

PART I

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*Ius Gentium* and the Origins of International Law

Cambridge University Press  
978-1-108-47423-8 — Rights and Civilizations  
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Excerpt  
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## The Rights of Peoples and *Ius Gentium*: Their Origins in the Modern Age

In response to the Protestant Reformation, Catholicism set out to reinforce its own doctrinal principles. This it did mainly by going back to the philosophy of Thomas Aquinas. This renewed doctrinal emphasis, sometimes referred to as Second Scholastic, developed out of the Spanish university of Salamanca. Among the leading exponents of this School of Salamanca was the Dominican friar Francisco de Vitoria (1483–1546). The historical situation he found himself grappling with was singularly complex and tormented: on the one hand it was felt necessary for Catholicism to counteract the Reformation; on the other the nascent sovereign states were bent on asserting their power over the Papacy and the Holy Roman Empire.

Furthermore, two fundamental questions were confronting Christianity: there was the problem raised by the discovery of the New World, making it necessary to legitimize its conquest at the hands of the European powers; and there was the expansionist drive of Islam, which posed an existential threat to the Western world of Christianity.

The analysis and solutions that Vitoria offers in addressing these crucial problems have earned him a place, next to Hugo Grotius, as one of the founding fathers of *ius gentium*, that is, of modern international law. We should therefore discuss the principles he laid at the foundation of the law of peoples, with a particular focus on four fundamental problems: (1) the relation between the Papacy and the Empire, (2) the rights of peoples, (3) the legitimation of the Spanish conquest, and (4) the criteria of “just war.”

### 1.1 The School of Salamanca and the Foundation of Power

In response to the absolutist policies pursued by Charles V and Philip II of Spain, the School of Salamanca – otherwise known as Second

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Scholastic, or Early Modern Scholasticism – formulated the doctrines of natural law and of limited sovereign power, all the while setting the state on a contract-theory foundation and making the argument that political power ultimately rests with the people.<sup>1</sup>

In Spain this movement was taken to extremes with equal force against the Pope and the Emperor. Wrote Vitoria: “Even if the Emperor were the lord of the world, that would not entitle him to seize the provinces of the Indian aborigines and to erect new lords and put down the former lords or to levy taxes. The Pope is not civil or temporal lord of the whole world, in the proper sense of civil lordship and power.”<sup>2</sup>

This rejection of a universal monarchy entailed two major consequences: that there is a natural law of universal scope, applying as *ius gentium* to the whole of humanity, and that there is a plurality of autonomous and sovereign powers.<sup>3</sup>

In the view of Fernando Vázquez, a jurist influenced by Vitoria,<sup>4</sup> princes and peoples alike were sovereign subjects under the *ius gentium*. He held that when the people form into a *res publica* under the law, their power vests entirely in the sovereign. On this view the *ius gentium* encompassed both international law and the domestic law internal to each state.<sup>5</sup>

<sup>1</sup> In this regard, see Gerhard Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriß* (Berlin: Duncker & Humblot, 1978), p. 34.

<sup>2</sup> Franciscus de Vitoria, “The first *relectio* of the Reverend Father, Brother Franciscus de Vitoria: On the Indians lately discovered,” in Ernest Nys (ed.), *De Indis et de Iure Belli Relectiones, Being Parts of Relectiones Theologicae XII* by Franciscus de Vitoria, trans. John Pawley Bate (New York and London: Oceana Publications, 1917), titles 1 and 2 of sec. 1. The Latin original: “Imperator non est totius orbis dominus. Dato quod imperator esset dominus mundi, non ideo id posset occupare provincias barbarorum, et constituere novos dominos, et veteres deponere, vel vectigalia capere. Papa non est dominus civilis, aut temporalis totius orbis, loquendo proprie de dominio et protestate civili.” Francisco de Vitoria, “De Indis insularis relectio prior” (1539), in *Relectiones Theologicae XII, Tomus Primus* (Lugduni: apud Iacobum Boyerium, 1557), pp. 313, 319, 322.

<sup>3</sup> Ernst Reibstein, *Von der Antike bis zur Aufklärung*, vol. 1 of *Völkerrecht: Eine Geschichte seiner Idee in der Lehre und Praxis* (Freiburg: Verlag Karl Alber, 1957–58), p. 279. Reibstein observes that the Spanish theologians were heirs to the Conciliar movement, which sought to reform ecclesiastic policy by vesting the Church’s supreme authority in an ecumenical council, and whose lasting effect consisted in modernizing the medieval doctrine under which the power of the state is derived.

