—"both rulers and ruled"[239]—may of their own initiative apply this choice democratically to consent to Spanish jurisdiction after having been convinced "of the prudent administration and the humanity of the Spaniards."[240] Also, they may of their own initiative, and in exercise of their free choice, "lawfully" convert to Christianity.[241] In effect, Vitoria inexplicably perceives the playing field as level and casts the Indians as seemingly in charge of their destiny.

However, as researchers have found, one of the key consequences of centering the ontological character of actors as the way to assess normative and distributive outcomes is that it compromises our ability to "objectively" assess and reform lapses in the operative normative framework.[242] This approach lends itself to system justification practices. In particular, when we emphasize or deflect criticisms of the status quo by highlighting the apparently uncompromised rational agency of those clearly disenfranchised by the status quo, we are deploying classic system justification devices. This is also the case when we convince ourselves that those disenfranchised by the status quo either deserve their situation because they consented to a particular rule or set of arrangements willingly or that they possess the means to get out of a particular situation. We shield the status quo from scrutiny. Similarly, insistent referrals to the plausibility of free will, deliberation, and voluntary choices irrespective of the circumstances in which legal actors find themselves perform a palliative function of reducing our own cognitive dissonance and reassuring us that all is well with the system as it is. For instance, for most people, in a system where there are obvious winners and losers, explanations that preserve the legitimacy of the system such as "[t]he losers are undeserving[,] they are lazy, unintelligent, poorly educated, or irresponsible"[243] are typical.[244]

By stressing that those clearly disenfranchised by the status quo hold their destiny in their own hands and can do something about their situation, Vitoria lays bare his tendency to underestimate the situation of the Amerindians and to overstate the power of their autonomy and rational agency. In this way, he bolsters the image of a status quo that he

239. *Id.* at 159–60.

240. *Id.*

241. *Id.* at 158.

242. *See generally* Ideology, Psychology, and Law (Jon Hanson ed., 2012).

243. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94(4) Cal. L. Rev. 1119, 1130 (2006).

244. Gary Blasi & John T Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, *in* Ideology, Psychology, and Law, *supra* note 242, at 81, 84.

believes has impartially given to each a level playing field for their pursuit of their interests. In this case, for instance, the interaction between the Spaniards and the Indians "seems to occur between equals entering knowledgeably into these transactions, each meeting the other's material lack and possessing, implicitly, the autonomy to decide what is of value to them."[245]

What Vitoria does, however, is not unique. As a growing body of social science research emphasize, humans consistently display a tendency to want to believe in the justness of their institutions, an inclination to perceive in a self-affirming way rational agency on their own part and on the part of others even where external or situational factors are clearly controlling.[246] Similarly, our tendency to rationalize the status quo in order to resolve cognitive dissonance amplifies rational perspectives and consolidates our strong attachment to doctrines such as voluntary choice or rationality. As Professors Adam Benforado and Jon Hanson write:

> If, for instance, we can find a way to blame the victim of a bad event by focusing on his or her bad disposition or flawed choice, we can assure ourselves that the world is just and maintain our firm grip on the reins of destiny. We can continue to be the strong individualists who, unfazed by the winds of situation, avoid negative results by making good choices and relying on our stalwart dispositions.[247]

Vitoria's account proceeds under the belief that it is how the Amerindians apply their rational agency—that is, the choices they make voluntarily—rather than the legal framework itself, that is often faulty and in contradiction of the law of nations. As a result, Vitoria's main prescriptions are targeted at fixing or correcting the peculiar Amerindians rather that the legal system itself. In addition, because the existence of the Amerindians within the Vitorian framework is repeatedly marked by wrongly made voluntary decisions, their opposition to the legal framework is recharacterized as self-interested violations of international law. In effect, by calling into question the actions and intelligence of the Amerindians, the fairness and legitimacy of Vitoria's *jus gentium* is preserved and shielded from scrutiny.

245. Anghie, *supra* note 25, at 21.

246. *See generally* Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 Emory L.J. 311 (2008); Hanson & Yosifon, *supra* note 226.

247. Benforado & Hanson, *supra* note 246, at 325.

Conclusion

The tendency in international law to conceptualize States as sharing human attributes reflects a long practice and a deep habit of thought. Often, this practice is obscured by its obviousness. The fact is, because this practice tends to paint a simplistically affirming view of human and consequently State actors, it becomes difficult for States and international legal scholars to criticize international legal doctrines that entrench these attributes without appearing to minimize their own agency. However, the indeterminacy and capaciousness of these anthropomorphic rationalizations not only allows their deployment for shifting purposes but also creates exacting burdens that often far surpass State capacities.[248]

As we see with the Amerindians in Vitoria's account, the emphasis on the rational and autonomous nature of State conduct also allows contemporary international lawyers to deflect criticisms of the legitimacy of particular legal outcomes by redirecting attention to the free will—now called sovereignty—of the relevant legal actors. Because these biases overstate the capacity of States as autonomous choicemaking agents who are responsible for their actions, States are primarily regarded as holding their destiny in their own hands. As a result, any criticism of the *status quo* or of particular legal outcomes by States are rationalized as nonobjective or self-interested, and hence explicitly adverse to the common interest.[249] Similarly, because modern international law depends on the orthodoxy that States are under no obligation to undertake legal obligations, any failure of a State to comply with a freely assumed legal obligation is seen as reflecting willful and calculated acts.[250] Professor Thomas Pogge, for instance, hints at the system-justification role that concepts such as consent (and relatedly "rationality") play in international legal argumentation. As he writes, a "common way of denying that the present global order is harming the poor invokes the venerable precept *volenti not fit iniuria*—no injustice is done to the consenting. Supranational institutional arrangements

248. Pogge, for instance, gives an excellent account of how international law establishes and maintains structures that systematically overburden developping countries. Thomas Pogge, *Divided Against Itself: Aspirations and Reality of International Law*, *in* The Cambridge Companion to International Law (James Crawford & Martti Koskenniemi eds., 2012).

249. Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* 15 (Melbourne L. Sch., Legal Studies Research Paper No. 520, 2009).

250. Henkin, *supra* note 5; Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. Conflict Resol. 588 (2007).

cannot be harming the poor when participation in them, such as WTO membership, is voluntary."[251]

However, for "Third World" States and jurists who have routinely been othered in the discipline's history in particular opposing the characterizations of human and State actors as being predominantly rational and autonomous, represents a risky undertaking that could well push them to the brink of legal subjectivity in international law.[252] For instance, for the newly independent States in Africa, it was hoped that showing that the African "is capable of managing his own affairs"[253] would not only negate doubts about the hollowness of the hard won right to self-determination but would provide a meritorious foundation to challenge crystallized colonial conceptions of the so-called uncivilised non-European that had seeped into positive international law.[254]

In many ways, international law has come to count on the fact that its main stakeholders find their generous self-conceptions echoed in how the discipline conceptualizes them. Thus, Vitoria's recourse to the affirming—even if unsubstantiated—attribution of rationality to legal actors partly explains the cult-like interest in his vision of international law. Further, it is no secret that the recourse to reason or individual rationality is a significant aspect of Vitoria's jurisprudence and of other natural law inspired accounts of *jus gentium*.[255] Curiously, however, no

251. Pogge, *supra* note 248, at 383.

252. I agree with Balakrishnan Rajagopal that the very meaning of the "Third World" has been disarticulated due to differences in economic and political power as well as political priorities that exist between States hitherto identifying as being part of the "Third World." *See* Balakrishnan Rajagopal, *Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 Third World Q., 767, 767 (2006). However, I use the term "Third World jurists" to designate general oppositional scholarship in International Law known as "Third World Approaches to International Law."

253. For instance, Ghana was the first territory in sub-Saharan Africa to gain independence. With the leaders of the liberation movements in other parts of Africa watching Ghana closely, Kwame Nkrumah in his Independence Declaration to the National Assembly delivered himself as follows: "I can see that you are here in your millions and my last warning to you is that you are to stand firm behind us so that we can prove to the world that when the African is given a chance he can show the world that he is somebody! We have awakened. We will not sleep anymore. Today, from now on, there is a new African in the world! That new African is ready to fight his own battles and show that after all, the black man is capable of managing his own affairs. We are going to demonstrate to the world, to the other nations, that we are prepared to lay our own foundation. . . . It's the only way that we can show the world that we are ready for our own battles." Kwame Nkrumah, Ghana Independence Speech (Mar. 6, 1957), http://www.bbc.co.uk/worldservice/focusonafrica/news/story/2007/02/070129_ghana50_independence_speech.shtml [https://perma.cc/2XBB-3KDN].

254. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1, 66–67 (1999).

255. Henry James Sumner Maine, Ancient Law 56 (1917).

proper account has been taken in international legal scholarship of the methodological accuracy of depicting legal actors as rational actors in Vitoria's work.

Instead, when international legal scholarship takes account of Vitoria's routine ascription of rationality to the Spaniard, this is not in any way seen as controversial. In fact, it would seem that Vitoria is stating the obvious. Similarly, when Vitoria extends such rationality to the native population, it is spoken of as affirming, beneficial, and as a testament of Vitoria's humanity.[256] He is described as being brave, and as a result, a champion of the Amerindians.[257] In effect, the ascription of reason to the individual and the consequent projection of the legal actor as being rational is enacted and confirmed in international scholarship as being proper and the humane thing to do.

Even in critical accounts of Vitoria's work which come closest to the problem, the main rebuke of Vitoria is not articulated as a pushback on the methodological unsoundness of conceptualizing legal actors as rational actors. While Anghie, for instance, brilliantly highlights ways in which Vitoria appears to paint the Amerindians as willing participants in his normative framework, he does not interrogate whether this way of conceptualizing legal actors is empirically substantiated or is an accurate premise on which to ground the normative project.

In this Article, I demonstrate through Vitoria's work how the history of international law confirms that the discipline's existence and functioning are intertwined with self-affirming notions about human nature. Similarly, the vocabulary of international law and legal argumentation has historically reinforced a particular idea of the nature of legal actors—that of rational and choice-driven actors. In highlighting this, I hope that this Article helps leverage the plausibility of a disconnect between how international law apprehends State actors and what the actual determinants of State agency are. In addition, I hope that this disconnect contextualizes and even emphasizes the urgency of the need to revise the erroneous conjectures about State actors that undergird the formulation of the international normative project. In this sense, it is important that legal theorizations of the State and its conduct, as well as the laws and institutions that these theories engender, be informed by a realistic appreciation of the circumstances in which States operate.

256. Araujo, *supra* note 177, at 327–29.

257. Georg Cavallar, The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria 75–121 (2002).