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At the Origins of Modernity

Francisco de Vitoria and the Discovery of International Law

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Editors

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Chapter 1
Introduction: Francisco de Vitoria and the Origins of the Modern Global Order

Anthony Pagden

Abstract This Introduction seeks to demonstrate how the various contributions to the volume relate to one another. It seeks, also, to locate them in the context of Francisco de Vitoria's attempt to create a new supra-national juridical order. This, although it was clearly intended to offer some degree of legitimacy for the Spanish occupation of the Americas, was also conceived as a "law of nations" that, while grounded ultimately upon natural law, would be, in essence, a positive law derived from the presumed consensus of a hypothetical international community.

In 1951, the German jurist (and former Nazi) Carl Schmitt began his attempt to describe the new international global order which was slowly emerging from the destruction of the Second World by declaring that "for four hundred years from the sixteenth to the twentieth centuries the structure of European international law (*Völkerrecht*)" had been "determined by a fundamental course of events, conquest of a new world." It was this "legendary and unforeseen… and unrepeatable historical event," he claimed, which had given rise to what he called "the traditional Eurocentric order of international law."

Above all, he went on, it was "the famous *relectiones* of Francisco de Vitoria [which] given the intellectual courage these lectures exhibited in formulating questions, and given the perfection of their scholastic method… influenced and dominated all further discussions of the problem."[1]

From an historiographical point of view, this must seem an irredeemable anachronism. Modern international law, as it has evolved since the nineteenth century, is very far removed, both in the normative claims it wishes to make and in its objectives, from Vitoria's "law of nations." There may, however, be another way of understanding Vitoria's achievement which makes it no less remarkable. To speak of Vitoria (or the School of Salamanca more broadly) in terms of "founders"

[1]Schmitt 2003, 39, 69.

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or "fathers" is to suggest that he, and they, had devised the basic conceptions on which modern international law is based. And that they clearly did not do. All of the terms Vitoria uses—even those most immediately identifiable as legal—derive from the neo-Aristotelian philosophical and theological traditions (Schmitt's "scholastic methods") in which he had been schooled. What, however, Vitoria did do, as Schmitt had seen, was to adapt an already familiar vocabulary, drawn from the conventional scholastic interpretation of the natural law, and the Roman legal framing of the civil law, in which to redescribe the relationship between Europe and a group of peoples whom he described as "previously unknown to our world." Vitoria's impact on subsequent theorists of the "laws of nations," in particular, on Alberico Gentili, and Hugo Grotius, was as Franco Todescan insists here considerable. As Todescan's essay demonstrates, however, Vitoria's influence on later generations cannot be captured by a summary of citations, important though these clearly were. For what Vitoria could have been said to have bequeathed to his immediate heirs, and they in their turn to a succession of later writers—most notably Samuel Pufendorf, Christian Wolf, and Emer de Vattel—was the possibility of a language, and what would eventually become an entire philosophical-legal genre, summed up in phrase "the law of nature and of nations," in which to recast what had really become a new global order.

This would perish, along with the natural law itself, with Kant, and Hegel. But some part of it was resurrected in the mid-nineteenth century as what we today would be prepared to recognize as the basis of modern international law—that is, as an essentially positive law, arrived at by a process (real in this case, not hypothetical) of consent among nations based upon a shared understanding of a universal rule of justice.

The problem for later generations with Vitoria's framing of the problem was that it presupposed the existence of the very thing—a universal rule of justice—which it was attempting to define. It also left the content of the law itself unspecified. Or to put it differently, while it insisted that the *ius gentium* must have the force of law—*lex*—it failed to state just how those *leges* were to be arrived at. Gentili's solution was to make the law of nations identical with the Roman law (a strategy followed later by Vico and Gravina).[2] Grotius equated it with what he called the "unwritten Civil Law" which was similarly arrived at by the "continual Use, and the Testimony of Men skilled in the Laws."[3] In the nineteenth century, and in the absence of a belief in a natural or divine law underpinning all legal norms, the law of nations became, in effect, the law which governed the relationship between the "civilized" peoples of the world—the only ones, in effect, to have "Men skilled in the Laws." "Barbarians" who did not by definition live in civil, or law-governed communities, lay outside it. Even today, although the word "barbarian" has dropped out of use, the International Court of Justice lists among those principles it seeks to apply to

[2]See Pagden 2015.

[3]Grotius 2005, I, 163.

