

**INDIGENOUS PEOPLES IN INTERNATIONAL LAW:  
THE SIGNIFICANCE OF FRANCISCO DE VITORIA AND  
BARTOLOME DE LAS CASAS**

**G.C. MARKS\***

**INTRODUCTION**

This paper was originally intended to be a discussion of the present day situation of indigenous rights in international law. To set the context for an analysis of the contemporary situation I had planned to review the historic development of the doctrine of indigenous rights from the sixteenth century, noting the decline in the international status of indigenous peoples by the nineteenth and early twentieth centuries. The major focus of the paper was then to be to describe, and account for, the apparent resurgence of interest in indigenous rights in recent years.

However, the work of the sixteenth century Spanish jurist-theologians, Francisco de Vitoria and Bartolomé de Las Casas, increasingly drew my attention in two respects. Firstly, their analyses, carried out at the very beginnings of European colonial expansion into the New World, had relevance to the modern day situation of minority indigenous peoples. Although the assumptions of these sixteenth century writers about law and society differed markedly from those of today, the issues addressed were very similar, and their analyses were clear, forthright and well-informed. They seemed to offer some potential for a better understanding of current problems and dilemmas in the development of international protection of indigenous rights.

Secondly, I was struck by the scant, and it seemed somewhat superficial, treatment which has been accorded Vitoria and Las Casas by modern writers. Vitoria has received some attention in respect of his contribution to the development of international law in general. However, in the context of indigenous rights, legal analysis of the writings of Vitoria and Las Casas seemed either dated, or insufficient to draw on the potential contribution of these writers to discussion of the status of indigenous peoples in international law. Consequently this paper has concentrated on the work of the Spanish writers of the sixteenth century, in particular Vitoria and Las Casas.

The first part provides an introduction to the uses of legal history in developing the doctrine of indigenous rights in international law, identifies in particular the significance of the sixteenth century Spanish writers, and reviews the existing literature.

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The second part provides an account of the central ideas of Vitoria and Las Casas, and notes problems in Vitoria's work for the assertion of indigenous rights. It is concluded that the Spanish contribution is to focus on the primary political and legal issues in the relationship between colonisers and indigenous peoples, including the basis of title and jurisdiction.

## I INDIGENOUS RIGHTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: AN HISTORICAL APPROACH

A number of modern writers, in discussing indigenous rights, describe a long tradition of recognition of the status and rights of indigenous peoples within international law. This tradition is seen by some to validate contemporary claims by indigenous peoples for international standing and protection. The recognition of indigenous rights in international law weakened in the nineteenth and early twentieth centuries. However, the situation of indigenous peoples has now re-emerged as an important issue in international law. Progress has been made in identifying and codifying indigenous rights in international instruments.<sup>1</sup>

Lindley noted that international law had a long history of recognising, in theory at least,<sup>2</sup> the territorial rights of indigenous peoples:<sup>3</sup>

...extending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one.

Lindley also observed the derogation from such recognition of indigenous rights evident in the late nineteenth and early twentieth centuries, as exemplified

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1 In particular

a) ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989): 28 ILM 1382 [hereinafter cited as ILO Convention No 169] which provides a partial revision of ILO Convention No 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957): 328 UNTS 247 [hereinafter cited as ILO Convention No 107].

b) The Draft Universal Declaration on Rights of Indigenous Peoples being developed under the auspices of the Working Group on Indigenous Populations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The text of this Draft Declaration as considered by the 1991 meeting of the Working Group on Indigenous Populations is contained in UN documents E/CN.4/Sub.2/AC.4/1991/CRP.1 and CRP.2; and E/CN.4/Sub.2/1991/40.

2 See text at notes 82 and 83 below for comment on the relationship between theory and practice in this context.

3 Lindley MF, *The Acquisition and Government of Backward Territory in International Law* (1926), p 20. The phrase "who are politically organized" raises the issue of definition of "politically organized" ie when can a territory be regarded as *terra nullius* or empty and therefore available for acquisition. The question of *terra nullius* is considered further in this paper, see text at notes 124–131 below.

in the writings of publicists such as Westlake.<sup>4</sup> According to Lindley writing in 1926:<sup>5</sup>

...especially in comparatively modern times a different doctrine has been contended for...; a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit.

A similar interpretation of the historical development of international law in respect of indigenous rights has been offered by Berman, that is that recognition of such rights was to be found within international law, at least prior to the nineteenth century:<sup>6</sup>

Before the era of European colonialism in the 19th century, a legal order since repudiated by the international community, the rights of indigenous peoples were widely recognized. The writings of Vittoria (sic), Grotius, Pufendorf, Vattel and others are replete with passages which describe indigenous societies as distinct political entities with territorial rights.

The re-emergence of indigenous rights as an issue of international law in recent times has been noted by Sanders,<sup>7</sup> who discusses contemporary developments such as increased indigenous advocacy and the development of international standards.<sup>8</sup> Sanders identifies indigenous rights as having been previously posited within international law, but as having been progressively brought within the ambit of the domestic law of the successor states of the colonial empires during the nineteenth century.

The process of the diminution of international rights and standing of indigenous peoples occurred even where there was apparent treaty recognition of rights. For example, the Treaty of Waitangi (1840) did not prevent the simple declaration of British sovereignty over the South Island of New Zealand on the basis of Cook's discovery – thus largely ignoring any rights of the indigenous people there.

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4 Westlake J, *International Law* (1910) and Oppenheim L (ed), *The Collected Papers of John Westlake on International Law* (1914), cited in Lindley, *ibid*, p 18.

5 *Ibid*.

6 Berman, Panel Discussion: "Are Indigenous Populations Entitled to International Juridical Personality", (1985) 79 ASIL Proc 189 at 190.

7 Sanders, "The Re-emergence of Indigenous Questions in International Law", (1983) 3 Can Hum Rts Yb 3 at 12-30.

8 Eg ILO Convention No 169 and the Draft Universal Declaration on Indigenous Rights. See note 1 above.

As Evatt has pointed out:<sup>9</sup>

...when it became expedient to assert sovereignty over the South Island, formalities [negotiations for cession] were dispensed with.

In the United States, a limited international dimension to the position of the Indians had been recognized by the Supreme Court in the early nineteenth century, in Chief Justice Marshall's doctrine of Indians as "domestic dependent nations" under the guardianship of the Federal Government.<sup>10</sup> However, even this acknowledgement of the international status of the Indians – limited and paternalistic as it was – was progressively eroded over time. Barsh has observed that by the mid twentieth century:<sup>11</sup>

...the American concept of native land rights turned completely on its head. Under the 19th century decisions, the United States merely enjoyed a kind of international legal protectorate over unsundered native territories, with an exclusive right to accept cessions. By the 1950's, however, this protectorate had evolved into an absolute sovereignty with power of disposal for any reason at all, and without any obligation to compensate for the taking unless the Indian interest had been brought within the American land tenure system...

Sanders sees the roots of the modern resurgence of indigenous rights in the humanitarian movements of the nineteenth century, and the persistence of indigenous peoples in refusing to accept a "domestic" status.<sup>12</sup> When he states that "Indigenous questions have re-emerged as questions of international law and policy",<sup>13</sup> Sanders is alluding to the tradition of recognition of indigenous rights in international law, identified by Lindley and Berman. He traces this tradition back to the early sixteenth century contact between the Spaniards and the Indians, noting in particular the doctrinal contribution of Francisco de Vitoria, whom he describes as "one of the fathers of international law"<sup>14</sup> and the role of Bartolomé de Las Casas who "was the greatest publicist"<sup>15</sup> in support of the rights of Indians. Sanders notes the continued, if uneven, tradition of indigenous rights in the work of Vattel, Grotius and Pufendorf.<sup>16</sup>

In the view of a number of writers including Lindley, Berman and Sanders, the jurisprudential basis of indigenous rights can be traced back through earlier traditions of international law. In this perspective the contemporary emergence of indigenous rights is not so much the progressive development of new law, but

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<sup>9</sup> Evatt, "The Acquisition of Territory in Australia and New Zealand" in Alexandrowicz CH (ed), *Grotian Society Papers 1968* (1970) p 16 at 45.

<sup>10</sup> *The Cherokee Nation v The State of Georgia* 30 US (5 Pet) 1.

<sup>11</sup> Barsh, "Behind Land Claims: Rationalising Dispossession in Anglo-American Law", (1986) 1 *Law and Anthropology* 15 at 27–28.

<sup>12</sup> Sanders, note 7 above.

<sup>13</sup> *Ibid*, at 30.

<sup>14</sup> *Ibid*, at 5.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*.

rather the restoration of rights previously existing and acknowledged. Thus Doubleday, discussing Inuit hunting rights, argues that the relationship between historical authority (as evidenced in the work of Vitoria, Grotius and Pufendorf) and the progressive development of international law can provide the necessary basis and elements to develop indigenous rights fully at law:<sup>17</sup>

Early publicists provide authority and theoretical roots. Existing international agreements provide materials for revision and inclusion. Processes like that of the Working Group on Indigenous Populations and the ILO 107 revision provide opportunities.

Some writers contend that indigenous rights arise in fact outside of the positive law system of the nation states. Berman, for example, sees such rights as:<sup>18</sup>

...pre-existing rights in the sense that they are not developed from the legal system of surrounding states but arise *sui generis* from the historical condition of indigenous peoples as distinctive societies with the aspiration to survive as such.

Similarly, Leary argues that the problematic relationship between the concepts of the "state" and of "peoples", which has constrained the application of the principle of self-determination to indigenous peoples in independent countries, can be overcome by taking a longer historical perspective of international law than is usually the case.<sup>19</sup> International law, she argues, stretches back beyond the Peace of Westphalia of 1648, often taken as its starting point, to times when organized states were not the predominant or sole actors in international life. Leary claims that:<sup>20</sup>

a longer view of international law shows that there was an evolution before Westphalia away from the state-centred concept. Today there is a similar trend.

She refers to the work of early pre-Westphalian theorists, and notes particularly that Vitoria, in discussing the Indians of the New World, regarded such peoples as having international legal personality and as requiring a level of equality in the relationship between them and Spain.

The advancement of indigenous claims can in fact be seen as something of a challenge to the state-centred system of positive international law, in a couple of ways. Firstly, indigenous rights claims, like human rights claims generally, are often, although not necessarily, advanced in terms of some higher, universal law or authority, some moral claim superior to the law created by the consent of sovereign states.

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17 Doubleday, "Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environment Law", (1983) 17 Den J Int'l Law and Policy (No 2) 373 at 384.

18 Berman, note 6 above, 190.

19 Leary, Panel Discussion, note 6 above, 189 at 194; and see further p 38 *et seq.*

20 *Ibid*, at 195.