<sup>4</sup> Reibstein claims that Vasquez met Vitoria in Salamanca and from him borrowed some of the essential elements of his own doctrine. See Ernst Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts: Studien zu den “Controversiae illustres” des Ferdinandus Vasquius (1559)* (Bern: Verlag Paul Haupt, 1949), p. 21.

<sup>5</sup> Wrote Vázquez: “Nos auté advertimus quod omnes homines iure naturae et gentium utimur, regimur et subiacemur a quo minime recedere fas est.” Fernando Vázquez de

In the view of Vitoria, by contrast, the sovereign held power through the people, but this power ultimately derived from God, such that the power of the state was founded on a divine mandate, and under natural law it was with the people that power ultimately rested. The state's sovereignty thus came to it by way of the political community, meaning the *res publica*,<sup>6</sup> on which it depended for its foundation. In this way a close relation was established between the sovereignty of the state, which was gaining recognition in international law, and the self-determination of the people.

Finally, the sovereignty of states was set by Vitoria within the frame of his *totus orbis* doctrine,<sup>7</sup> under which all peoples form a single great community extending across the entire world. The basic feature of this community consisted in its being governed exclusively by the laws of justice and fairness.

## 1.2 The Rights of Man, the Rights of Peoples, and *Ius Gentium* in Francisco de Vitoria

The *totus orbis* conception is clearly grounded in natural law. Indeed, Vitoria proceeds from an assumption of equality among men and peoples, whose mutual relations must accordingly stand on an equal footing.<sup>8</sup>

This conception is based on the premise that all men are endowed with the same material and spiritual nature that shapes their development as

Menchaca, *Controversiarum illustrium aliarumque usu frequentium libri tres* (Venice: Rampazetus, 1564), I, 26, § 14, p. 80. And: "Sic ergo de iure communi omnium gentium princeps non lege superior, sed potius eius minister, custos et executor est, ut iam diximus" (ibid., I, 45, § 3, p. 127). Furthermore, "ius comune à iureconsultis appellatur ius naturale vel gentium" (ibid., I, 45, § 17, p. 128).

<sup>6</sup> Wrote Vitoria: "[Question 1, Article 4: The material cause of civil power is the commonwealth.] / But the material cause on which this naturally and divinely appointed power rests is the commonwealth." Francisco de Vitoria, "On civil power," in Anthony Pagden and Jeremy Lawrance (eds.), *Political Writings* (Cambridge: Cambridge University Press, 1991), p. 11. The Latin original: "Constitutione ergo divina, respublica hanc potestatem habet: causa vero materialis in qua huiusmodi potestas residet iure naturali." Vitoria, "Relectio de potestate civili" (1528), in *Relectiones Theologicae* (n. 2), p. 183.

<sup>7</sup> As Vitoria put it: "The whole world, which in a sense is a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations." Vitoria, "On civil power" (n. 6), p. 40. The Latin original: "Habet enim totus orbis, qui aliquo modo est una respublica, potestatem ferendi leges aequas, et convenientes omnibus, quales sunt in iure gentium." Vitoria, "Relectio de potestate civili" (n. 6), p. 208.

<sup>8</sup> See Josef Soder, *Die Idee der Völkergemeinschaft: Francisco de Vitoria und die philosophischen Grundlagen des Völkerrechts* (Frankfurt am Main: Metzner Verlag, 1955), p. 80.

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members of a community. The approach behind this conception is Stoic,<sup>9</sup> grounding natural law in human nature, and so in the natural equality of men: on the one hand the interests and ambitions of individuals define the structure and aims of the state, but on the other hand they find their limit in the *bonum commune*, or common good.<sup>10</sup> Life alone is inviolable, and in relation to it even the common good cannot take precedence.

What explains Vitoria's interest in an investigation of international law is the necessary connection that in his doctrine obtains between the equality of men and the equality of peoples: just as human nature grounds the equality of men – for they all have that same element in common – so it also grounds the equality of peoples. And here Vitoria goes so far as to put forward the idea that just as individuals have rights, so do the peoples they belong to.

In short, the community of peoples and of states is based on the same human nature “from which derive those higher legal principles that govern the man's natural membership in the state and the states' membership in the community of the whole of humanity.”<sup>11</sup>

In virtue of the link Vitoria found between the natural rights of man and the *ius gentium*, governing relations among states, he was prompted to draw some conclusions of disruptive force, especially on Spain's policy of conquest. These are considerations that matter importantly even in the contemporary debate.