"such disputes as are submitted to it": "the general principles of law recognized by civilized nations."[4]

That, however, was precisely what Vitoria had denied. His view of the law of nations was uncompromisingly universalistic, and it was precisely this aspect of his thought that determined the ways his work has been interpreted by later generations. As Andrew Fitzmaurice explains in his essay, ever since the seventeenth century Vitoria and his successors have often been portrayed as combatants in a struggle against the settlers and the agents of the Crown, if not the Crown itself, for justice in the Americas. "I love the university of Salamanca', enthused, Samuel Johnson, in 1763, "for when the Spaniards were in doubt as to the lawfulness of their conquering America, the University of Salamanca gave it as their opinion that it was not lawful."[5] The fact that the Spanish authorities had listened to the Salamancan theologians rather than "their Christian friends and relations" claimed John Stuart Mill, a century later, had led them to "side" with "the Pagans" and to do their best to "protect the natives."[6] Without the moral interference of the "divines of Salamanca," the consequences of the Spanish conquest would, he argued, have been far more deadly than they were. Among most of the liberal international jurists of the nineteenth century, and in particular those associated with the highly influential *Institut de droit international*, the "School" and Vitoria in particular were also closely associated with a supposedly anti-imperialist discourse.

It is also this aspect of Vitoria which has often led him to be hailed, in the twentieth century as the "founder" or "father" of "international law." As Yolanda Gamarra explains here, although attempts to establish a genealogy for modern "international law" may now look quaintly antiquarian, it was a designation which played a significant role in the attempt by a Spanish legal elite with strong international ties, both in Europe and in the USA in the period from 1918 until the outbreak of the Spanish Civil War, to establish a new, humanistic, and, in some broader sense, modernistic interpretation of the legacy of the Spanish empire. Vitoria and his successors were cast as the ancestors of a mode of liberal international legal thinking which offered a counterbalance to the notorious "Black Legend" of relentless Spanish atrocities across the entire reach of the empire from the Netherlands to Peru.

More recently, however, they, and Vitoria in particular, have been seen less as courageous moralists, than as the earliest in a long line of apologists for a blatant form of Christian imperialism, a process which Pablo Zapatero describes in his contribution to this volume.[7] Historically neither image is entirely correct. Vitoria himself, as we know from his correspondence, was sincerely outraged by the behavior of those to whom he referred as the "Peruleros," which, he said, "freezes

[4]Article 39 of the *Statute of the International Court of Justice*.

[5]Boswell 1934, I, 45.

[6]*Considerations on Representative Government*, [1861] in Mill 1984, xix.

[7]See, e.g., Anghie 2005.

the blood in my veins."[8] Yet his discussion of the legitimacy of the conquest, a subject which he had begun, as Schmitt had seen in "an astonishingly objective manner," nevertheless, ends, in Schmitt's words "with the claim that the Spanish are waging a just war, and therefore may annex Indian lands if the Indians resist free *commercium* (not only 'trade') and the free mission of Christianity."[9] The first of these claims is not quite right, and the second is simply false. But it is true that for all his objectivity and indignation, Vitoria's concern was not with the morality or the legitimacy of the Spanish settlers' behavior in the Indies. Nor was he much interested in the ultimate fate of the Indians. His declared objective was rather to establish a legal basis for a situation which already existed and which he believed (or at least claimed to believe) had to be morally acceptable a priori because the Catholic Monarchs were clearly beyond reproach in this as were their successors. Since, as Zapatero notes, "the discovery of an entire continent populated by *infidels* [had] made the old paradigms unworkable," Vitoria was confronted with the need to recast those paradigms in such a way as to make them applicable to, in Zapatero's words "the reality of a larger World in which the Old Continent was a mere unit of the aggregate whole."

The debate over Vitoria's true objectives, and the significance of his contributions to the history of what might be described as the international legal order, has tended to focus on a very small part of his work, although as Simona Langella in this volume, has demonstrated, a great deal still needs to be done on Vitoria's other scattered writings, in particular his substantial accounts of the natural and civil law to be found in his commentaries on St. Thomas Aquinas Since, however, Vitoria has been taken up largely by jurists and historians of political thought most attention has been focused on two of Vitoria's *relectiones* "On the Newly Discovered Indians" (*De Indis recenter inventis*)—henceforth "On the American Indians"—and "On the Law of War" (*De iure belli*), both delivered in 1539. The first of these, the one which would make Vitoria celebrated, was concerned with the highly contentious question: "by what right were the barbarians subjected to Spanish rule?"[10]

Vitoria was not, of course, the first to ask this question. But he was the first to do so at length in public. *Relectiones* were essentially public lectures on topics of wider interest than most university lectures; and if contemporary accounts may be even half believed Vitoria attracted listeners by their hundreds from all across the university. He began by insisting in "On the American Indians" that his lecture was "demonstrative"—that is intended not to argue about the truth but to explain it. "Are we to suppose," he asked, that Ferdinand and Isabella, "most Catholic Monarchs" and Charles V, officially entitled "most righteous and Christian prince" might have failed "to make the most careful and meticulous inquiries" into a matter of such concern to both their security and their conscience? "Of course not:

[8]"Letter to Miguel de Arcos," 8 November 1534, in Vitoria 1991, 331.