In respect of a higher authoritative source challenging the discretion of the states, Gross refers to "the recent revival of natural law thinking in the field of international law"<sup>21</sup> providing "a radical departure from the consensual view of international law".<sup>22</sup> However, it should be noted that Gross sees the positive law of the Westphalian state system continuing to prevail, notwithstanding the revival in natural law thought.<sup>23</sup>

Kamenka, discussing the post war development of human rights, alludes to its natural law undertones, even if such developments do not reflect the classic natural law formulations. As Kamenka observes:<sup>24</sup>

The concept of human rights is no longer tied to belief in God or natural law in its classical sense. But it still seeks or claims a form of endorsement that transcends or pretends to transcend specific historical institutions and traditions, legal systems, governments, or national and even regional communities.

Secondly, by positing a collectivity *viz* the indigenous people, as a bearer of international rights, the "statism" of the contemporary international legal order may be challenged. Crawford has noted how even the most basic claims of indigenous peoples – passive claims to be simply left alone to live their own lives – inherently represent claims against the states in which they live.<sup>25</sup> Crawford observes:<sup>26</sup>

The first thing to notice then is statism. Discussion of Aborigines takes place against the background of the division of the world into states or state areas, and the assumption that the primary human collective, above the family, is the state.

Thus, modern writers who invoke international law traditions stretching back to the sixteenth century to provide some historical basis or legitimacy for indigenous claims, sometimes pose challenges to the bases of modern international law. Falk makes this challenge explicit, bringing together issues of natural law and the state-centred nature of the system in his critique:<sup>27</sup>

The jurisprudential starting point of the rights of peoples is a direct assault upon positivist and neo-positivist views of international law as dependent upon State practice and acknowledgement. In this regard, the rights of peoples can be associated with pre-positivist

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21 Gross, "The Peace of Westphalia, 1648-1948" (1948) 42 AJIL 20 at 39.

22 Ibid.

23 Ibid, at 40-41.

24 Kamenka, "Human Rights, Peoples Rights" in Crawford J (ed), *The Rights of Peoples* (1988), p 127 at 128.

25 Crawford, "The Aborigine in Comparative Law", (1987) 2 Law and Anthropology 5 at 14.

26 Ibid, at 7.

27 Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in Crawford, note 24 above, p 17 at 19.

conceptions of natural law which at the very birth of international law were invoked by Victoria (sic) and others on behalf of Indians being cruelly victimized by the Spanish *conquistadores*.

It can be seen that methodological issues at the basis of international law are transported into the discussion of indigenous rights, and in particular the use of historical sources. In respect of historical discussion of pre-Westphalian texts generally, scholars "are tempted to read their own methodological concerns into the work of their predecessors".<sup>28</sup> Consequently methodological issues may be present, if not explicit, in the modern discussion of earlier texts on indigenous rights.<sup>29</sup>

The interest in the early international law publicists is not one only of legal history. There is an assumption amongst a number of commentators that these early texts remain coherent and valuable passages in the body of international law, i.e. that they bear on the present situation. Not that all commentators view international law as being historically favourable to indigenous rights. Bennett has for example argued that the incorporation of the principle of guardianship in the early stages of colonialism consequently diminished the international status of indigenous people.<sup>30</sup>

Nevertheless the early theorists are seen by a number of commentators to validate the assertion that indigenous peoples have rights in international law. In particular the discussion of indigenous rights in sixteenth century Spain is seen as a significant part of this process of validation.

### *The Spanish School of International Law*

The Spanish theorists of the sixteenth century have been collectively referred to as the "Spanish School".<sup>31</sup> The Spanish School was largely contemporaneous with the discovery and conquest of the Americas by Spain. They considered, amongst other issues, the legitimacy of the Spanish presence in America and subjugation of the Indians. Most renowned was Francisco de Vitoria, professor of theology at the University of Salamanca. The Spanish School may also be considered to have included Domingo de Soto, Francisco Suarez and Bartolomé

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<sup>28</sup> Kennedy, "Primitive Legal Scholarship", (1986) 27 Harv Int'l LJ No 1, 1, n 2 at 2.

<sup>29</sup> It is necessary to be aware of this problem to the extent that it may create distortions in the interpretation of earlier views on indigenous rights. The issue is discussed more fully below in respect of specific commentators.

<sup>30</sup> Bennett G, *Aboriginal Rights in International Law* (1978), pp 4–11. Such less "optimistic" interpretations are discussed in the following section, in respect of the Spanish theorists at least.

<sup>31</sup> Scott JB, *The Spanish Origin of International Law* (1932) IX, argues:

...that there was a Spanish school of international law in the sixteenth century, within forty years after the discovery of America; that the founder of this school was Francisco de Vitoria.

Kennedy, note 28 above, accepts this categorization, although disagreeing with Scott over the influence of the school.

de Las Casas.<sup>32</sup> Las Casas in particular was a noted defender of the rights of the Indians. In the specific context of indigenous rights the major two theorists of the Spanish School are Vitoria and Las Casas. Consequently the use of "Spanish School" here is meant to refer primarily to these two theorists.

A number of modern writers on indigenous rights refer in particular to the Spanish School in the course of invoking the historical tradition of indigenous rights. These references, often quite brief (a paragraph, sometimes a page or so), usually serve to introduce a more detailed analysis of contemporary developments. Despite the brevity, the references to the Spanish School and its influence on later international law scholars have been used to legitimize indigenous claims. The Spanish School is seen by some as the foundation of that legal tradition of recognition of indigenous rights which has been described above. The identification of this recognition of indigenous rights at the very beginnings of European colonialism, and coincidentally at what is seen as the beginning of modern international law, in the Spanish School is seen to provide authoritative weight to indigenous claims. In this view, indigenous rights, somewhat neglected of late, are now being restored to their proper place as a central and original issue of international law.

The main proponent of the view that modern international law originates in the work of the sixteenth century Spaniards is J.B. Scott.<sup>33</sup> Scott argues that:<sup>34</sup>

...the discovery of America gave rise to a modern law of nations...The Spanish School came into being and passed out within the course of a century, but it has to its credit the modern law of nations.

Other writers have noted the importance of the Spanish School, if not as founding modern international law, at least as representing a significant development. Briery observes, in respect of Vitoria's treatment of the relationship between Spain and the Indians, a step towards universalizing international law:<sup>35</sup>

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32 The composition of such a "Spanish School" is a matter of some contention. Scott in fact includes Grotius, because of the influence of Vitoria on him and similarity of doctrine between Vitoria and Grotius. A. Nussbaum, on the other hand, criticizes the use of Suarez as a founder of modern international law by modern naturalists (such as Scott) - see Kennedy, note 28 above, at 40, n 73. Carro, "The Spanish Theological-Juridical Renaissance and the Ideology of Bartolomé de Las Casas", in Friede J and Keen B (eds), *Bartolomé de Las Casas in History*, (1971), captures the idea of important and innovative developments in Spanish thought in the sixteenth century in his description of a "Spanish Theological-Juridical Renaissance" led, according to Carro, by Vitoria and Soto, and which closely influenced Las Casas. These differences of emphasis need not unduly concern us here. However, it should be noted that the term "Spanish School" is being used quite loosely, to identify the developments in Spanish theological-legal thought in the sixteenth century of which Las Casas and Vitoria were part.

33 See Scott, note 31 above, also Scott JB, *The Spanish Conception of International Law and Sanctions* (1934).

34 *Ibid* (1934).

35 Briery JL, *The Law of Nations*, 6th ed (1963), p 26.



In this Vitoria's teaching marks an important step in the expansion of international law into a world system; for it meant that a law which had its rise among the few princes of Christendom was not to be limited to their relations with one another but was universally valid, founded as it was on a natural law applying equally to all men everywhere.

He notes that until recent years "The work of these early Spanish writers has been unfairly neglected".<sup>36</sup>

### *Interpretations of the Spanish School in the Modern Literature: An Overview*

The contributions of Vitoria and Las Casas are described and analyzed below. The necessity for a fresh examination of these writers lies largely in the state of the literature, which presents a degree of superficiality, confusion, and even error, in the interpretations available. Distortions have arisen because Vitoria and Las Casas have been recruited by modern writers to bolster positions taken in the contention over indigenous rights (and in Vitoria's case over international law in general). Modern writers have tended to use the Spanish School as a symbol, produced to add weight to claims being advanced. Thus the treatment accorded the Spanish School has tended to serve an ideological function, rather than being disinterested historical and legal analysis. In such circumstances it is important that the contribution of the Spanish School be comprehended as clearly as possible. Distortion and confusion may "muddy the waters" of the indigenous rights discourse. An overview of the literature can help establish the parameters for an examination and analysis of the Spanish School's contribution.

A number of writers assume that the Spanish School represents a strong and consistent advocacy of Indian rights. Other writers note certain ambivalences, even contradictions, within the texts, even to the extent of finding theoretical support for colonialism therein. A range of interpretations is presented, although preponderantly the assessment is that the Spanish School was favourable to the recognition of indigenous rights in law.

Henderson, for example, argues that the Spanish School set high standards in respect of indigenous rights.<sup>37</sup> He traces the doctrine of indigenous rights to Vitoria, whose ideas are transmitted into Spanish colonial law through the advocacy of Las Casas. Vitorian doctrine entered into the mainstream of international law:<sup>38</sup>

As the idea of a world state united by Christianity was transformed into the concept of the territorial sovereignty of the princes, the

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36 Ibid

37 Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition" in Boldt M and Long JA (eds), *The Quest for Justice* (1965), p 185.

38 Ibid, p 189.

doctrine of aboriginal rights was accepted as legitimate in the law of nations. The adoption of the Vitorian principles of aboriginal rights by European jurists Gentilis, Grotius, and Pufendorf confirmed the vitality of the doctrine and created order.

Henderson sees Vitorian doctrine as involving the recognition of the national character of the Indian tribes, and therefore their rightful place in the law of nations and their right to the ownership of their land under their own law and customs. Spanish dominion can only be established with "the voluntary consent of the majority of the American nations".<sup>39</sup>

Of considerable interest is Henderson's equation of such a doctrine with human rights. He sees the Vitorian perception as being entrenched in the modern international human rights covenants. Indeed Henderson describes Vitoria's doctrine of aboriginal rights as "the seminal doctrine of human rights".<sup>40</sup> Closely connected with Henderson's view of human rights originating in indigenous rights, is his observation of the natural rights basis of indigenous rights, in Vitorian doctrine and later:<sup>41</sup>

The European jurists' complete acceptance of Vitoria's doctrine of aboriginal rights was based on their acceptance of the natural rights principles: all rights precede rules and are the foundation of legitimate rules as law.

Stone, similarly, in examining the contribution of sixteenth century Spain to the development of concepts of natural law and justice, suggests that modern human rights derive from the assertion of indigenous rights made by what he terms the "Spanish School of natural lawyers of the 'golden' sixteenth century".<sup>42</sup> Stone notes that in considering the problem of the legitimacy of Spanish expansion by conquest of the Indians:<sup>43</sup>

The question of the inviolability of human rights as such, even of men beyond the reach of the Christian *oecumene*, became a centre of attention. In one of the great human documents of all time the Dominican Francisco de Vitoria<sup>44</sup> ...proclaimed a 'natural' community of all mankind, and the universal validity of human rights...

