Francisco de Vitoria and the Meaning of Aboriginal Rights

THOMAS FLANAGAN

Section 35 of The Constitution Act, 1982, entrenched "the existing aboriginal and treaty rights of the aboriginal peoples of Canada" in the Canadian constitution. Yet no one then or now has a precise idea of the content of these "aboriginal rights." In this state of intellectual confusion, we may learn something by recurring to classic works of international law that dealt with the clash between Indians and Europeans. This paper will look at Francisco de Vitoria, *De Indis* (1539). Vitoria has been acclaimed as the father of international law; understanding him is, if not the end of the matter, at least a good beginning.

Felix Cohen, a noted American authority on Indian law, wrote that our "concepts of Indian title" are mainly "to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law" (43-44). Canadian writers such as Peter Cumming, Neil Mickenberg, and Maureen Davies have echoed this favourable assessment (Cumming and Mickenberg 14; Davies 20-22). But this view, although not incorrect, is misleading because it is partial and one-sided. It rests on a reading of Vitoria that emphasizes Section II of *De Indis* while virtually ignoring Section III. It will be shown below that Vitoria's position is far more complex than the simple advocacy of the rights of Indians as rational human beings.

Vitoria never travelled to the New World and had no first-hand knowledge of Indians. However, his attention was drawn to Pizarro's spectacular conquest of Peru (1531-33) when he encountered in the confessional some of the *conquistadores* who came to Salamanca to seek absolution for sins of murder or pillage committed against the Incas. A letter of 1534 shows Vitoria's reaction: "My blood runs cold," he wrote, at the mention of their crimes. He saw "no other motive for the war than that of robbery," and he thought the conquerors should make restitution for their sins (Brennan 114-16).

Vitoria, however, did not consider the conquest as such unjust. "I do not dispute that the Emperor can conquer the Indies, for I presume that, strictly speaking, he can do so." And again: "I consider all the battles and conquests

to be good and holy." Tellingly, he did not propose that the Spanish soldiers should make restitution by returning the Incas' property to them; rather they should give half of it to the Spanish poor.

To understand the complexities of Vitoria's view, we must turn to his *De Indis recenter inventis Relectio*. It is divided into three sections. The first is a sort of general introduction, of which the main topic is the question

> whether the aborigines in question were true owners in both private and public law before the arrival of the Spaniards; that is, whether they were true owners of private property and possessions and also whether there were among them any who were the true princes and overlords of others (*utrum barbari isti essent veri domini ante adventum Hispanorum, et privatim et publice, i.e., utrum essent veri domini privatarum rerum et possessionum et utrum essent inter eos aliqui veri principes et domini aliorum*) (Vitoria 120, 222).

Dominium is a scholastic concept that includes both private control of property and public control of government (*et privatim et publice*); in modern language one would speak of both ownership and sovereignty as aspects of *dominium*.

Vitoria cited two *a priori* reasons why the Indians might be incapable of *dominium*: that they were heretics, and that they were irrational. On the first point, he agreed that they were heretics but denied that heresy precluded a capacity for *dominium* (123-25). On the second point, Vitoria agreed that rationality was necessary for *dominium* but denied that Indians were irrational: "This is clear, because there is 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; they also have a kind of religion" (127). That the Indians seemed "so unintelligent and stupid," Vitoria attributed mostly "to a bad and barbarous upbringing, for even among ourselves we find many peasants who differ little from brutes" (127-28). The upshot of the argument was thus "that the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners" (128).

Vitoria went on in Section II to consider seven mistaken reasons or "titles" which might be advanced to justify the conquest of the Indies and the seizure of their inhabitants' property. This is the section of *De Indis* which is so often quoted in contemporary discussions of aboriginal rights. Note that the seven titles treated by Vitoria represent his own exhaustive attempt to think of reasons; not all these reasons were commonly given at the time (Brennan 120).