[9]Schmitt 2003, 92.

[10]"On the American Indians" Vitoria 1991, 233.

further cavils are unnecessary, and even insolent."[11] By the time he had finished, however, it must have been clear to his audience that the Spanish Crown could make only the slimmest of claims to exercise what we today would call sovereignty and property rights—and what he called "private and public *dominium*"—in the Americas. Certainly, Charles V himself seems to have thought so since shortly afterward he issued a rebuke to the prior of San Esteban for having allowed his charges to "discuss and treat in their sermons and *relectiones*, the right that we have in the Indies, Islands and *Tierra Firma* of the Ocean Sea…. For to discuss such matter without our knowledge and without first informing us is most prejudicial and scandalous."[12]

Although it was for supposedly having denied the legitimacy of the Spanish conquests that Vitoria subsequently became famous outside Spain, it was not this which ultimately made his arguments so important for later generations. It was, instead, that in his attempt to answer the question "by what right were the barbarians subjected to Spanish rule?" he initiated a re-evaluation of the ancient concept of the law of nations—the Roman *ius gentium*—in a way which led to a fundamental re-evaluation of what Schmitt called the "*nomos* of the earth." His significance for the subsequent development of what was to become "international law" was not, that he had bequeathed to later generation a number of augments capable of grounding European claims to occupy non-European territories, or subjugate non-European peoples; it was that he had transformed what had hitherto been a body of normative moral arguments into a set of legal rights. The law of nations, therefore, became, as Niklas Luhman and others have pointed out, the sole instrument with which to recreate an order in a world that both the discoveries and the Reformation had effectively dismantled.[13]

Initially, the *ius gentium* had been the law used by the Romans in their dealing with non-Roman citizens, and it covered such universal, but non-natural institutions as slavery (defined in the *Digest* as "an institution of the *ius gentium*, whereby someone is made subject to the ownership of another, against nature").[14] Like all law, it had its origins in the *most maiorum* or the customs of the majority, for as Cicero had observed: "There is a fellowship that is extremely widespread shared by all with all."[15] This Vitoria recast as a form of positive law which, as he phrased it "is not equitable of itself [that is not identical with the natural law] but has been established by human statute grounded in reason." As Simona Langella points out, "in his commentary to the II-II, q. 57, a. 3, of 1535, Vitoria included the *ius gentium* in the positive right [*ius*]." And, as he phrased it in "On the American Indians," "the consent of the greater part of the world is enough to make it binding, especially

[11] *Ibid.*, 233–4.

[12] Printed in Getino 1930, 150–1.

[13] Luhman 2004, 440.

[14] *Digest* I. 5. IV.

[15] *De Officis*, III 69.

when it is for the common good of all men."[16] As André Azevedo Alves argues in this volume, "The *ius gentium* as Vitoria conceived it was thus common to all mankind and could be recognized by reason even though it was not created through the deliberate will of any human legislator."

What this implied was that the law of nations should be understood as that law which *could* have been agreed upon by "the consent of the greater part of the world" had anyone been in a position to discover what its collective reasoning might be. Such a law did not, however, actually require, as Vitoria's pupil and successor, Domingo De Soto put it, "a meeting of all men in one place" to decide what this was, because "reason dictates what are its particularities."[17] It was then enacted, if only *ex hypothesi*, by what Vitoria famously called the *respublica totius orbis*—"the republic of the whole world." Although this conception, as Johannes Thumfart points out in his essay in this volume, "is mainly a metaphor that Vitoria employs in one episode of the [*relectio*] *De Potestate civili*," it clearly operates, "to make the point that the undivided state of an interconnected world is more natural than the divided one and therefore ontologically and juridically precedes the latter as a stronger claim." What Vitoria had suggested was that there might exist a species of legal authority not merely between states (as the Roman *ius gentium* had been conceived) but also over all—to use Thumfart's language—the "commons" of the world. Vitoria's objective, as Franco Todescan points out here, was to avoid "the dangers implicit in individualistic and voluntaristic theories [of natural law] …. by setting up a *jus gentium* that would allow sovereign states to go beyond their contractual ties and form an organic community that would come together naturally." For Vitoria, this world *respublica* takes the form of a single legal person, with, *de iure* at least, full powers of enactment—the *vis legis*—so that, in Vitoria's words, "the law of nations does not have the force merely of pacts or agreements between men, but has the force of a positive enactment (*lex*)."[18]

By giving the "world" a juridical personality and by insisting that the law of nations was not a natural but a positive law, Vitoria was making two very striking claims. The first was that as the *respublica* of all humanity takes precedence over the nation, so the *ius gentium* must take precedence over the local legislative practices of individual states, which implies that in cases of conflict it must trump local domestic law. For no "kingdom may chose to ignore this law of nations."[19] As Francisco Castilla Urbano writes here, what Vitoria was in effect attempting to do was to transform:

> a Law of Peoples, which subjects human beings to its provisions, into a ius inter gentes, which makes of nations the main players. If the consent of the republics is the basis of the rules underlying the international order, the original dependence of the ius gentium on the

[16]Vitoria 1991, 281.