Henderson and Stone see the natural-rights based doctrine of indigenous rights as foreshadowing the later development of human rights law. In this view there is no conflict between the equality of individuals and the collective needs of indigenous peoples – the recognition of one is the recognition of the other.

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39 Ibid, p 188.

40 Ibid.

41 Ibid, pp 189–190.

42 Stone J, *Human Law and Human Justice* (1965), p 61.

43 Ibid.

44 Stone says of Vitoria: "He was obviously centuries ahead of his time..." Ibid, p 62.

A number of other writers also trace indigenous rights back through international law theorists to Vitoria. Davies, for example, sees Vitoria's influence on later theorists as his principal legacy:<sup>45</sup>

Although Vitoria's influence was considerable during his lifetime, his impact as an international scholar derives perhaps most directly from his influences on later scholars.

The purpose of these writers in citing Vitoria is to demonstrate the considerable lineage of the doctrine of indigenous rights in international law, and to put to rest the perception that international concern for indigenous rights is merely a post World War II phenomenon.<sup>46</sup> Rather, Davies points out:<sup>47</sup>

... discussion of fundamental rights in relation to Aboriginal peoples is contemporaneous with the "Age of Discovery"

and

One of the fathers of modern international law [i.e. Vitoria] can, with justification, also be labelled the father of European Aboriginal rights theory.

It is not the purpose of these writers to subject the doctrines of the Spanish School to detailed critical analysis. Their approach can be summarised as positive and somewhat general, focussing on Vitoria, with passing favourable references to Las Casas.

Other writers, whilst generally sharing a favourable attitude to the contribution of the Spanish School, explicitly address aspects of the work of the School which tend to support, under certain conditions, colonialism. There is a realisation that Vitorian doctrine especially is not unambiguous, and can be problematic for indigenous rights.

Lindley for example notes this double aspect to the Spanish School. On the positive side he notes firstly the role of Vitoria and Las Casas in opposing the notion that "backward territory" can be considered as *terra nullius* on the basis that the inhabitants are barbarians and infidels.<sup>48</sup> Lindley observes however, on the negative side so to speak, that Vitoria allows for a number of grounds which can justify war by the Spaniards against the Indians, and thus possession of their lands. He also notes Vitoria's (hesitant) support for the concept of guardianship or tutelage to justify Spanish rule.<sup>49</sup>

Sanders notes and endorses the role of Vitoria and Las Casas in asserting indigenous rights at an early stage of international law, but he also observes that Vitoria does provide some grounds for justifying colonialism, especially if the

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45 Davies, "Aspects of Aboriginal Rights in International Law", in Morse BW (ed), *Aboriginal Peoples and the Law* (1985), p 16 at 22.

46 Writers expressing a similar interpretation include Berman, note 6 above; Falk, note 27 above; Leary, note 19 above; Doubleday, note 17 above.

47 Davies, note 45 above, at 20.

48 Lindley note 3 above, p 12.

49 Ibid

subjugation of the indigenous people should appear to be for their benefit.<sup>50</sup> He comments:<sup>51</sup>

On this narrow basis the doctrine of trusteeship developed.

Scott, writing in the 1920's and 30's, noted, and indeed endorsed, Vitoria's guardianship doctrine.<sup>52</sup> Wortley, following Scott's approach, explicitly linked Vitorian doctrine and the principles of the League's Mandate system.<sup>53</sup>

Further along the spectrum is the view that Vitoria was little more than an apologist for Spanish imperialism, and that in fact he laid the theoretical foundations of colonialism. This position is found in Joyner,<sup>54</sup> and in Concha, the latter considering, according to Hanke:<sup>55</sup>

such a thinker as Francisco de Vitoria essentially and inevitably a supporter of the *conquistadores*.

Williams has noted how some writers accuse Vitoria of casuistry, by clothing Spanish colonial dominion in terms acceptable to the enlightened political thought of the Renaissance.<sup>56</sup> Williams has noted correctly the phenomenon that:<sup>57</sup>

...writers have focussed on only one-half of the Victorian (sic) system, while pretending that the other, seemingly contradictory half, never existed.

This selective approach, identified by Williams, is a problem in the literature. Most of the writers discussed above (with the exception of Scott) only touch briefly on the Spanish School whilst pursuing some more major theme. However there has been some more substantial analysis, and this is surveyed briefly below.

### *Substantive Treatment of the Spanish School*

#### **Felix Cohen**

Cohen's work is interesting in that he attempts to link the Spanish School directly with the development of US Indian law.<sup>58</sup> He argues that US Indian

<sup>50</sup> Sanders, note 7 above, at 5.

<sup>51</sup> Ibid.

<sup>52</sup> Scott, note 31 above, pp 157-158.

<sup>53</sup> Wortley, "Idealism in International Law: A Spanish View of the Colonial Problem", (1938) 24 *The Grotius Society* (1962) 147 at 155-160.

<sup>54</sup> Joyner, "The Historical Status of American Indians Under International Law", 11 *The Indian Historian* No 4, 30 at 31.

<sup>55</sup> Concha J, "*Las Relaciones sobre Las Indios de Francisco de Vitoria*" (1966) discussed in Hanke L, *All Mankind is One* (1974), p 47.

<sup>56</sup> Williams, "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought", (1983) 57 *S Calif L Rev* No 1, 1.

<sup>57</sup> Ibid, at 85.

<sup>58</sup> Cohen, "The Spanish Origins of Indian Rights in the Law of the United States", (1942) 31 *Geo LJ* 1.

law, at the time of writing (1942), could not be adequately comprehended without an appreciation of its international law nature:<sup>59</sup>

...our Indian law originated, and can still be most clearly grasped, as a branch of international law, and [that] in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish theological jurists of the sixteenth and seventeenth centuries, most notably by the author of the lectures *De Indis*, Francisco de Vitoria.

This approach attempts to demonstrate a concrete application of Vitorian doctrine to contemporary law, in contrast to the more general influence on international law suggested by a number of writers (see above). Cohen's work has attracted considerable attention.<sup>60</sup>

Cohen's approach indeed incorporates the general Vitorian influence on international law tradition. This international law tradition of indigenous rights works its way into US law through early US Supreme Court decisions in cases on Indian rights. Cohen shows that, whilst not relying directly on Vitoria, Court opinions frequently refer to:<sup>61</sup>

...statements by Grotius and Vattel that are either copied or adapted from the words of Vitoria. It is thus clear that the tradition of legal teaching carried Vitoria's theories on Indian rights to the judges and attorneys who formulated our legal doctrine in this field.

The second path by which Spanish law and doctrine became part of US law, according to Cohen, is historical accident – much of US territory had formerly been under Spanish control.<sup>62</sup> The US thereby inherited the relevant law of the previous sovereign.<sup>63</sup> An interesting example is the *Walapai* case,<sup>64</sup> where the Spanish law to be applied in a dispute over land between a railroad company and Indians was found to recognize the Indian right of occupancy, largely on the basis of the writings of Vitoria and the Laws of the Indies.<sup>65</sup> The US Supreme Court noted the community of doctrine between Spain and the US on the issue – not surprising if US doctrine in fact is built on the Spanish.

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59 *Ibid*, at 17.

60 Eg see Williams, note 56 above, at 73. He describes Cohen as "the single most influential legal scholar to have written on US-Indian legal relations".

61 Cohen, note 58 above, at 17.

62 *Ibid*, at 18–19. Cohen points out that neither France (the Louisiana Cession) nor Mexico (the Mexican Cession and the Gadsden Purchase) had significantly altered relevant Spanish law after replacing Spain as sovereign.

63 *Ibid*, at 18: "Under the accepted doctrine of international law that the law of the prior sovereign remains in force in ceded territory until changed by the affirmative action of the new sovereign..."

64 *United States, as Guardian of the Indians of the Tribe of Hualpai v Santa Fe Pacific RR Co*, 314 US 339 (1941).

65 The sixteenth century Spanish laws governing the administration of the American colonies.

Cohen considers that the "dependent nations" status of US Indians combines the Vitorian attribution of sovereignty to indigenous peoples with the guardianship concept which also exists in Vitorian doctrine. To Cohen, US Indian law acts as protection of Indian rights against the predatory interests of settlers and the constituent states of the Union in Indian land. It can be argued that Cohen's views are somewhat dated,<sup>66</sup> and perhaps took an unduly optimistic view of US Indian law when written. However Cohen presents a strong, and influential, case for the contemporary relevance of the Spanish School, at least within the US context.

### **J B Scott**

Scott, one of the leading proponents of the 1920's naturalist writers who sought to rehabilitate the Spanish Schools' role in founding international law, endeavoured to find correspondences between modern international law and Vitorian doctrine.<sup>67</sup> He saw his task as:<sup>68</sup>

...To state some of the fundamental principles of the law of nations and to see if they are to be found, and in what form, in the Readings of Victoria (sic)...

Correlation does not necessarily mean that a causal relationship exists. Scott's approach is somewhat naive, and the tone uncritical and eulogistic.<sup>69</sup> His interest in the Spanish School was wider than indigenous rights – it was a sustained attack on the influence of positivism in modern international law, and an attempt to reinstate a natural law basis. By returning to Vitorian principles, an international law could be established:<sup>70</sup>

...in which law and morality shall become one and inseparable.

Scott's work has been influential with later writers on indigenous rights, and the "rediscovery" of the Spanish School can, in a large measure, be attributed to him.<sup>71</sup> By providing a substantial body of work in English on the Spanish School he widened awareness of the School outside the world of Spanish language scholarship.

### **Lewis Hanke**

Hanke is an American historian who has written extensively on Las Casas.<sup>72</sup> Although there has been considerable controversy in Spanish about Las Casas throughout the centuries, discussion of his work in English has been limited.<sup>73</sup>

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66 Cf Barsh, see text at note 11 above.

67 See Kennedy, note 28 above, n 2 at 2.

68 Scott, note 33 above, p 278.

69 Of which Scott was to a degree aware. Note his disclaimer in the Preface (IX): "The volume, it is hoped, will not be considered special pleading".

70 See note 31 above, XI.

71 See Kennedy, note 28 above, 2–5 and 15–20. Also Williams, note 56 above, 85–86.

72 Hanke L, *The Spanish Struggle for Justice in the Conquest of America*, 4th reprint (1965); *All Mankind is One* (1974); *Aristotle and the American Indians* (1959);

Most references to Las Casas in analysis of indigenous rights and international law are very brief. Typically Lindley devotes a few lines of positive assessment of Las Casas' work:<sup>74</sup>

...jurist and missionary and a noble champion of the American Indians...[who]...maintained that the conquest of the Indies from the natives was unlawful, tyrannical, and unjust...