Restated in modern language, the seven titles are:

1. The Holy Roman Emperor, who at that time was also King of Spain, is the rightful ruler of the whole world.
2. The Pope is temporal monarch of the whole world and has given the Indies to Spain.
3. The Spanish can claim the Indies by right of discovery.
4. The Spanish may conquer the Indians because they have refused to become Christians.
5. The Indians may be conquered in punishment for their violations of natural law, such as sodomy, human sacrifice and cannibalism.
6. The Indians have voluntarily submitted to the King's emissaries.
7. God has made a special grant of the Indies to Spain. (Vitoria 129)

The first two points, which would not impress a modern reader, were dealt with thoroughly by Vitoria. He showed that the sixteenth century was a world of nations, not a single realm subject to the Holy Roman Emperor, and that the Pope was only a spiritual, not a temporal ruler (129-38). The third argument, the right of discovery, is more relevant to the modern student. Vitoria admitted the right of discovery (*ius inventionis*) in the abstract but held it inapplicable in this case because the Indies were not *nullius terra*. As proved in Section 1, the "barbarians were true owners, both from the public and from the private standpoint (139).

Again, Vitoria treated more thoroughly than would a modern author the contention that the Indians might be conquered because of their refusal to become Christians. He showed that this principle was not generally followed in dealings with other non-Christian peoples, that the gospel had not yet been preached to the Indians in any convincing way, and that in any case religious conversion should be uncoerced (140-45). More interesting to us is his discussion of the fifth title, that Indians could be punished by the Spaniards for heinous crimes against natural law. Here again, Vitoria argued that this principle was not generally followed. Even in Christian nations, even among the Spaniards themselves, there were frequent violations of natural law. If this principle were to be followed, "there would be daily changes of kingdoms, seeing that there are many sinners in every realm" (147).

Vitoria gave short shrift to the last two titles. The Indians may have appeared to submit to the Spanish Crown, but they "did not know what they were doing; nay, they may not have understood what the Spaniards were seeking. Further, we find the Spaniards seeking it in armed array from an unwarlike and timid crowd" (148). As to the argument about a special gift from God, Vitoria

was even more sceptical. One should not believe such an argument, he wrote, unless it "were confirmed by miracles," and he knew of none occurring in the Indies (148).

This refutation of fallacies did not, however, exhaust the argument of *De Indis*. Vitoria now passed on to the little-cited Section III, "On the lawful titles whereby the aborigines of America could have come into the power of Spain" (150). Note the use of the subjunctive "could have come" (*potuerint venire*) (256). As in Section II, Vitoria was not so much concerned to analyze the arguments that had actually been made as he was to discover and analyze all possible arguments about the conquest of the Indians.

There are two major lines of thought in Section III that could legitimize the conquest. The first stems from the law of nations (*ius gentium*). "What natural reason has established among all nations is called the *ius gentium*" (151). Vitoria advanced four propositions as belonging to the law of nations: that the Spanish have a right to travel in the Indies, provided they do not harm the natives; that the Spaniards may trade with the natives; that the Spaniards may exploit "any things which are treated as common both to citizens and to strangers" (153), for example, they may pan gold in the rivers or dive for pearls in coastal waters; and that their children born in the Indies may become citizens of native polities.

None of the above would today be a part of the law of nations, for domestic positive law intervenes in all these areas. It is taken for granted today that the sovereign may regulate or prohibit travel and trade by foreigners, manage common-property resources, and create rules of citizenship. Whether as an empirical matter Vitoria was correct in his assessment of the content of the *ius gentium* in 1539 is not at issue here and is probably a moot question, for the *ius gentium* did not exist in any clear way until it was described by the great publicists from Vitoria onward. For our purposes, the important point is that Vitoria asserted, and attempted to prove by various arguments, that these four propositions were part of the law of nations.

The next move in the argument was critical. If the law of nations conferred these rights upon the Spaniards, they could vindicate their rights by force of arms if necessary. They should indeed try rational persuasion first.

> But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. And not only so, but, if safety can not otherwise be had, they may build fortresses and defensive works, and, if they have sustained a wrong, they may follow it up with war on the authorization of their sovereign and may avail themselves of the other rights of war. (154)

Vitoria urged the Spaniards to use moderation against the natives, who were

"timid by nature and in other respects dull and stupid"; they should strive to keep their warfare defensive. But if no other means to achieve peace were available, they might go on the offensive, seize the Indians' cities, and reduce them to subjection. If the Indians still persisted in hostility against the Spaniards, the latter "then ... can make war on the Indians, no longer as an innocent folk, but as against forsworn enemies, and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones ... " (155). At the extreme, they might even enslave the Indians pursuant to the law of war (155-56).