[17]Soto 1556, 197.

[18]"On Civil Power," Vitoria 1991, 40. For a more detailed account of how this operates see Deckers 1991, 345–94.

[19]*Ibid.*

> nations cannot be denied; however that does not militate against its ontological priority with regard to the nations, not only because the pacts are incumbent on the parties, but also because their goal is to protect that totality which, in so far as it is composed of moral beings, constituted humanity before any nations came into being.

It was, and remains, of course, a highly controversial argument. It was rejected by some of Vitoria's own colleagues and by most of the great modern theorists of the law of nations in the seventeenth and eighteenth centuries. It is also, for instance, precisely in denial of the claim that an international court can take precedence over a domestic one that the USA (among other states) has refused to allow itself to be bound by the International Criminal Court because that "would allow the trial of American citizens for crimes committed on American soil, which are otherwise entirely within the judicial power of the USA." Similar objections have been raised against such international agreements as the Ottawa treaty on land mines and the Kyoto Protocol against climate change. Nevertheless, as Vitoria had seen, if any international law is to be a true *law* and not a simple set of moral injunctions it cannot be brushed aside by domestic law.

The second of Vitoria's claims was that if the law of nations was truly universal, if it really did constitute the rulings of the world *respublica* it must then apply to all peoples everywhere. The Indians could not—as Mauro Mantovani reminds us in his essay—be deprived of their goods or their land (their private *dominium*) nor of their sovereignty (their public *dominium*) merely because they were unbelievers, for *dominium*, in Simona Langella's words, was a faculty which conferred upon its bearers the "capacity to use things." It therefore constituted an inalienable right, which derived from natural law not grace, and consequently applied to all peoples everywhere no matter what their religious beliefs. Human nature, and the rights and duties which derived from it, were the same in all parts of the world. In the much-cited verse of St. Mathew: "He causes his sun to rise on the evil and the good, and sends rain on the righteous and unrighteous". (4:45) To suggest otherwise was the heresy into which the Calvinists (and in particular the English colonists in America) had fallen. For a Catholic, therefore, there could exist no distinction *in law* between Christians and non-Christians, "civilized" nations and "barbarous" ones. This, argued Schmitt, meant that "he [Vitoria] no longer recognized the spatial order of the medieval *respublica Christiana* with its distinction between the territory of Christian peoples and that of heathens and non-believers."[20]

It is this formulation of the law of nations which provided Vitoria with the only legitimate grounds on which to base a claim that the wars waged by the Spanish in America against its native inhabitants might have been just ones.[21] In Question 3 of "On the American Indians" he described eight titles which might be held to be just by such criteria. The only ones to which he seems to have been prepared to give any credence, however, are Articles 1 and 5. They are also the ones most pertinent to the subject of this volume and those that played the most significant roles in Vitoria's

[20]Schmitt 2003, 107.

[21]"On the American Indians," Vitoria 1991, 264.

attempt to forge a language which might be capable of sustaining a claim to the existence of universal juridical norms.[22]

The first is what he famously called "the right of natural partnership and communication" (*ius naturalis societas et communicationis*). This, as Thumfart phrases it, serves "as anthropological, customary (*communicatio*) and material (*commons*) underpinnings of international political collaboration."[23] It is a complex set of claims divided into five propositions. At the core, however, lies an allusion to the ancient obligation to offer hospitality to strangers. For "Nature" claimed Vitoria, quoting the *Digest* "has decreed a certain kinship between men (*Digest* I.i. 3)… Man is not a 'wolf to his fellow men' - *homo homini lupus* - as the comedian [Plautus] says, but a fellow."[24] All of this brings with it an obligation to friendship for "amity between men is part of the natural law." "In the beginning of the world," he continued:

> when all things were held in common, everyone was allowed to visit and travel through any land he wished. This right was clearly not taken away by the division of property; it was never the intention of nations to prevent men's free mutual intercourse with one another by its division.

This allowed Vitoria to transform the ancient concept of hospitality—the authority he cites is Virgil—into a right under the law of nations and the natural law.[25] "Among all nations," he wrote, "it is considered inhuman to treat travelers badly without some special cause, humane and dutiful to behave hospitably to strangers." As Thumfart says, "In this way, the commons are also the base of Vitoria's strongest just title in favor of conquest."

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

This, of course, meant that the Indians could not, "lawfully bar them [the Spaniards] from their homeland without due cause."[26] If they attempted to do so, then a just war might be waged against them. Of course, this would only apply if

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[22]For a more extensive account see Pagden 2015.