The most significant sources for understanding Vitoria's theses on the equality of peoples and states are the *De Temperantia*, the *Relectio de Indis*, and the *Relectio de Iure Belli*, three writings in which are contained the principles of his doctrine on the law of peoples.

The problem at hand was whether the peoples of the New World could be subjugated, considering that they followed customs contrary to natural law and to nature and practiced killing. In reality, Vitoria observed, Christians themselves were tainted with a record of criminal behavior that would on the very same basis warrant a war waged by the Indios against Christian faithfuls.<sup>12</sup> In short, Vitoria accords an equal standing

<sup>9</sup> Oestreich, *Geschichte der Menschenrechte* (n. 1), p. 34.

<sup>10</sup> As Vitoria put it, “with regard to natural things the community is superior and the individual is subject or inferior.” Vitoria, “On the power of the Church,” II, in *Political Writings* (n. 6), p. 119. The Latin original: “Licet enim in ordine ad naturalia communitas sit superior, et quilibet homo velut subiectus et inferior in ordine.” Vitoria, “Relectio de potestate ecclesiae” (1532–1533), II, in *Relectiones Theologicae* (n. 2), p. 120.

<sup>11</sup> Soder, *Die Idee der Völkergemeinschaft* (n. 8), p. 82; my translation.

<sup>12</sup> “FOURTH CONCLUSION: Christian princes cannot wage war on unbelievers on the grounds of their crimes against nature, any more than for other crimes which are not

to pagans and Christian peoples in what concerns the right to declare war.<sup>13</sup>

Despite this equiparation, Vitoria finds it legitimate to wage war to protect the rights of man, especially in the face of human sacrifice.<sup>14</sup> So, if on the one hand this position posits human life as a supreme value, on the

against nature. For example, they cannot use the sin of sodomy, any more than the sin of fornication, as a pretext.” Vitoria, “On dietary laws, or self-restraint,” in *Political Writings* (n. 6), p. 224; italics in original. Vitoria carries this reasoning further: “Now by this argument the princes of non-Christians would have as much right to declare war on Christians who sin against nature” (ibid., p. 225).

The two passages in the Latin original: “Quarta conclusio: Principes cristiani non possunt inferre bellum infidelibus ratione delictorum contra naturam plus quam propter alia delicta quae non sunt contra naturam, puta propter peccatum sodomiae plus quam propter peccatum fornicationis.” Vitoria, fragment belonging to the *Relectio de Temperantia* (1537), appendix I, 2, to Vicente Beltrán de Heredia (ed.), *Comentario al tratado de la ley* (Madrid: Instituto Francisco de Vitoria, 1952), p. 107. “Item sequeretur quod principes infideles possunt etiam inferre bellum christianis, qui peccant contra naturam” (ibid., p. 109).

In this regard, see Soder, *Die Idee der Völkergemeinschaft* (n. 8), p. 84. On Vitoria’s fragment belonging to the *Relectio de Temperantia*, see Ada Lamacchia, “Francisco de Vitoria e l’innovazione moderna del diritto delle genti,” introduction to Vitoria, *Relectio de Indis: La questione degli Indios* (Bari: Levante Editori, 1996), pp. LIII ff.

<sup>13</sup> See Lamacchia, “Francisco de Vitoria” (n. 12), p. LIV. The radical nature of these theses was probably the reason why Vitoria ended up removing the fragment from the *Relectio de Temperantia*. The fragment was found by Vicente Beltrán de Heredia between 1929 and 1930 in the Dominican archives in Seville. On the find, see ibid., LI.

<sup>14</sup> Wrote Vitoria: “Christian princes can declare war on the barbarians because they feed on human flesh and because they practice human sacrifice.” Vitoria, “On dietary laws, or self-restraint” (n. 6), p. 225. Elsewhere he writes: “I assert also that without the Pope’s authority the Spaniards can stop all such nefarious usage and ritual among the aborigines, being entitled to rescue innocent people from an unjust death.” Vitoria, “On the Indians lately discovered” (n. 2), sec. 3.15, § 403.