Some reading between the lines is probably called for here. Vitoria had to be circumspect in what he said in order to avoid outright condemnation by the Spanish Crown. The discussions at Salamanca brought inquiries from the Emperor about "certain clerics who are teachers in your monastery [who] have taken it upon themselves to discuss, in their sermons and dissertations, Our right to the isles of the Indies ... " (Brennan 175). The clerics were commanded "to refrain, now and at all future times, from engaging in discussions, sermons, or debates, without Our express permission, regarding the topics above mentioned ... " (Brennan 139). In these circumstances, Vitoria's repeated references to the need to treat the Indians with moderation probably can be interpreted as tacit disapproval of the Spanish conquests as they actually took place; for they were marked by speed and brutality rather than by attempts at persuasion and defensive warfare.

Although he condemned the historical reality of the Spanish conquests in America, Vitoria could see that an outcome of European domination over the "barbarians" was justifiable and perhaps inevitable. Indian sovereigns were unlikely to accede willingly to the Spaniards' legitimate rights of travel, trade and exploitation of resources. Why should they? These rights, after all, were grounded in the *ius gentium*, a product of European law and philosophy utterly unknown to the Indians. The same *ius gentium* sanctioned warfare to vindicate rights: defensive warfare at first, but offensive warfare and conquest if necessary. Given European technological superiority, there could not be much doubt about how the conflicts would end.

In Robert Nozick's terminology, Vitoria offered an "invisible-hand explanation" of European domination over the Indians (18-19). Even though conquest was not the intent of the explorers, it was bound to arise through mutual interaction under the law of nations. Strikingly, it never seemed to occur to Vitoria to doubt whether the *ius gentium* was applicable to non-European peoples. The Thomistic view of universal human rationality, which led him in Section I to uphold the Indians' humanity and equal rights, led him to apply the *ius gentium* to the Indians in Section III; for the law of nations is "what natural reason has established in all nations" (Vitoria 151). But even the most highly civilized of

Indian nations, the Incas and Aztecs, were about four thousand years behind contemporary Europeans in technology, military science and social organization. The Indian empires were perhaps comparable to early Pharaonic Egypt – a mighty empire indeed, but ruled by a god-king, with literacy restricted to a hieratic elite, without metallurgy except for gold and silver ornaments. They were in no position to withstand the firearms and steel weapons of even a small number of Spaniards. Legal equality under the law of nations was only a chimera in the light of such factual inequality.

This interpretation finds confirmation in Vitoria's second *Relectio*, "On the Indians, or on the Law of War Made by the Spaniards on the Barbarians," commonly known as *De Jure Belli*. Its title is a bit misleading, for it contains almost nothing specific about the conquest of the Indies. It is rather a general treatise on the law of war. The connection to *De Indis* is given in the first sentence: "Inasmuch as the seizure and occupation of those lands of the barbarians whom we style Indians can best, it seems, be defended under the law of war ... " (165).

Throughout *De Jure Belli*, wars against Christians and wars against barbarians are treated in basically the same way, subsumed under the doctrine of the just war. To summarize briefly, a prince should live in peace with his neighbours as much as possible. He may not engage in aggression or conquest for its own sake, but he may use force to defend his realm from wrongs committed against it. He should strive to keep his military reaction proportionate to the injury suffered, but if necessary he can go to great lengths to restore peace and security. He may kill not only enemy soldiers, but the innocent as well, as in the taking of a fortified city. He may punish or kill the guilty parties who started the war. He may confiscate enemy property to make good his own expenses, establish fortresses, annex territory and even depose rulers, although he should not push these extreme measures farther than is required for peace and security.

Indians are not entitled to any special treatment because of their primitive civilization; on the contrary, especially stern measures may be required to pacify barbarians:

> But there are times when security can not be got save by destroying all one's enemies: and this is especially the case against unbelievers, from whom it is useless ever to hope for a just peace and as the only remedy is to destroy all of them who can bear arms against us, provided they have already been at fault. (183)

But these draconian words, taken out of context, do not truly represent Vitoria's views. The burden of his argument is that the law of war, as part of the law of nations, is fundamentally the same for all. Dealing with unbelievers is a cir-

cumstance that, along with many other factors, might justify extra severity in certain situations; but it is not a licence for indiscriminate cruelty. On the other hand, neither is it a general warrant for particular lenience or tolerance. Barbarians, as nations under the *ius gentium*, must abide by the same rules of war and suffer the same consequences from conflicts.