[23]"On the American Indians," Vitoria 1991, 278. As he defines it, this seems to have been Vitoria's own creation. St. Augustine had suggested that denial of a right of passage might be sufficient *injuria* for a just war. But this has none of the structure of Vitoria's argument (*Quaestiones in Heptateuchum*, IV. 44; *Decretum* C.23. 2.3).

[24]"On the American Indians," Vitoria 1991, 280.

[25]*Ibid*., p. 278, citing Justinian *Institutes* I.2.1, "what natural reason has established among all nations is called the law of nations." See note above.

[26]*Ibid*., 279.

"these travels of the Spaniards are… neither harmful nor detrimental to the barbarians" something about which Vitoria remained evasive saying only that he "supposed it to be" (*ut supponimus*).[27] This assertion set in motion a prolonged debate over the limits and extent of what today is called "freedom of movement." (This is certainly not now held to be a universal right as Vitoria had argued; it is the case, however, that limited "freedom of movement" is considered to be a right (no 13) under the Universal Declaration of Human Rights of 1948 and that, of course, ever since the article 48 of the Treaty of Rome of 1957, it has been one of main guiding principles of the European Union.)

Vitoria extended the same argument to commerce. The natural right of communication delivers a right under the law of nations for all travelers (*peregrini*) to engage in trade with whosever they please "so long as they do not harm the citizens" of the lands through which they are traveling. Therefore, he added, "they [the Spaniards] may import the commodities which they [the Indians] lack and export the gold and silver and other things which they have in abundance." As André Azevedo Alves points out:

> The vigor of Vitoria's defense of the ius communicationis as a binding restriction on the legitimate power of states and empires can be illustrated by the fact that Grotius to a large extent built his own defense of the positions of the Dutch Republic in its conflict with Portugal and Spain in Asia by resorting to Vitoria's authority and to his reasoning in defense of free trade and open access to markets.

Indeed, at the very end of his lecture, Vitoria reminded his audience that the Portuguese had done just as well out of a licit trade "with similar sorts of people," without conquering them, as the Spaniards had done by possibly illicit occupation. Something which, he tentatively suggested, the Spanish crown might think of emulating.[28]

The transition from passage to trade was, however, at best, a shaky one since the right of passage, as a *natural* right could only be understood as both a "prefect" (one that is which is binding in all possible circumstances) and negative one: in that every individual has a natural right *not* to be hindered. The right to free trade, by contrast, comes our looking very much like an "imperfect" obligation. As the eighteenth-century Swiss diplomat, Emer de Vattel said of it later,—and he clearly had Vitoria in mind—"the obligation of trading with other nations is in itself an imperfect obligation, and gives them only an imperfect right…. When the Spaniards attacked the Americans under a pretence that those people refused to traffic with them, they only endeavored to throw a colourable veil over their own insatiable avarice."[29]

Furthermore, Vitoria is insistent throughout that the *ius gentium* is a body of law which must apply to all peoples equally; and this meant that if the Indians could not deny the Spanish right of free passage (and more contentiously settlement) in their

[27] *Ibid.*, 278.

[28] *Ibid.*, 291-2.

[29] Vattel 2008, 275.

territories so long as they made no attempt to violate the sovereignty (public *dominium*) of local rulers, neither could the Spanish deny such access to, say, the French. "It would not be lawful for the French to prohibit Spaniards from travelling or even living in France, or vice versa, so long as it caused no sort of harm to themselves."[30]

There were, however, serious problems with Vitoria's formulation of the argument. In 1546, the theologian, and another of Vitoria's close associates, Melchor Cano, remarked that although the Spaniards might have natural rights as travelers, or even as ambassadors, they had gone to America as neither. They had gone as conquerors. "We would not," he concluded dryly, "be prepared to describe Alexander the Great as a *peregrinus*"[31] As the Saxon jurist and historian, Samuel Pufendorf pointed out, in 1672, Vitoria's understanding of the right of hospitality confused transit, with property. This "natural communication," he wrote scathingly, "cannot prevent a property holder from having the final decision on the question, whether he wishes to share with others the use of his property." It was also, in Pufendorf's view, "crude indeed" to claim that everyone possessed such a right, irrespective of "the numbers in which they had come" or "their purpose in coming".[32]

For Pufendorf, however, the key issue was precisely the degree to which the law of nations, if it was a positive law with an international reach, could really override the civil laws of individual states. If it had been created by a consensus among nations, and not among single individuals in the state of nature relying solely upon their natural reason, then it was clear to Pufendorf that it could not, as Vitoria insisted it should, take precedence over other forms of positive law. It would, as Cano had argued, clearly be absurd to suggest that there might exist a law which would forbid a prince from controlling the passage of foreigners over his own territories. Vitoria's claim that the French could not lawfully "prevent the Spaniards from traveling to or even living in France and vice versa" would have given the French as perfect a right to wage war against Charles V as he had to make war on the Indians.