The Latin original: “Principes christianorum possunt inferre bellum barbaris quia vescuntur carnibus humanis et quia sacrificant homines.” Vitoria, fragment from the *Relectio de Temperantia*, in *Comentario al tratado de la ley* (n. 12), p. 107. “Dico etiam, quod sine autoritate Pontificis possunt Hispani prohibere barbaros ab omni nefaria consuetudine, et ritu, quia possunt defendere innocentes a morte iniusta.” Vitoria, “De Indis” (n. 2), p. 368.

In the same vein, Vitoria found that even though the Indios were possessed of human rationality, they did not manage to develop its full potential. Indeed, taking up the Aristotelian distinction between actuality and potentiality, he asserts that “God and nature are not wanting in the supply of what is necessary in great measure for the race. Now, the most conspicuous feature of man is reason, and power is useless which is not reducible to action.” Vitoria, “On the Indians lately discovered” (n. 2), sec. 1, 23rd proposition. The Latin original: “Deus et natura non deficiunt in necessariis pro magna parte speciei. Praecipuum autem in homine est ratio, et frustra est potentia, quae non reducitur ad actum.” Vitoria, “De Indis” (n. 2), p. 309. Vitoria accordingly found it

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other it ambiguously lends itself to justifying the Spanish conquerors in waging war on the peoples of the New World.

As for the rights of people, the question that comes up instead is that of recognizing the rights the New World populations have to the goods in their possession. Here Vitoria argues that the Spanish conquest is not grounds for robbing them of their riches.

These ideas are further developed in the *Relectio de Indis*, where Vitoria, as we saw, argues that the Holy Roman Emperor is not the sovereign of the world (*dominus totius orbis*), and so that it would not be possible to take this route in legitimizing the subjugation of New World peoples. After all, Vitoria argues, even those who see the Emperor as having dominion over the world (*dominium orbis*) must concede that such dominion is exercised not by property (*per proprietatem*) but by jurisdiction (*per iurisdictionem*).<sup>15</sup> This is consistent with the other thesis advanced by Vitoria, who asserts that the peoples of the Americas before the Spanish conquest enjoyed the status of legal persons, and that among them there accordingly existed ownership relationships. In this respect, too, their position was equal to that of Christian peoples.<sup>16</sup> The foundation of *ius gentium* in natural law, a foundation in turn rooted in Stoic doctrine, thus makes it possible to construct a law of peoples predicated on the principle that all men and peoples have equal rights.

legitimate for the Spaniards to administer the “barbarian” peoples, provided that this policy not be carried out in self-interest but for the benefit of the Indios: “It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns [...], so long as this was clearly for their benefit.” Vitoria, “On the Indians lately discovered” (n. 2), sec. 3.18, § 407. The Latin original: “Posset ergo quis dicere, quod pro utilitate eorum possent principes Hispani accipere administrationem illorum, et constituere illis per oppida praefectos et gubernatores [...] cum illa limitatione, ut fiant propter bona, et utilitatem eorum, et non tantum ad quaestum Hispanorum.” Vitoria, “De Indis” (n. 2), pp. 372–73. On this point, cf. Martin van Gelderen, “Vitoria, Grotius and human rights: The early experience of colonialism in Spanish and Dutch political thought,” in Wolfgang Schmale (ed.), *Human Rights and Cultural Diversity: Europe, Arabic-Islamic World, Africa, China* (Goldbach: Keip Publishing, 1993), p. 221.

<sup>15</sup> Vitoria, “On the Indians lately discovered” (n. 2), sec. 2.2, § 349: “even those who attribute lordship over the world to the Emperor do not claim that he is lord in ownership, but only in jurisdiction.” The Latin original at Vitoria, “De Indis” (n. 2), p. 320. Cf. Soder, *Die Idee der Völkergemeinschaft* (n. 8), p. 89.

<sup>16</sup> Vitoria, “On the Indians lately discovered” (n. 2), sec. 1.24, § 336: “the conclusion stands sure, that the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view.” The Latin original: “Restat conclusio certa, quod antequam Hispani ad illos venissent, illi erant ita veri domini, et publice et privatim.” Vitoria, “De Indis” (n. 2), p. 310.