Vitoria's second line of inquiry was "whether the Indians could have come under the sway of the Spaniards, in the interest of the spread of Christianity" (150). The answer was "yes," supported by arguments drawn both from the *ius gentium* and from revelation. It was evident to Vitoria that "Christians have a right to preach and declare the Gospel in barbarian lands" (156). Moreover, if the barbarians hinder this work of evangelization, Christians "may then accept or even make war, until they succeed in obtaining facilities and safety for preaching the Gospel" (157). This is not the same as the discredited right of producing conversions by force of arms; it is the more restricted right of obtaining freedom to proselytize. With reference to actual events, Vitoria wrote: "I personally have no doubt that the Spaniards were bound to employ force and arms in order to continue their work there, but I fear measures were adopted in excess of what is allowed by human and divine law" (158).

This argument about missionary activity ramified in several directions. It would, wrote Vitoria, be legitimate for the Spaniards to resort to war to protect native converts from persecution by their pagan rulers. Moreover, if "a large part (*bona pars*) 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 and depose their other unbelieving rulers" (158). Finally, the Spaniards could lawfully "rescue innocent people from an unjust death," as in cases of human sacrifice or cannibalism. This meant not only liberating the victims as they "are actually being dragged to death," but putting a stop to such practices altogether. If the Indians rejected such interference, that would be "a good ground for making war on them" and deposing their rulers if necessary (159).

This whole line of thought amounts to a second invisible-hand explanation and justification of European dominance in the New World. Since Indian rulers thought themselves divine or at least especially supported by divine power, they could scarcely be expected to sit idly by while missionaries from another empire made conversions to a new divinity. Armed conflict would seem inevitable in the situation.

It is noteworthy that Vitoria unquestioningly accepted the truth of Christianity just as he accepted the universal validity of the *ius gentium*. The right to evangelize can only be derived from a belief in the transcendental truth of Christianity. No European sovereign of Vitoria's day, let alone Vitoria himself,

would have recognized an unhindered right of, say, Islamic missionaries to proselytize in Christian countries; such activity would have been correctly perceived as a threat to both Church and State. Once again, Vitoria emerges as a theorist of European superiority, not of true international equality.

A couple of other arguments may briefly be mentioned. Vitoria suggested that it would be legitimate if the Indians, "aware alike of the prudent administration and the humanity of the Spaniards, were of their own motion, both rulers and ruled, to accept the King of Spain as their sovereign"; this would, however, require majority support of the people (160). It was also conceivable that the Spanish might acquire dominion by fighting as allies of Indian nations that had been wronged by others. This, said Vitoria, is how much of the Roman Empire was acquired. These two methods often operated together; for a weak nation, having successfully obtained the assistance of a much more powerful one, often ended by becoming a client of its protector. Again, one senses behind these legalistic arguments the tremendous factual inequality between Europeans and Indians.

Perhaps Vitoria was aware that his intellectual framework of equality between Indians and Europeans under the law of nations as known by reason and under the truth of Christianity as known by revelation was bound to deliver the Indians into the dominion of the Europeans. At any rate, he shifted his ground somewhat in the final part of Section III:

> There is another title which can indeed not be asserted, but brought up for discussion, and some think it a lawful one. I dare not affirm it at all, nor do I entirely condemn it. It is this: Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts; but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries of human life. 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, and might even give them new lords, so long as this was clearly for their benefit. (160-61)

Vitoria here was speculating along the lines of the nineteenth-century doctrine of trusteeship, that a civilized nation could temporarily rule an uncivlized one for the benefit of the latter. He even went as far as to make a qualified reference to the Aristotelian doctrine of the "slave by nature," later applied by Sepulveda

to the Indians (Hanke). "All the barbarians in question are of that type," he wrote, "and so they may *in part* be governed as slaves are" (my emphasis) (Vitoria 161). Governing the Indians "in part" as slaves meant that it ought to be done "for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards" (161). This ideal of trusteeship was echoed in another of Vitoria's works:

> Any ruler who has acquired sovereignty over pagans must make laws suitable for their country even in temporal affairs, so that their possessions are preserved and developed and they are not despoiled of money and treasure ... . In brief, a king is obliged to do for the pagans over whom he rules whatever he would be obliged to do for the good of his own people, even though those things might be services which, through ignorance or some similar cause, the barbarians did not possess beforehand. (Hamilton 134)

Major importance must be accorded to the emergence of this idea of trusteeship at the end of Vitoria's treatise. It does not follow in strict logic from his earlier line of thought; rather, it shows that his attempt to deal with the problem had reached an impasse.

Vitoria seems to have sensed that his ahistorical doctrine of the universal rationality of all men would deliver the Indians into servitude. Yet he did not have at his disposal a historical theory of the evolution of civilization that could reconcile a universal potential for rationality with differential stages of development. The Aristotelian idea of the "slave by nature" took account of differences, to be sure, but it did not allow for growth. Vitoria groped for a historical understanding of the problem without being in a position to achieve it. Vitoria, as a philosopher of international law, tried to think through the confrontation of sovereign nations of vastly different levels of civilization. Each path he took showed that, starting from initial equality of rights, one ends with loss of sovereignty by the weaker and subjection to the stronger. Thus the initial assertion of equal rights is illusory when measured against the inevitable outcome.

Although Vitoria only toyed with the idea, he seems to have sensed that something like trusteeship was a more humane response to the problem of clashing societies of different levels of development. Thus Vitoria's concluding speculation, and not his earlier defence of Indian equality, is the true origin of aboriginal rights. There would be no need for a special category of "aboriginal" rights if the two societies were more or less on the same level. Conquest or change of sovereignty presents no particular problem in international law where one state takes over the territory of another at more or less the same level of advancement. The property rights of the population are preserved

under the doctrine of state succession. A serious problem does arise, however, where a population at a lower level of advancement does not have property rights that are compatible with the legal system of the new sovereign. In this case, a doctrine of aboriginal rights provides some transitional protection while the level of the population is raised. As Alpheus Henry Snow wrote in plain words in 1918: "Aborigines are the members of uncivilized tribes which inhabit a region at the time a civilized State extends its sovereignty over the region, and which have so inhabited from time immemorial; and also the uncivilized descendants of such persons dwelling in the region" (Snow 7).

Contemporary thought about aboriginal rights is fundamentally confused. On the one hand, the very term "aboriginal rights," legally entrenched in four separate sections of the Constitution Act, 1982, presupposes a trustee relationship of a civilized state over an uncivilized people. On the other hand, the exponents of aboriginal rights increasingly resort to notions of nationhood and sovereign equality under international law. Recurrence to Vitoria's admirably principled attempt to think through the problem helps us to understand the incoherence of much contemporary discussion.

WORKS CITED

Brennan, Edward J. Spanish *Debates Regarding the Conquest of America and the Treatment of the Indians, 1511-51*. Diss. U of Chicago, 1959.

Cohen, Felix S. "Original Indian Title." *Minnesota Law Review* 32 (1947-48) 1:28-59.

Cumming, Peter A. and Neil H. Mickenberg. *Native Rights in Canada*. Toronto: General Publishing, 1972, 2nd ed.

Davies, Maureen. "Aspects of Aboriginal Rights in International Law." *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*. Ed. Bradford W. Morse. Ottawa: Carleton Univ. Press, 1985.

Hamilton, Bernice. *Political Thought in Sixteenth-Century Spain*. Oxford: Clarendon Press, 1963.

Hanke, Lewis. *All Mankind is One*. Dekalb: Northern Illinois UP, 1974.

Nozick, Robert. *Anarchy, State and Utopia*. New York: Basic Books, 1975.

Snow, Alpheus Henry. *The Question of Aborigines in the Law and Practice of Nations*. Northbrook, ILL.: Metro Books, 1972. Reprint of 1919 ed.

Vitoria, Franciscus de. *De Indis et De Jure Belli Relectiones. Classics of International Law*. New York: Oceana, 1964. Reprint of 1st ed., 1917.