Las Casas' fate in legal discussion has often been as a footnote reference, albeit perceived positively,<sup>75</sup> or to be mentioned as an appendage to Vitoria, with an assumed identical doctrinal position.<sup>76</sup> However Las Casas' work merits closer attention. There are significant differences with Victorian doctrine, and in some respects Las Casas is more relevant to the modern situation of indigenous peoples.

Hanke's contribution is to have brought Las Casas' work to the attention of the English reader in greater detail and depth than was previously available, and to have provided a bridge between English and Spanish language scholarship. The problem with Hanke's work, from the point of assessing Las Casas' contribution to development of indigenous rights principles in law, is that he writes as an historian rather than a lawyer, and a very idealistic one at that. Anxious to rebut the "black Legend" of Spanish ferocity and greed in the Americas, Hanke casts Las Casas in the role of heroic, and successful, defender of Indian rights. Consequently, Hanke hopes, in the judgment of history, Spain's

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*Bartolomé de Las Casas: An Interpretation of His Life and Writings* (1951); plus a number of articles in English and in Spanish – see Bibliography in *All Mankind is One*.

73 Essays by Spanish historians and theologians on Las Casas have appeared in English translation in Friede J and Keen B (eds), note 32 above. In English the only recent work other than Hanke has been Wagner HR, *The Life and Writings of Bartolomé de Las Casas* (1967), which provides a detailed chronological account of Las Casas' life. An earlier work by the American historian FA Macnutt, *Bartholome de Las Casas* (1909), eulogises Las Casas but sees Spencerian evolution as dooming his efforts on behalf of the Indians. For a discussion of the treatment of Las Casas by American historians, especially in the nineteenth century, see Keen, "Introduction: Approaches to Las Casas, 1535–1970" in Friede and Keen, *ibid*, p 3 esp at 32–46. As noted above analysis of Las Casas' work from a legal perspective has been minimal.

74 Lindley, note 3 above, at 12.

75 Eg Davies, note 45 above, at p 44 says in a footnote:

One of the key figures in this process [debates over Indian rights] was Fra Bartalome (sic) de Las Casas, a Dominican who participated in the conquest of the Caribbean and, as a result of witnessing the brutal destruction of the native populations, became a fervent advocate of the native cause.

Williams, note 56 above, at p 66 n 280 says simply:

On Las Casas and his pivotal role as official defender of Indian rights, see L. Hanke, *All Mankind*..

76 Henderson, see text at note 37 above.

reputation as a liberal and just colonial administrator is preserved. Such an approach not only denies the realities of colonial situations distant from, and to a considerable degree out of the control of, the metropolitan power, it fails to account for the implications of Las Casas' views on the position of indigenous rights in law, something which Las Casas was very concerned with and had studied closely. The Colombian historian Juan Friede has commented perceptively on both Hanke's role as a publicist of Las Casas, and Las Casas' significance for modern international law development:<sup>77</sup>

The indubitable value of his [Hanke's] classic work [on Las Casas], *The Spanish Struggle for Justice in the Conquest of America*, consists in the fact that he was one of the first scholars to reveal, in a systematic way, with a great store of bibliographical sources and through a serious documentary investigation, the transcendent importance of the Indian problem in the historical context of the sixteenth century. In recent years the subject has acquired a new relevance owing to its retrospective connection with the struggle of colonial peoples against European imperialism.

### *General Comments*

The literature reveals problems in the response of writers to the Spanish School. Large claims are advanced as to the significance of the Spanish School, especially in relation to indigenous rights. However differing interpretations exist as to what this contribution is, particularly with Vitoria. Las Casas' views are co-opted in support of Vitoria, but with scant attention paid to the detail of his doctrine, or to differences between him and Vitoria.

In citing the Spanish School, writers demonstrate the modern tendency to an eclecticism of sources of authority –

...relying at times on propositions about justice and at times on state practice to provide a basis for doctrinal elaborations.<sup>78</sup>

In the case of indigenous rights, where state practice may well be inimical,<sup>79</sup> writers make an appeal to justice: finding little help in positive law, they look for support in earlier texts, for example the Spanish School. Difficulties can arise however in confusing similarity of issues with similarity of methods. Writers of the Spanish School do not share the same assumptions and conceptual framework as modern scholars. For example, as Kennedy has pointed out, whereas the eclecticism of modern writers is based upon methodological scepticism, the marked eclecticism of the Spanish School writers is based on

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<sup>77</sup> Friede, "Las Casas and Indigenism" in Friede and Keen, note 32 above, p 127 at 205.

<sup>78</sup> Kennedy, note 28 above, at 7.

<sup>79</sup> But cf Cohen above, pp 12–14.



confidence and certainty in their system of law.<sup>80</sup> The Spanish School writers have a more holistic approach, and natural law and positive law do not compete, but rather complement each other. The interest and relevance of the Spanish School lie in the issues it addressed:<sup>81</sup>

The primitives analyzed problems which arose out of increasing diversity of contact among civil authorities. They considered, for example, the treatment due newly discovered aborigines, a topic not unlike modern discussion of self-determination, decolonization or the rights of indigenous peoples.

The doctrine of the Spanish School may or may not have been incorporated into international law at some stage, but how relevant is this if the doctrine has been forgotten and fallen into desuetude at a later time? Harkening back to earlier and better times may be little more than nostalgic indulgence, if such norms have long since failed to guide state practice (if indeed they ever did).

Perhaps more important than whether the Spanish doctrine has ever been part of international law is whether it *should* be applied in the development of international law (and if so, it becomes important to be clear as to what the doctrine is). This is the sense of comments made by Judge Ammoun in a Separate Opinion in *Western Sahara*:<sup>82</sup>

It is well known that in the sixteenth century Francisco de Vitoria protested against the application to the American Indians, in order to deprive them of their lands, of the concept of *res nullius*.

This approach by the eminent Spanish jurist and canonist, which was adopted by Vattel in the nineteenth (sic) century, was hardly echoed at all at the Berlin Conference of 1885. *It is however the concept which should be adopted today.*

Indeed, Judge Ammoun feels that the Advisory Opinion (in para 80) takes a considerable step along the path laid out by Vitoria and Vattel.<sup>83</sup>

Examination of the Spanish School may provide insights into the place of indigenous peoples in international law, and the nature of the rights adhering to such peoples. The School grappled with fundamental questions of the law of nations and rights within that law. It may suggest doctrines which should be adopted today. However the analysis of the sixteenth century texts cannot automatically be transposed into the twentieth century: the lexicon of the discourse was different, and cannot too readily be assimilated to that of the

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80 Kennedy, note 28 above, at 6–7. These writers unselfconsciously and non-hierarchically invoked a range of diverse authorities – the Bible, scholastic authors, ancient and medieval jurists etc.

81 Ibid, at 11. Kennedy uses the category "primitive scholars" in a non-pejorative way, to distinguish a particular group of theorists, prior to 1648, including Vitoria, Suarez, Gentilis and Grotius.

82 *Western Sahara (Request for Advisory Opinion)* ICJ Rep 1975, p 6 at 86–87.

83 Ibid at 87.

twentieth century, without creating distortion and confusion, as evidenced in the literature.

## II FRANCISCO DE VITORIA AND BARTOLOME DE LAS CASAS

Vitoria was a distinguished professor of theology at the University of Salamanca between 1526 and 1546. In a series of lectures (posthumously collected and published by his students), the *Relectiones Theologicae*,<sup>84</sup> Vitoria considered, *inter alia*, the legal issues of discovery, conquest, and settlement in the Americas. The *Relectiones*, particularly *De Indis Noviter Inventis*<sup>85</sup> (On the Indians Recently Discovered) have had considerable influence on some international theorists through to the present day.

Las Casas was a vigorous Indianist for much of his life. Broadly speaking, the Indianist party in Spain supported the freedom of the Indians from subjection to the Spanish colonists. It supported the authority of the Crown in its endeavours to maintain control of the administration of the distant Spanish colonies, thereby hoping to provide protection to the Indians from the depredations of the Spanish colonists. It objected to cruel and inhumane treatment of the Indians, and denied that Indians were inferior to Europeans. The colonialist party, that is the colonists in America and their supporters in Spain, on the other hand vigorously denied the equality of the Indians and the worth of their societies. They needed Indian land and Indian labour to directly control and exploit in order to acquire wealth through extraction and development of natural resources. As Friede points out:<sup>86</sup>

This subjection [of the Indians] came to form the vested interest of the colonists.

Las Casas was perhaps the most prominent of the Indianists, quite close to and generally supported by Court circles. His activities in the colonies and his writing and lobbying in Spain, aroused opposition amongst the colonialist party, and he had many determined enemies. The stakes in the contention between Indianists and colonialists were high, that is whether the Indian lands were to be separate Indian provinces within a Spanish Empire, or Hispanicized settler colonies, with the Indians being reduced eventually to a minority, with very little power or rights. The bitter and hard-fought conflict in Spain over colonial policy in the first half of the sixteenth century forced into open discussion the major issues involved in the colonial relationship, that is the relationship between a more recently arrived and powerful society and the prior occupants.

The careers of Las Casas (1474–1566) and Vitoria (cc.1486–1546) overlapped both in time, and, to a degree, in subjects considered in their works. It is often assumed that, in respect of the relationship between Spain and the

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<sup>84</sup> Vitoria F, *De Indis et de Jure Belli Relectiones* (1st ed n.p. 1557, 1696) reprinted in Scott JB (ed), *Classics of International Law* (1964) (Bate J trans).

<sup>85</sup> *Ibid.* *De Indis Noviter Inventis* hereinafter cited as *De Indis*.

<sup>86</sup> Friede, note 77 above, p 137.

Indians, Las Casas and Vitoria have identical views.<sup>87</sup> This is not in fact the case. Their works do indeed evidence an awareness of the thoughts of each other, and Vitoria incorporated ideas from Las Casas' tract *Tratado sobre la guerra* in the *Relecciones*,<sup>88</sup> whilst Las Casas cited Vitoria at times, usually in support. Both asserted the universality of human rights. They assumed the equality of all humans as rational beings, whether Christian or not, and consequently they argued that all peoples have the right in natural law to their own laws and rulers. There are differences between Las Casas and Vitoria however.

The differences are significant in the context of indigenous rights.

Las Casas' analysis was more uncompromising and, in the later part of his life, more radical than that of Vitoria. Las Casas was aware of these differences with Vitoria, and explicitly rejected important elements of his doctrine.<sup>89</sup> Las Casas' views were rooted in the social and political realities of post-Conquest America, and the elaboration of his juridical views reflects his concern with the material welfare and physical survival of the Indians, based on his personal observations of the destruction wrought upon the Indians by the Spanish intrusion.<sup>90</sup> His unequivocal assertion of indigenous rights, and his wide view of such rights to encompass material security, cultural integrity and political autonomy, make his doctrine comparable with modern notions of self-determination and assertions of indigenous rights.