### 1.3 The Legitimation of the Spanish Conquest of the New World

As straightforward as Vitoria's theses may seem in the outline just offered, there is a greater complexity to them. Indeed, in asserting the rights of the Indios, he did not rule out the legitimacy of the Spanish conquest. Even if neither the Spanish discovery of the New World nor its conquest and occupation was legal grounds for exercising sovereign power over the same lands, for these were subject to the dominion of its non-Christian peoples, the Spanish did, in his judgment, have other grounds. On top of the list he placed "natural partnership and communication,"<sup>17</sup> giving the Spaniards the right to stay in and travel the lands of the Indios (so long as no damage was done to them). Another ground lay in the right to wage war on them if any of their sovereigns should embark on a policy of steering back to idolatry the Christian converts who were subject to their rule. Another one still was papal authority, so long as the Pope willed that converted Indios come under the rule of a Christian sovereign. And, as noted, Vitoria also mentions the imperative to protect innocent people against inhuman laws; an uncoerced decision of the Indios to accept the king of Spain as their sovereign; and a call for Spanish help by any local population engaged in conflict with another.

But as Carl Schmitt observes, especially important among the grounds on which to base the Spanish conquest was the one listed as the "second title," by *papal mandate*: this was held up as the true ground of legitimacy. It consisted in the Pope entrusting to the Spaniards the mission to crusade and convert the Indios to Christianity,<sup>18</sup> from which also derived the *justness of war*, which could be waged on that basis, and an ensuing conquest would thereby also be legitimate. From these grounds follow

<sup>17</sup> Vitoria, *Political Writings* (n. 6), p. xxvi. Luigi Ferrajoli underscores in this regard how the foundation on which Vitoria rested his idea of an international community as a *communitas orbis* lay in what he referred to as *ius communicationis ac societatis*, along with the bodies of law it entailed, most notably *ius commercii* and *ius migrandi*: this, in his view, provided the ground on which the Spanish conquest found its legitimation. See Luigi Ferrajoli, "Dai diritti del cittadino ai diritti della persona," in Danilo Zolo (ed.), *La cittadinanza: Appartenenza, identità, diritti* (Rome and Bari: Laterza, 1994), p. 290.

<sup>18</sup> See Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos Press Publishing, 2006; orig. pub. 1950). Wrote Vitoria: "Another possible title is by way of propagation of Christianity." Vitoria, "On the Indians lately discovered" (n. 2), sec. 3.9, § 397. The Latin original: "Alius titulus potest esse scilicet causa religionis christianae propagandae." Vitoria, "De Indis" (n. 2), p. 352.

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some implications of deep significance, some of these relating to the cultural backdrop against which to set Vitoria's "law of peoples," others instead relating to the criteria of "just war" and what these in turn mean, which will be the topic of the next section.

In Vitoria's worldview, "although [...] the Pope is not temporal lord, yet he has power in matters temporal when this would subserve."<sup>19</sup> This stance, according to Schmitt, locates Vitoria's thinking within the conception of the medieval *res publica Christiana*, in which the Papacy and the Empire figured as two dispensations within the same unity. The Church also secured the legitimacy of any war that might be waged under its own authority, for the papal mandate would clearly set out the *iusta causa* of such a war.

This doctrine fell out of favor only with the advent of the system of territorial states, when it would no longer be possible to reconcile it with the European international law proper to the interstate period from the sixteenth to the twentieth century. Schmitt characterizes the transformation by noting that "the completely secularized international law now in force is based on the territorial sovereignty of states, each of which might conclude its own concordat [with the Vatican], none of which recognizes any spiritual authority with regard to international law, and all of which treat religious questions as purely internal state matters."<sup>20</sup>

On this modern conception, the criterion for the justness of war would no longer lie in the authority of the Church but in the equal sovereignty of states within the system of *jus publicum Europaeum*. In this system, predicated on the balance of power among states, the criterion of just cause would no longer hold sway, and all wars waged by sovereign states would be considered just. The ecclesiastic argument would give way to the legal one, and the moral *iusta causa* argument would be displaced by the formal-legal *justus hostis* one.<sup>21</sup>

However, without denying that Vitoria's doctrine belongs in the context of the medieval *res publica Christiana*, it must also be underscored that this doctrine was highly innovative in recognizing the plurality of sovereign states and the equal rights of peoples (even if Vitoria managed

<sup>19</sup> Victoria, "On the Indians lately discovered" (n. 2), sec. 3.10, § 398. The Latin original: "Probatur, quia licet [...] papa non sit dominus temporalis, tamen habet potestatem in temporalibus in ordine ad spiritualia." Vitoria, "De Indis" (n. 2), p. 363.

<sup>20</sup> Schmitt, *The Nomos of the Earth* (n. 18), pt. II, chap. 2, § B, p. 111.

<sup>21</sup> *Ibid.*, chap. 3, § C, pp. 133 ff.