Any such right would in fact, however, be contrary to actual practice and a violation of the civil laws of Castile. Did it mean, then, that the civil laws of Castile were in some sense in violation of the common wisdom of the commonwealth of the world? Cleary the answer could only be no. In Vitoria's account, it would appear that rights that derived from the *ius gentium* must trump any laws derived from a purely civil code, since, as we have seen for Vitoria, the *respublica totius orbis* is prior to, and must take precedent over, any individual state. For Pufendorf, however, there simply could exist no right which had somehow survived the *divisio rerum*, because this had been precisely the moment in history in which the *ius gentium* itself had come into being. And this meant that the *ius gentium* was what

[30]"On the American Indians," Vitoria 1991, 278.

[31]"nisi vocetur Alexander peregrinus," *De Dominio indorum*, in Pereña 1956, 142.

[32]Pufendorf 1934, II, 364–6.

its name claimed it to be: a law which governed the relationships between states (and peoples), not a universal law governing the behavior of individuals in a hypothetical stateless condition. As Pufendorf understood it, Vitoria's assertion that any prince might possess the right to force the rulers of states "to abstain from harming others" came down to the claim that what were, in fact, private rights—such as the *ius peregrinandi*—could be used not merely to trump the rights of states, but also to legitimate wars in their defense which could of necessity, and by right, only be waged *by* states. "Most writers" concluded Pufendorf "feel that the safest reply to make is this: Every state may reach a decision, according to its own usage, on the admission of foreigners who come to it for other reasons than are necessary and deserving of sympathy." Refugees clearly possessed some kind of claim to permanent settlement, if only on the grounds of charity. But refugees had no right to behave as conquerors, and they certainly did not have any prior claim over any portion of their land of adoption. "Such persons," he concluded, "must recognize the established government of that country and so adapt themselves to it so that they may be the source of no conspiracies and revolts."[33] The Spanish had obviously not come to America as "refugees" and certainly had not recognized the established government of the Indians. Therefore, they had no right to be there at all.

The basic principle to which Vitoria was appealing, however, was the necessary universality of any law of nations. In general, the two analogous claims of the nineteenth-century-French jurist Gaston Jèze—as described here by Andrew Fitzmaurice—are broadly true: that "civilized powers have no more right to seize the territories of savages than savages have to occupy the European continent. The law of nations does not admit any distinction between the barbarians and the so-called civilized: men of all races, white or black, yellow or red, however unequal they are in fact have to be considered equal in the law." This is not to deny the accusation made by some post-colonial theorists that Vitoria's claims were often read by later generations to imply the direct opposite. But then no writer can be held accountable for the subsequent misuses made of their texts.

Merchants, furthermore, were not the only class of person to possess a right to travel. So, too, and far more problematically, were missionaries, who on Vitoria's account have a natural right to "teach them [the Indians] the truth if they are willing to hear."[34] It is this, perhaps more than any other claim, which has given rise to the post-colonial argument supposition that under the guise of universality, Vitoria was, in fact, arguing for the right of the Church to assert its authority over non-Christians.[35] But despite Vitoria's evocation of St. Mark "Go ye into the world and preach the gospel to every creature" the only *right*, Vitoria, in fact, invokes here

[33] *Ibid.*

[34] "On the American Indians," Vitoria 1991, 284.

[35] Antony Anghie, for instance claims, that "Vitoria bases his conclusion that the Indians are not sovereign on the simple assertion that they are pagan" Anghie 2005, 29. Cf. Sharon Korman who infers from Vitoria's claim that non-Christian rulers were bound to admit Christian missionaries under the *ius peregrinandi* implied that non-Christian states did not possess the same legal standing as Christian ones. Korman 1996, 53.

is an appeal to what was known as the "Law of Vicinage" and the "defence of the innocent" (to which I shall return). For "brotherly correction is as much part of the natural law as brotherly love" and the non-Christian is always, by definition, in need of correction.[36] But although the Indians may be, by the terms of the *ius communicationis*, under an obligation to allow the Christians to be *heard*, they are under no obligation to listen, much less, of course to believe what they hear. Vitoria was prepared to accept that if the Indian princes were actively to oppose the conversion of their subjects by force they might be resisted since this would constitute a harm inflicted by the rulers on the ruled. In that case: "the Spaniards could wage war on behalf of their [i.e., the Indians'] subjects for the oppression and wrongs they were suffering, especially in such important matters."[37] Then again, however, what applied to the Americans would also have to apply to the rest of the world. There is nothing in the logic of Vitoria's argument which could justify, for instance, denying admission of non-Christian missionaries to *Spain*. He did not, of course, say so, but it was surely such implications which led Charles V's advisors to condemn the *relectio* as "most prejudicial and scandalous."