With Vitoria the approach is more theoretical, and the doctrinal focus is the basic issue of legitimacy of title and jurisdiction. Vitoria develops a theoretical model which juxtaposes legitimate spheres of sovereignty for Spaniards and Indians, delineates the boundaries between spheres, and describes the consequences of transgressing those boundaries.

As the debate over Indian rights was conducted largely in terms of natural law, it is necessary to outline briefly what is meant by "natural law" in this context. In sixteenth century Spain natural law was part and parcel of a single legal/moral order.<sup>91</sup> Divine authority provided the binding force of all law, and law and morality were conflated. Consequently natural law and positive law

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<sup>87</sup> As does Henderson, see text at note 37 above. Another related assumption is that Las Casas simply reflected the views of Vitoria. See also Carro, note 32 above, at p 248. Carro considers that Las Casas owed all his knowledge to the outstanding Dominican theologian-jurists of the period. Whilst recognising differences between Las Casas and Vitoria, Carro interprets any such differences in doctrine as a mistake or lack of understanding on Las Casas' part, since in Carro's opinion:

...he [Las Casas] could not rise to the high level of a Francisco de Vitoria or a Domingo de Soto, two masters of a theological-juridical system.

<sup>88</sup> See Fernández, "Fray Bartolomé de Las Casas: A Bibliographical Sketch" in Friede and Keen, note 32 above, p 67 at 89.

<sup>89</sup> See text at notes 149-151 below.

<sup>90</sup> See text at note 195 below.

<sup>91</sup> Kennedy, note 28 above, at 13-23 discusses the relationship between natural law, positive law, and international law (*ius gentium*) in Vitorian doctrine.

were not oppositional categories, as they would probably be seen today. The sovereign was not the source of an independent legal order, rather his promulgations were authoritative to the extent that they conformed with the moral/legal order. Natural law was simply law arising out of different sources to positive law. However it was not "moral law", rather it was as real and binding as positive law. Natural law derived from authoritative texts (themselves diverse) and the process of natural reason. In the Vitorian–Lascasian discourse natural law both empowers sovereigns (they are part of the natural order – including, according to Las Casas and Vitoria, the indigenous rulers), and limits the exercise of that power, as sovereigns are, like everyone else, subject to natural law. Of course it was possible to argue over the content of natural law – as did Las Casas and Juan Gines de Sepulveda at the Valladolid disputation discussed below.

Stone has described natural law thus:<sup>92</sup>

Natural law is that part of eternal law which man can apprehend with his unaided reason, but can neither create nor change whether by reason or will; for not man, but *God's reason*, is the measure of all that is good.

### *Las Casas*

Las Casas was born in Seville (1474), possibly of *converso*<sup>93</sup> lineage. His life and career were to be intimately bound up with America and the Indians. His father and uncles had sailed with Columbus, and as a student Las Casas had for a while the services of an Indian boy as a page. In 1501 Las Casas, as a priest, accompanied his father on an expedition to America, where he entered into family–type relations with his former page's family. This intimacy both with America and the Indians remained a feature of his life and work, and he often contrasted his first–hand knowledge of the realities of America with the ignorance of his doctrinal enemies. In the Prologue to his *History of the Indies* he notes the hearsay nature of other writers:<sup>94</sup>

I see that some have written of Indian things, not those they witnessed, but rather those they heard about, and not too well – although they themselves would never admit it.

In contrast, and noting that:<sup>95</sup>

Jurists say that law is born from the true account of facts...

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<sup>92</sup> Stone, note 42 above, p 53.

<sup>93</sup> It seems likely that Las Casas was descended from a family of converted Jews – *conversos*. See Fernández, note 88 above, pp 67–68 and Collard A (transl and ed), Bartolomé de Las Casas, *History of the Indies* (1971) IX, XXI. Collard feels Las Casas' *converso* origins account for his opposition to forced conversion of the Indians.

<sup>94</sup> Collard, *ibid*, p 5.

<sup>95</sup> *Ibid*, p 9.

he points out his depth of experience:<sup>96</sup>

...and I have roamed these Indies since about 1500. I have firsthand knowledge of what pertains to my *History*: the profane, secular and ecclesiastical acts committed in my day, ... the quality, nature and properties of these lands and kingdoms; the customs, religions, rites, ceremonies and conditions of their natural inhabitants...

Not that Las Casas was from the beginning closely interested in Indian rights. In the period 1502–1514 he lived in Hispaniola and Cuba as a typical cleric–gentleman, holding land as an *encomendero*<sup>97</sup> and working his land and mines with Indians provided through the *repartimiento*<sup>98</sup>. Although humane in his treatment of Indians, he was uncritical of a system which apportioned Indian land and labour without any reference to the rights of the original inhabitants. Criticized by the Dominicans for participating in the *encomienda*, he was converted in 1514 to the view that the Spanish treatment of the Indians was fundamentally unjust, renounced his own *encomienda*, and devoted the remainder of his life to the protection of the Indians and the restoration of their former non–colonial status.

In 1522 he entered the Dominican order and commenced a period of intense study of the legal basis of Spanish rule in the Indies. He became a noted publicist and lobbyist.<sup>99</sup> His influence reached its peak with the promulgation of the New Laws of 1542 reforming the administration of the Indies. These liberal laws attempted to overturn the *encomienda*, and restore Indian civil rights, in particular personal liberty.<sup>100</sup>

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<sup>96</sup> *Ibid*, p 11.

<sup>97</sup> The *encomienda* system of distribution of land and peoples is explained in Hanke L, *Bartolomé de Las Casas: An Interpretation of His Life and Writings* (1951), p 15:

The theory of the *encomienda* was simple. The Spanish crown gave or 'commended' Indians to Spaniards, who become *encomenderos*, and this grant gave the Spaniards the right to exact labor or tribute from the Indians. In return, the *encomenderos* were obliged to provide religious instruction for their Indians and to protect them.

<sup>98</sup> The *repartimiento* was the allocation or allotment of Indians to *encomenderos*.

<sup>99</sup> In 1552–53 Las Casas had published a series of 9 treatises, including the *Very Brief Account of the Destruction of the Indies*, which was reprinted many times, in a number of languages, over succeeding centuries, and which contributed to the development of the so–called "Black Legend" of Spanish cruelty in the conquest of the Indies. Two of his major works were not published for many years after his death, partly due to the controversial nature of his views. The *History of the Indies* was first published in 1875 but not in English translation until 1971 – the Collard translation, note 93 above (which is a considerably shortened version of the original work) –and his *Defence of the Indians* (see note 103 below) was not published until 1974, although a summary version in Spanish had been amongst the tracts published in 1552–1553.

<sup>100</sup> These laws were however never effectively implemented. The strong reaction in the colonies, including armed revolt, resulted in significant weakening of the reforms as early as 1545.

Perhaps the best known incident in Las Casas' career was the disputation with Juan Gines de Sepulveda at Valladolid, Spain in 1550–51. Sepulveda was a leading humanist scholar, and a protagonist for the colonialist party. In 1531 he had published an interpretation of the Aristotelian theory of "slaves by nature", which purported to justify enslaving "inferior" peoples.<sup>101</sup> In 1543 he explicitly applied this doctrine to the justification of wars against the Indians.<sup>102</sup> He was one of the leading apologists in Spain for colonialism by force of arms, and the deprivation of Indian liberty by the colonialists. The Valladolid disputation was convened by the king, Charles V, and the Council of the Indies in an attempt to resolve the continuing contention in Spain over the morality and legality of the wars of conquest against the Indians. The issues were to be debated by Las Casas and Sepulveda before a Council of 14 comprising eminent jurists and theologians.

The Valladolid disputation is the archetypal sixteenth century discussion of the law and morality of colonialism. Las Casas' arguments, which he titled *In Defence of the Indians*<sup>103</sup> provides a detailed rebuttal of the basis upon which Spanish colonialism attempted to justify the subjugation of the Indians. Although the legal frame of reference is different to modern law, which does not conflate law and morality with the unselfconscious ease evident in *The Defence*, there is much of interest in Las Casas' analysis of the colonial relationship. This interest arises from commonality of issues between sixteenth century America and the situation of indigenous peoples today, and also because of the nature of Las Casas' approach to the material. Having single-mindedly studied the question over a long period, it was Las Casas' intention to hone down the welter of arguments surrounding the relationship between Indians and Spaniards to basic principles. He was well aware of this tendency in his work:<sup>104</sup>

For forty eight years I have studied and sought to make clear the law;  
I believe, if I do not deceive myself, that I have penetrated to the pure  
waters of principle.

In the latter part of his life Las Casas' political influence waned. This was paralleled by an increasing radicalisation of his views, and his post-Valladolid writings evidence a radical, even Utopian trend, which took the logic of his

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<sup>101</sup> de Sepulveda JG, *Democrates* (1531). There was an obvious implication for the treatment of the Indians.

<sup>102</sup> de Sepulveda JG, *Democrates Alter or Secendus* (1543).

<sup>103</sup> de Las Casas B, *The Defence of the Most Reverend Lord, Don Fray Bartolomé de Las Casas, of the Order of Preachers, Late Bishop of Chiapa, Against the Persecutors and Slanderers of the Peoples of the New World Discovered Across the Seas* (circa 1552 – unpublished Latin manuscript: Poole S (trans and ed) (1974). Hereinafter cited as *The Defence*.

<sup>104</sup> Quoted in Martinez, "Las Casas on the Conquest of America" in Friede and Keen, note 32 above, p 309 at 341. Note however that Las Casas believed in grounding his theoretical propositions in fact. See text at note 95 above. Note also that in his Preface to the *Defence*, at p 28, he states his intention to prove Sepulveda and his followers "wrong in law" and also "how wrong they are in fact".

system to its extreme, by rejecting virtually any Spanish claim over the Indians.<sup>105</sup>

In the end, despite the claims of modern writers who wish to idealize the achievements of Las Casas, he was not successful in altering the nature of Spanish colonial rule, and its highly destructive effects on the Indians.<sup>106</sup> He died bitterly disillusioned with the way Spain governed the Indies. However he wished his letters and documents preserved and catalogued so that there would be:<sup>107</sup>

...true testimony that always and for many years, through the mercy of God, I have defended the Indians from injustices, injuries [and that] if God decides to destroy Spain, [to] let people know it was on account of the destruction we have wrought in the Indies.

### **Las Casas' Doctrine as set out in *The Defence***

*The Defence* can be seen as the major statement of Las Casas' system of thought. Hanke notes that Las Casas' own repeated references to *The Defence* in his 1552 treatises:<sup>108</sup>

...indicate that he [Las Casas] looked upon it as the most detailed exposition of his views.

*The Defence* provides an accessible and comprehensive formulation of Lascasian doctrine.<sup>109</sup> Although the theme of the discussion is the appropriate method of evangelization, and so may seem somewhat remote to modern concerns, it is basically an attempt to define the correct juridical basis for the relationship between the Spanish Crown and the various Indian peoples and their rulers.

Indeed, in respect of evangelization, the often-repeated instruction to explorers and *conquistadores* to convert the Indians is not to be necessarily taken at face value, that is as signifying merely an outpouring of Spanish missionary zeal. The Americas represented a new situation for Spain, which, in attacking the

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<sup>105</sup> Friede, note 77 above, pp 194–205.

<sup>106</sup> As Friede states, *ibid*, p 195:

In the long run the Lascasian movement, the last vigorous Indianist effort of the colonial period, was unable to overcome the opposition of the Spanish colonists, and the intensity of corrective discussion and action gradually declined during the reign of Phillip II.

<sup>107</sup> *Ibid*, p 204

<sup>108</sup> Hanke, note 55 above, p 82.

<sup>109</sup> *Ibid*, p 157:

*The Defence*, because it has so many of the essential parts of Las Casas' doctrine, will probably become the favourite treatise of those who wish to get a general appreciation of his theoretical labours.

*The Defence* is the major source of Las Casas' writings available in English.

Indians lacked the "reconquest" justification of the wars against the Moors on the Iberian peninsula.<sup>110</sup> As Johnson puts the problem:<sup>111</sup>

*Ergo*, how could a Castillian conquest, or even a Castillian presence be justified?

Johnson believes that the answer or justification lay in a mission or obligation to convert. That is, conversion served to provide a legal basis for the Spanish intrusion. It was:<sup>112</sup>

"the best claim that could be established for lands that were not properly subject to 'reconquest'".

Thus evangelization itself was closely involved with legitimizing colonisation. It was part of, rather than an avoidance of, the basic issues concerning the legality of the subjection of one people to another.

Las Casas understood this connection well, hence his emphasis on peaceful evangelization, his strong opposition to forced conversion, and his oft expressed scepticism as to the motives of those who argued the evangelization mission as a basis for jurisdiction.

Las Casas opens his *Defence* by indicating in the Preface the scope of the disaster befalling the Indians:<sup>113</sup>

If, then, the Indians are being brought to the point of extermination, if as many peoples are being destroyed as widespread kingdoms are being overthrown...

and the pervasive cruelty of the *conquistadores*:<sup>114</sup>

...these brutal men who are hardened to seeing fields bathed in human blood, who make no distinction of sex or age, who do not spare infants at their mothers' breasts, pregnant women, the great, the lowly or even men of feeble and gray old age...

A fundamental aspect of Las Casas' work is his concern at the genocidal nature of the Spanish intrusion – the very survival of the indigenous populations was at issue, and Las Casas drew attention to the rapid and dramatic decrease in population, which he attributed not only to the destruction caused by warfare but also to the harsh physical labours required of Indians under the *repartimiento*.<sup>115</sup> Las Casas estimated a loss of population during the first half of the sixteenth century of between 15 and 20 million.<sup>116</sup>

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<sup>110</sup> Also the Indians could not be considered "enemies of Christianity" in the way that Moors and Jews were thought of by Spaniards, ie the Spaniards also lacked this justification for attacking the Indians.

<sup>111</sup> Comments by HB Johnson Jr in Hanke, note 55 above, p 169, n 108.

<sup>112</sup> *Ibid*.

<sup>113</sup> Las Casas, note 103 above, p 19.

<sup>114</sup> *Ibid*.

<sup>115</sup> Netheim, "Indigenous Rights, Human Rights and Australia", (1987) 61 ALJ 291 at 295 notes that genocide remains a real concern to some indigenous peoples:



In the Preface of *The Defence* Las Casas notes the ideological importance of the debate over Indian rights, and the importance of the recognition of Indian rights as a constraint upon behaviour of the settlers in the colonies – or rather that failure to recognise those rights would remove such barriers and constraints to genocide and enslavement as existed.

### Sepulveda's four arguments

Las Casas identifies 4 main justifications advanced by Sepulveda to prove that war against the Indians is justified. These arguments are, briefly:

#### a) Barbarism

The Indians are barbarians, and therefore, following Aristotle, natural slaves, obliged by natural law to subject themselves to the (superior) Spanish.<sup>117</sup> Natural law was thus invoked on both sides of the indigenous rights argument. Stone notes this double application of natural law in the Spanish arguments on the Indians in that both those advocating the rights of Indians, and those denying such rights (as per Sepulveda's argument on 'natural slaves') based their arguments on propositions drawn from natural law:<sup>118</sup>

...the contrary view to the assertions of Indian rights (also natural law based) that mere primitiveness, idolatry and pagan practices justified conquest and subjection, was being used by other Spanish thinkers (eg Juan Gines de Sepulveda) to justify military adventures and exploitation in South America.

#### b) Crimes against divine (revealed) and natural law

Idolatry, sodomy, cannibalism, and human sacrifice justify and require intervention and punishment by Christians, according to Sepulveda's thesis.

#### c) Rescue of innocent victims

Allied to Sepulveda's second argument, is the contention that innocent victims (even if willing victims) should be rescued from such practices. A sort of "intervention d'humanité" argument, except that the intervention may lead to permanent subjugation.

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Also of continuing relevance to some indigenous peoples is the Convention on the Prevention and Punishment of the Crime of Genocide.

116 For many years this estimate was considered to be rhetorical exaggeration. However more recent demographic studies have tended to confirm Las Casas' figures. See studies quoted in Keen, "Introduction: approaches to Las Casas, 1537–1970" in Friede and Keen, note 32 above, p 3 at 44.

117 In Sepulveda's argument:

... in the same way that matter yields to form, body to soul, sense to reason, animals to human beings, women to men, children to adults, and, finally, the imperfect to the more perfect, the worse to the better, the cheaper to the more precious and excellent, to the advantage of both.

Las Casas, note 103 above, Summary of Sepulveda's Position, pp 11–12.

118 Stone, note 42 above, p 62.

d) Evangelization

Armed force may be used to ensure the propagation of Christian faith.

These four propositions are not as distant from modern concerns as they may at first appear. They encompass principles and issues which are germane to the situation of indigenous peoples today.

*The first proposition* is of fundamental importance, since it challenges the concept of equality of mankind, on which human rights are based. Las Casas refuted this Aristotelian-based proposition of "natural slavery" by arguing that the true barbarians to whom the doctrine applied were "wild men" living in forests and caves in remote and barren areas.<sup>119</sup> These people were rarely found, and were freaks and exceptions to the natural order of rational humankind. To Las Casas it is clear that the Indians of America did not belong to such a category. The Indians, Las Casas said, could only be considered barbarians in the restricted sense of being unlettered. The Indians were rational, normal human beings, the equal of all other mankind. They could not, therefore, be "slaves by nature", and enjoyed the same rights to liberty and property as the Spaniards or anyone else.

It may appear that Las Casas has accepted the Aristotelian framework, and merely sought an "escape clause" for the Indians from the charge of barbarism on the facts of the case – that the Indians do not fall into the category of "natural slaves" because of the particular characteristics and achievements of their society. There has indeed been some controversy as to the extent to which Las Casas incorporated Aristotelian thinking, or merely found it necessary to argue in Aristotelian concepts because of the weight of Aristotle's authority. Nevertheless it is clear that Las Casas' purpose was more general than merely to enter "special pleading" on behalf of the Indians. His concern was to show the essential humanity and rationality (and therefore equality) of all mankind, and to deal with Aristotle's argument by narrowing the category of "barbarian" to the most exceptional, a-social freaks of nature – almost Caliban-type creatures. For Las Casas the facts and the principles went together, for to condemn such large populations as existed in the Americas to the charge of barbarism would be to condemn God's creation to the charge of irrationality:<sup>120</sup>

Who, therefore, except one who is irreverent toward God and contemptuous of nature, has dared to write that countless numbers of

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<sup>119</sup> Las Casas, following Aristotle and St Thomas Aquinas distinguishes four types of barbarians: those who behave in a barbarous (savage) manner, even though not actually barbarians; the unlettered peoples; the "true barbarians" to whom the doctrine of natural slavery applies; and finally, non-Christians. When dealing with the possible application of "natural slavery" he distinguishes carefully and clearly the category of "true barbarians". At other parts of the text he uses the term more loosely, covering the other three categories, in the general sense of "uncivilized". See text at note 133 below.

<sup>120</sup> Las Casas, note 103 above, p 35.

natives across the ocean are barbarous, savage, uncivilized, and slow witted...

He emphasises this point:<sup>121</sup>

Again, if we believe that such a huge part of mankind is barbaric, it would follow that God's design has for the most part been ineffective, with so many thousands of men deprived of the natural light that is common to all peoples. And so there would be a great reduction in the perfection of the entire universe.

Hanke argues for the generality of Las Casas' approach in the dispute over barbarism:<sup>122</sup>

He [Las Casas] not only denies vigorously that the Indians fall into the category of natural slaves, but his argument tends to lead inevitably to the conclusion that no nation – or people – should be condemned as a whole to such an inferior position.

The accusation of barbarism is the fundamental racial basis of colonialism – it provides the justification for the subordination of one society by another, ie that one race of people is, for whatever reason, inferior to another. Las Casas was aware of the psychological mechanisms, in terms of self-justification, and the political implications, in terms of loss of sovereignty, at work in the assertions of racial/cultural (the two categories became inextricably inter-woven) inferiority. He set out this process, with characteristic scepticism as to colonialist motive:<sup>123</sup>

Worldly ambitious men who sought wealth and pleasure placed their hope in obtaining gold and silver by the labor and sweat, even through very harsh slavery, oppression, and death [of the Indians]...they devised a means to hide their tyranny and injustices and to justify themselves in their own light. This is the way they worked it out: to assert falsely that the Indians were so lacking in the reason common to all men that they were not able to govern themselves and needed tutors...they did not hesitate to allege that the Indians were beasts or almost beasts...Then they claimed it was just to subject them to our rule by law, or to hunt them like beasts, and then reduce them to slavery.

It is the alleged lack of capacity for self-government which establishes the right of the coloniser to subject the indigenous people to their rule, and Las Casas aimed not only to defend the objective regime of Indian rights and interests, but at a more fundamental level to defend the reputation of Indians as rational beings, with societies which required no external interference or control. He devoted considerable space and energy to confounding the Aristotelian doctrine, not only in *The Defence* but in his other works, and he drew upon his close observation of Indian life, language and culture. He linked the equality of

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<sup>121</sup> Ibid, p 36.

<sup>122</sup> Hanke L, *Aristotle and the American Indians* (1959), pp 57–58.