The second of Vitoria's "just titles" (although it is, in fact, the fifth) is a remote ancestor of what in modern international law comes under the general heading of the "responsibility to protect." This, which was finally adopted by the United Nations in the General Assembly of the World Summit Outcome in 2005, has subsequently become what one analyst has called "the accepted international reflex in principle."[38] Vitoria calls it the "defence of the innocent against tyranny." The Spanish might, he wrote—and only *might*—have a right to intervene in the Americas, "either on account of the personal tyranny of the barbarians' masters towards their subjects or because of their tyrannical and oppressive laws against the innocent." As in Vitoria's words "the Spaniards are the barbarians' neighbors, as is shown by the parable of the Samaritan (Luke 10: 29-37); …. the barbarians are obliged to love their neighbors as themselves," and vice versa.[39] Under the terms of what was often called the "Roman Law of Vicinity," neighbors also have a corresponding duty to assist each other in times of crisis. Now as the rulers of individual states have an unassailable right to "punish those of its own members who are intent on harming it with execution or other penalties," it clearly follows that: "If the commonwealth has these powers against its own members, there can be no doubt that the whole world has the same powers against any harmful and evil men."[40]

But although, as we have seen, the world *respublica* does possess *de iure* the "power to enact laws" (*potestas ferendi leges*), there clearly exists no institutions

[36]"On the American Indians," Vitoria 1991, 284.

[37]*Ibid.* 285.

[38]Evans 2008, 53.

[39]*Ibid.* 287–8.

[40]"On the Law of War" Vitoria 1991, 305.

that could transform this into a de facto authority.[41] The question then arises: who, in the absence of some analogue of the United Nations, has the right to do the job for "the whole world"? Vitoria's answer is "the prince," by which he apparently means any legally established ruler, capable of assuming the legislative authority of the entire world for "these powers can only exist if exercised though the princes of the commonwealth":

> The prince has the authority not only over his own people but also over foreigners to force them to abstain from harming others; this is his right by the law of nations and the authority of the whole world. Indeed, it seems he has this right by natural law: the world could not exist unless some men had the power and authority to deter the wicked by force from doing harm to the good and the innocent.[42]

On Vitoria's account, under the appropriate conditions, the sovereign of any one state could draw upon the authority of the law of nations in order to act on behalf of the world *respublica.* In doing so, however, he was not exercising the purely private right that "any person even a private citizen may declare and wage a defensive war"—since he had not himself been harmed by the behavior of the "barbarians."[43] He was instead assuming the legislative authority of the *respublica totius orbis*, and in doing so, as Francisco Castilla Urbano explains here, he was constrained to act *only* for the sole and exclusive good of the world commonwealth. In the case of the Americas, then, the Spanish are merely the instruments of a putative international community. They are in America by historical contingency, and the task of defending the innocent has thus fallen to them. But it could just as easily have been assumed by any other ruler, Christian or—since unbelievers have just as much right to "public *dominium*" as Christians—non-Christian. The entire argument is, however, at best problematical, since it implies that the authority to act on behalf of one legal entity—the international community—can only derive from another which is, historically, a subsequent creation.

The principal evidence Vitoria used to support his claim that the American Indians were being forced to live under "tyrannical and oppressive laws against the innocent" was human sacrifice and cannibalism. Although Vitoria accepts that there is no prohibition against cannibalism "in divine or civil law" and that it is not, therefore, a mortal sin "provided that it is not against charity to God or one's neighbor" (although it is hard to know who one is going to eat if not one's neighbor); it is clearly contrary to the *ius gentium* since it "is held in abomination by all nations who have a civil and human life."[44] Human sacrifice is more tricky if only because the biblical stories of Abraham and Jephthah seemed to imply that

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[41]"On Civil Power," Vitoria 1991, 40 and see Miaja de la Muela 1965. Vitoria like most scholastics, accepted the traditional distinction between *potestas* and *auctoritas* (on which Hobbes heaped such scorn). On this issue see, Wagner 2011 who describes *potestas* as a "factual power reflexively embedded in a legal order."

[42]"On the Law of War," Vitoria 1991, 305.

[43]*Ibid.*, 299.

[44]"On Dietary Laws," Vitoria 1991, 209.