<sup>123</sup> Las Casas, *De Unico Vocationis* quoted in Hanke, note 108 above, p 157.

the Indians as rational beings with the legitimacy of their laws and their capacity for self-government, as is shown in the following passage:<sup>124</sup>

They are not ignorant, inhuman or bestial. Rather, long before they had heard the word Spaniard they had properly organized states, wisely ordered by excellent laws, religion and customs. They cultivated friendship and, bound together in common fellowship, lived in populous cities in which they wisely administered the affairs of both peace and war justly and equitably, truly governed by laws that at very many points surpass ours.

There is a vital connection between the question of the status of the indigenous inhabitants - their alleged "barbarism", "primitiveness", "backwardness", etc and the territorial concept of *terra nullius*. By defining away the essential humanity of the inhabitants, and by denigrating their capacity for self-government, it becomes possible to convert inhabited land to empty land - *terra nullius* - available for the first taker. As Joyner has pointed out in respect of the Americas:<sup>125</sup>

Despite the manifest inhabitation of the land by Indian tribes, European jurists conveniently reasoned that all Indians were barbarians and savages by instinct, and therefore incapable of self-government.

In this contention, the individual qualities of indigenous persons and their personal rights and liberties at the same time define their collective rights to self-government and freedom from external control. To separate out the individual human rights of the indigenous persons from the collective political rights of indigenous peoples creates a dichotomy which would appear to be largely lacking in the thinking of Las Casas (and Vitoria). They argued that the Americas were indeed inhabited by human beings the equal of the Spaniards, and were therefore not *terrae nullius*.

Similarly Australia was considered *terra nullius*, despite, in Joyner's phrase "the manifest inhabitation of the land". Sovereignty was acquired by Britain on the basis of occupation. Whether this theory of occupation accords with historical fact,<sup>126</sup> the rationale for this approach lay in the alleged primitive or barbaric state of Aboriginal society. The Report of the Select Committee of the House of Commons on "Aborigines" in 1837 referred to Aboriginal tribes as:<sup>127</sup>

...forming probably the least-instructed portion of the human race in all the arts of social life. Such indeed, is the barbarous state of these people and so entirely destitute are they even of the rudest forms of

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<sup>124</sup> Las Casas, note 103 above, pp 42-43.

<sup>125</sup> Joyner, note 54 above, at 31.

<sup>126</sup> That is, whether the mode of acquisition of Australia was by "occupation" or by "conquest". See Evatt, note 9 above, pp 291-292 and Schaffer, "International Law and Sovereign Rights of Indigenous Peoples" in Hocking B (ed), *International Law and Aboriginal Human Rights* (1989), p 19 for a discussion of the issue.

<sup>127</sup> Lindley, note 3 above, p 41.

civil polity, that their claims, whether as sovereigns or as proprietors of the soil, have been utterly disregarded.

However there was nothing peculiar or special in the position of the Aborigines in being denied the capability for self-government because of their alleged barbarism.<sup>128</sup> The colonialist party in sixteenth century Spain had vigorously pushed the same line in respect of the Indians of central and southern America. Sepulveda had argued:<sup>129</sup>

that those people [the Indians] are barbaric, uninstructed in letters and the art of government, and completely ignorant, unreasoning, and totally incapable of learning anything but the mechanical arts; that they are sunk in vice, are cruel, and are of such character that, as nature teaches, they are to be governed by the will of others.

Indeed the concept of *terra nullius* has come to have little to do with the original meaning of literally uninhabited land. Rather, at least in the context of colonialism, its function has been, through association with ideas of barbarism, to deprive indigenous peoples of their original independent or separate existence. Las Casas was aware that accusations of barbarism could in effect create *terra nullius*, and so argued the basic equality of mankind in respect of the Indians, and the rights which flow from such equality.

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<sup>128</sup> As is sometimes thought. That is that the doctrine of *terra nullius* has been in particular applied in Australia because of the apparent low level of development of Aboriginal society. However, as Evatt herself points out, (note 9 above, at 18) distinctions between modes of acquisition may relate to practicalities, rather than legalities. In the case of the Treaty of Waitangi she notes:

It has been argued that this Treaty could not be recognised as valid in international law since the Chiefs had no status or capacity to enter into such a transaction. This argument results in the labelling of both New Zealand and Australia as *terrae nullius*.

(It has been noted earlier (note 9 above) that the South Island of New Zealand was in fact acquired on the basis of *terra nullius*.)

Similarly land dealings with North American Indians were matters of convenience, rather than of recognition. McNeil K, *Common Law Aboriginal Title* (1989), at p 223 points out, in discussing certain seventeenth century cases, that:

In other words, because Indians were barbarians, their presence apparently counted for nothing, and therefore the Crown's title was complete from the outset. Private purchase might quiet Indian claims, but against the Crown and its grantees they were nullities because the Indians had nothing to sell.

The linkage between alleged barbarism and *terra nullius* has been fundamental in the acquisition of sovereignty over the territories of indigenous peoples. This remains the case in Australia, despite the High Court ruling in the case of *Eddie Mabo and others v The State of Queensland* of 3 June 1992 that "The lands of this continent were not *terra nullius* or 'practically unoccupied' in 1788". Quoted in Frank Brennan SJ, "The Mabo Case and Terra Nullius", *Uniya Occasional Paper* No 34, 1. In fact, in terms of the Select Committee of 1837, the rights of Australian Aborigines as sovereigns remain "utterly disregarded".

<sup>129</sup> Las Casas, note 103 above, p 11.

Today blatant assertions of the superiority of one race or culture over another, and grossly distorted accounts of indigenous societies, are likely to be given little credence. However, views as to the relative value of indigenous societies as against the major societies with which they are co-located may still influence the basis of rights to be accorded to indigenous peoples. No doubt elements of social Darwinism persist in modern Western thought, and whereas once Christianity was seen as the cure for the backwardness of indigenous peoples such as the Indians, today modernisation and development are often seen as inevitable and desirable, and the existence of indigenous claims as an impediment to progress. Falk has noted that:<sup>130</sup>

the nationalism of an indigenous people is viewed from the dominant perspective as a primitive stage of human society appropriately extinguished in the course of the modernizing process of development.

Because of this perceived inequality, rights accorded indigenous peoples are seen as acts of benevolence, granted at the discretion of the majority society. Falk argues however that the wider problems created by the process of modernisation are so great that the value of indigenous societies as "societal models of ecological success"<sup>131</sup> is forcing a reassessment of the parity between indigenous societies and the more powerful majority societies.<sup>132</sup>

It is not Las Casas' intention to contend that all societies are equal in their achievements, but rather that all societies have an equal right in natural law to independent existence, and where necessary, self defence:<sup>133</sup>

Since, therefore, every nation by the eternal law has a ruler or prince, it is wrong for one nation to attack another under pretext of being superior in wisdom...Hence every nation, no matter how barbaric, has the right to defend itself against a more civilized one that wants to conquer it and take away its freedom.

The Papal Bull *Sublimis Dei* 1531 provided a major statement of the fundamental equality of Indians and the legal implications which flowed therefrom. It was frequently cited by Las Casas<sup>134</sup> (who had in fact had some influence in its promulgation). It asserted the divinely inspired rationality of all

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<sup>130</sup> Falk, note 27 above, p18. See also Stavenhagen at UN Seminar 1989, quoted in Barsh, "United Nations Seminar on Indigenous Peoples and States", (1989) 83 AJIL No 3, 599 at 601:

The racism against indigenous people is not based on biological characteristics but cultural and political ones. [It is] a new form of racism, when a modern society sets itself up as a standard.

<sup>131</sup> Falk, note 27 above, p 23.

<sup>132</sup> Falk, *ibid*, contends: "In essence, protecting the Aboriginal viewpoint is not a paternalistic undertaking, it is increasingly recognized to be an expression of overall enlightened self-interest."

<sup>133</sup> Las Casas, note 103 above, p 47.

<sup>134</sup> Including in Las Casas, *ibid*, at pp 100-101.

mankind, and interpreted accusations against the Indians as a novel and satanic device. The consequence of the Indian's equality was that:<sup>135</sup>

...the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property...; should the contrary happen it shall be null and no effect.

*Sepulveda's second thesis* concerned subjugation in order to correct and punish crimes against divine and natural law, in particular idolatry and human sacrifice. Las Casas denies any right of punishment to Christians, whether Popes or princes.

His argument rests not on whether such offences occur (although he held that the various accusations against the Indians were greatly exaggerated), but on whether outsiders have any jurisdiction in such matters. This is, again, a recognition of Indian polity and rights. Thus:<sup>136</sup>

Surely, no matter how despicable the crimes they [the Indians] may commit against God...neither the Church nor Christian rulers can take cognizance of them or punish them for these. For there is no jurisdiction, which is the necessary basis for all juridical acts...

Las Casas accordingly asserted that Spaniards lacked jurisdiction in America. This is because jurisdiction itself is part of the natural law or natural order whereby the world is divided into territories or districts, and that jurisdiction grows out of this territorial division, and inheres in the people of that territory:<sup>137</sup>

...jurisdiction is said to be implanted in a locality or territory, or in the bones of the persons of each community or state, so that it cannot be separated from them...

Las Casas defined a territory as:<sup>138</sup>

the totality of lands within the borders of each locality where one has the right to rule

and noted that each state so defined, should be sufficient to itself (that is not requiring external interference) and had the right to protect its borders. This included the rulers of pagan states:<sup>139</sup>

Since, in this respect, their jurisdiction is no less natural than the jurisdiction of Christian rulers.

*The third thesis*, that intervention is warranted to protect innocent victims from crimes such as cannibalism and human sacrifice was rejected by Las Casas as interference in the cultural autonomy and integrity of the Indians. Las Casas

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<sup>135</sup> Quoted in Hanke, note 108 above, p 21.

<sup>136</sup> Las Casas, note 103 above, p 55.

<sup>137</sup> *Ibid*, p 83.

<sup>138</sup> *Ibid*

<sup>139</sup> *Ibid*

built his case against the intervention proposition step by step, proceeding from practical questions to issues of principle. By taking the most extreme example, human sacrifice, Las Casas intended to prove the case for all lesser "crimes" at the same time. His approach was radical and uncompromising.

First Las Casas pointed out that the destruction caused to innocent and guilty alike, if such rescue could only be effected by warfare, would far outweigh the good done by saving a few innocent victims.<sup>140</sup> Further the Indians were under no obligation to believe the Spaniards in condemning such practices, as the bad behaviour of the Spaniards destroyed their credibility.<sup>141</sup> These arguments however do not go to the heart of the matter, viz the right of the Indians to their own religious and cultural practices.

Las Casas demonstrated the widespread existence of sacrifice throughout history and in many cultures. He noted, from Plutarch, that the Romans did not usually punish barbarian sacrifice "because they knew it was done from custom and law".<sup>142</sup> Respect for customs and laws is, according to Las Casas, important. However Las Casas advanced the argument further. Rather than viewing sacrifice as a crime (excusable perhaps, or at least difficult to punish), he attempted to discern what positive functions the practice may serve in the societies which followed it. In doing so he demonstrated a remarkable cultural relativism, which he nevertheless explained in universal natural law principles. Thus religion itself is universal, as it represents a seeking-after of God:<sup>143</sup>

...no nation is so barbarous that it does not have at least some confused knowledge about God. Now all persons understand that God is that which (sic) there is nothing better or greater.