God—or at least the God of the Old Testament—was not averse to human sacrifice at least in principle. But that, too, is finally dismissed on the grounds that no man may "deliver himself up to execution" (unless justly convicted of a crime), for the same reason that he may not commit suicide, because possession in his own body (*dominium corporis suuis*) belongs not to him, but to God.[45]

It is important to note, however, that although human sacrifice, at least, constitutes a violation of the law of nature, it is not that which, in Vitoria's view, might justify intervention, any more than a Christian prince might legitimately make war on another Christian prince because his subjects are "adulterers or fornicators, perjurers or thieves because these things are against natural law."[46] As Francisco Suárez observed later, it was not man's task to vindicate the Almighty. If God wishes to take revenge upon the pagans for their sins, he remarked acidly, "he is capable of doing so for himself."[47] The difference between "unnatural" activities practiced among individuals in Christian states and the cannibalism and human sacrifice practiced in the Americas is that whereas the former are forbidden by law, the latter were sanctioned by the state. They are, that is, a part of the civil law. It is this which makes them tyrannical. The *harm* which the rulers of the barbarian are prepared to inflict upon their own subjects in this way clearly constitutes a breach not of the natural law but of the *ius gentium*. And it because of this, not because of the gruesome nature of the practices themselves, that the human community may intervene to prevent them.

It is also the case, Vitoria insisted, that: "It makes no difference that all the barbarians consent to these kinds of laws and sacrifices, or that they refuse to accept the Spaniards as their liberators in this matter." For as Soto phrased it, "that which nature teaches is not within the reach of everyone, but only those who have serene reason and are free from all obscurity (*nebula*)."[48] Prolonged habit is capable of distorting every human being's understanding of the natural law and by implicating the law of nations. "For sometimes," wrote Suárez, "due to bad customs, and in those who have fallen profoundly into evil, the knowledge of the natural law may be changed."[49] Clearly, then, if the rulers of the "barbarians" refuse to abandon their crimes against their own peoples: "their masters may be changed and new princes set up."[50]

It is worth noting, however, that neither the "defence of the innocence" nor "the responsibility to protect" is able to create sovereignty. In other words, although Vitoria does not say on what grounds the "new prince" would be created, there is nothing to suggest that it should be a Spanish one. Indeed, he was quite explicit that: "If necessity and the requirements of war demand that the greater part of

[45] *Ibid.*, 215.
[46] *Ibid.*, 1.5 218.
[47] Suárez 1954, 149–152.
[48] Soto 1556, 195.
[49] Suárez 1965, 94.
[50] "On the American Indians," Vitoria 1991, 287–8.

enemy territory, or a large number of cities be occupied in this way, they ought to be returned once the war is over and peace has been made."[51] Although this was not written in the American context, it would seem to suggest that indeed the new prince would have to be a native one.

Vitoria's conception of war "in defence of the innocent," in common with all attempts to justify armed intervention in the interests of "others," fails, of course, to specify very clearly what would count as "tyranny" and "oppressive laws" outside the two specific—and extreme—cases he cites. It was, too, an innovative move since, in general, theories of the "just war" avoided claims made on behalf of third parties, unless these were, specifically, involved as "allies" (*socii*). The Indians might for instance have sought the assistance of the Europeans in their (legitimate) struggles against other Indians. This had indeed, as Vitoria pointed out, happened in the case of the Tlaxcalans who—at least in Hernán Cortés' account of events—had sought Spanish aid in their struggle against the Aztecs. But no subsequent writer on the laws of war was prepared to accept that one ruler had the authority to decide what constitutes an "offence against the innocent" in another state, nor to intervene on their behalf. Intervention was only licit if the actions of that state also in some way constituted a clear and direct threat to the belligerent.

It was also the case that "defence of the innocent" constituted, in effect, the intervention by a *state* in defense of the rights of *individuals*. It might well—indeed most certainly would—involve substantial damage to non-combatants,—a subject explored in detail in Jörg Alejandro Tellkamp's essay—most especially, if as Vitoria insisted, the "innocents" in question do not need to recognize the fact that they *are* victims. Furthermore, as Tellkamp points out (although in the context of a rather different moral issue), "because the moral action has to be evaluated in its entirety and not only with regard to the intended end," it could well be argued that the disruption of the state, which in other instances (see the account by André Azevedo Alves) Vitoria viewed as the greatest possible harm, would far outweigh the good that might pertain to individuals threatened by either human sacrifice or cannibalism.

It had to wait until something which clearly resembled an international community which possessed some sense of itself—however vague—as a political order —that is to say it had to wait until first the creation of the League of Nations in 1920 and then the creation of the United Nations in 1945, before it became possible to think of Vitoria's "just title" as what it has now subsequently become: namely the principal legal ground for the intervention of one state in the affairs of another. It had to wait, that is, until the "international community" began to look upon itself as something resembling Vitoria's *respublica totius orbis*, and the "law of nations" became accepted, in principle at least, as a universally binding law which could not be simply overruled by domestic legislation.

We still, of course, have a long way to go. But Vitoria's *relectiones* set in train a series of debates, which have by no means ceased, about what the international

[51] "On the Law of War," Vitoria 1991, 324.