Within all religions the idea of sacrifice is a central principle or theme, and offering sacrifices "is a very old practice, introduced by natural law".<sup>144</sup> Human sacrifice, whilst an error, is a reasonable practice within sacrificial behaviour:<sup>145</sup>

Since, then, the pagans believe that the universal good and welfare of the whole state consists in sacrifices and immolations, that is, human victims...it is not surprising that, when afflicted by needs, they sacrifice what in the judgement of all is most precious and pleasing to God, that is, men.

The essential point Las Casas was making was not that human sacrifice is necessarily correct or moral, but rather that *intervention*, beyond the level of

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140 "...the death of a few innocent victims is better than the complete destruction of entire kingdoms, cities and strongholds" Las Casas, *ibid*, p 119.

141 "Why will they [the Indians] believe such a proud, greedy, cruel and rapacious nation" *Ibid*.

142 *Ibid*, p 223.

143 *Ibid*, p 226.

144 *Ibid*, p 231.

145 *Ibid*, p 238.



peaceful suasion, cannot be justified: it would be an infringement of the jurisdictional boundaries.

In being prepared to base his argument on the most extreme case, Las Casas was being consciously radical,<sup>146</sup> and typically uncompromising in delineating the basic principles at issue – in this case jurisdiction, and the closely linked concepts of religious freedom (that is from interference or suppression) and cultural integrity. Issues of religious freedom and cultural integrity remain central to indigenous claims today.<sup>147</sup>

*Sepulveda's fourth thesis*, that war may be waged against pagans in order to prepare the way for preaching the faith, was answered by Las Casas on a number of grounds. He strenuously rejected the practice of forced conversions, or in any way attempting to evangelize with the support of arms. He demonstrated here his appreciation of the strength and resistance of the belief-systems of other cultures, in that any conversions accompanied by the terrors of war would not represent an expression of true belief. Again he reiterated that the natural sovereignty and independence of the Indians be respected – paganism and resistance to the gospel provided no excuse for war, even though Las Casas felt that the Indians were obliged to at least receive and listen to missionaries.

His views on the justice and practicality of armed evangelization are shown in the following statement:<sup>148</sup>

What will the Indians think about our religion, which those wicked tyrants claim they are teaching by subjugating the Indians through massacres and the force of war before the gospel is preached to

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<sup>146</sup> In a letter, referring to the Valladolid disputation, he says:

In this controversy I maintained and proved many conclusions which no one before dared to treat or write about.

Quoted in Hanke, note 108 above, p 95. Hanke notes about this letter:

... the only specific doctrine he mentioned was his defence of human sacrifice by the Indians.

Hanke's view is, p 95:

Thus Las Casas respected, perhaps more than any of his contemporaries, the beliefs, rites and customs of the Indians as appropriate and proper for them.

<sup>147</sup> Eg the Noonkanbah dispute in Western Australia in 1979–80 over the prospective drilling of an Aboriginal sacred site can be seen in terms of religious freedom and cultural integrity. Although not analogous to interference with religious practices on moral grounds (with Noonkanbah the interference was for economic reasons) the question of jurisdiction emerges clearly in the statement by Magistrate D McCann in response to argument presented by counsel for the mining company, CRA, opposing an application to stop mineral exploration on Noonkanbah:

In coming to Australia the white man brought his form of law. That law stands and cannot be overridden by moral or spiritual arguments.

(Quoted in Hawke S, *Noonkanbah: whose land, whose law* (1989), p 23.)

<sup>148</sup> Las Casas, note 103 above, p 298.

them?...Furthermore, what advantage is there in destroying idols if the Indians, after being treated this way, keep them and adore them secretly in their hearts.

Evangelizing wars and forced conversions are generally not directly relevant to the concerns of indigenous peoples today. However Las Casas' treatment of the issue emphasises themes of political and cultural autonomy.

### **Disagreement with Vitoria**

Having discussed Sepulveda's four main propositions directly, Las Casas turned to a critique of the authorities cited by Sepulveda. One of these was Vitoria.

Las Casas referred to Vitoria four times in *The Defence*, three times in support, but once to discuss Sepulveda's reference to Vitoria's doctrine on jurisdiction. Las Casas criticised Vitoria's views, the point of contention being Vitoria's treatment of possible titles to Spanish jurisdiction in the Indies.

In *De Indis* Vitoria had shown seven titles or claims to Spanish jurisdiction (such as discovery) as false, that is providing no legal basis for subjection of the Indians. Vitoria also demonstrated seven possible grounds for just title<sup>149</sup> (Vitorian doctrine is discussed more fully below). It is with these possible grounds for legal title of Spain over the Indians that Las Casas disagreed. To Las Casas the only legitimate role for Spain in America was peaceful evangelization. In the Lascasian system, unlike the Vitorian, there can be no legitimate overthrow of local Indian polity.

The apparent ambiguity of Vitorian doctrine has caused the problems of interpretation in the modern literature discussed above. This is not a problem with Las Casas. In *The Defence* he refutes Vitoria's assertion of possible just titles, not by doctrinal argument but rather by impugning Vitoria's motives. He states that Vitoria had temporized for reasons of political expediency – that Vitoria saw a need to balance or qualify his exposition of seven false titles, by finding some grounds to justify Spain's continued presence in the Americas:<sup>150</sup>

He [Vitoria] is a little more careless, however, regarding some of those [just] titles, since he wished to moderate what seemed to the Emperor's party to have been harshly put.

Las Casas notes the conditional expression used by Vitoria in advancing the seven possible titles (he actually added an eighth in even more qualified terms – see below), and interprets this to show that Vitoria realised he was on shaky ground. Las Casas concludes that Sepulveda is incorrect in citing Vitoria:<sup>151</sup>

Now since the circumstances that this learned father [Vitoria] supposes are false, and he says some things hesitantly, surely

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<sup>149</sup> Vitoria, note 85 above, pp 129–162.

<sup>150</sup> Las Casas, note 103 above, p 341.

<sup>151</sup> *Ibid.*

Sepulveda should not have thrown up against us an opinion that is based on false information.

Las Casas' position represents a far more thorough-going assertion of the rights of indigenous peoples than that of Vitoria. The difference has been overlooked or ignored by most modern writers, who assume a close similarity between the doctrines of Vitoria and Las Casas. Spanish writers have been more aware of the discrepancy in views, although they have often assumed Vitoria to be more correct, mainly on the basis of his standing and authority. Martinez<sup>152</sup> has noted the characteristic assumption in respect of Vitoria of *Magister dixit, ergo ita est* (the master said it, therefore it is so).

### **Las Casas' view of the proper relationship between Spain and the Indians**

Las Casas did not deny to Spain a form of dominion in the Indies – a sort of "super-sovereignty", akin to a protectorate arrangement, with a very large degree of autonomy resting with the Indian lords (or caciques as known in the West Indies). The basis for such over-arching sovereignty was the mission of peaceful evangelization. This view came from Las Casas' interpretation of the Papal donation of the Americas to Spain. Las Casas' view of Papal donation was much more restrictive than that of most of his contemporaries. He minimized the implications of such donation in terms of power and jurisdiction. He was convinced that the sovereignty of the Indian lords had been improperly usurped by Spain.

The Spanish monopoly in the Americas was based largely on the famous bull *Inter Caetera* of Alexander VI in 1492. Las Casas (and Vitoria) denied the power of the Pope to distribute the lands of infidels to Christian Princes.<sup>153</sup> The Indian caciques were, understandably, not impressed by papal donation of their lands, according to an early account of a meeting between Pizarro and the cacique of Cena, who expressed the view:<sup>154</sup>

...as for the pope who gave away lands that he didn't own, he must have been drunk; and a king who asked for and acquired such a gift must have been crazy.

Las Casas deals with this issue in *The Defence*. He gives a highly restrictive interpretation of *Inter Caetera*. Las Casas contends that the exclusive right to evangelization conferred by the bull provides no basis for title or jurisdiction, which can only be established by the voluntary agreement of the Indians after conversion, and even then with "the rights of their natural lords...retained."<sup>155</sup>

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<sup>152</sup> Martinez, note 104 above, at 320.

<sup>153</sup> Papal donation and the Pope's spiritual and temporal powers are discussed more fully below, see text at notes 172–180, which deals with Vitoria's rejection of such Papal authority.

<sup>154</sup> Quoted in Hanke, note 108 above, p 353.

<sup>155</sup> Las Casas, note 103 above, p 353.

The bull provided, *inter alia*:<sup>156</sup>

...to make the aforementioned continents and islands, as well as their natives and inhabitants, subject to yourselves and to lead them to the Catholic faith.

Las Casas interprets "subject" to mean "dispose", in the sense of dispose them to the faith. In doing this he was consciously prepared to abandon a literal interpretation in favour of a contextual approach, in the light of the document's overall objective and purpose. Thus Las Casas argued:<sup>157</sup>

...that words should serve the intention of understanding, since the gospel consists not of the written page but of the foundation of reason and meaning, and whenever reality can not be presented in any other way, the words must be extended to a different meaning.

He concludes:<sup>158</sup>

Therefore let us restrict the word 'subject' so that it is understood as meaning the subjection that will be borne of the meek and gentle preaching of the divine word. 'Subject' must be taken in this sense, even if its literal meaning be opposed to this interpretation.

Las Casas thus rejects Sepulveda's reliance on papal donation:<sup>159</sup>

Therefore Sepulveda's claim that the Pope approved of war against the Indians and exhorted the Catholic Kings to subjugate them by war is false.

Whilst the Indians were directly under the protection of the Spanish King, ie vassals of the Crown, they were in Las Casas' view at the same time completely under the authority of their own rulers, and under the control or authority of no Spaniard other than the Spanish king. Hence he was opposed to the *encomienda* principally because it gave individual Spaniards direct authority over Indians, as well as because of the inhumane circumstances often associated with it.

Las Casas' program sought the restoration of Indian polities wherever that was still possible, and the restitution of all property taken from Indians, whether such property was acquired "legally" under the *encomienda*, or by straight theft and plunder. He consistently reproached the allocation of Indian land, and, for example, denied the king's right to have granted land to Columbus:<sup>160</sup>

...for it was another's land, namely, it belonged to its native inhabitants, the Indians, and to their native kings who ruled there.

In the later part of his life, as he saw the legislative reform program which he had helped develop dismantled under the constant pressure of the colonists, his views became increasingly radical. He lost interest in the protectorate system with Spain pre-eminent, which he had earlier envisaged, and increasingly he

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156 *Ibid*, p 351.

157 *Ibid*, p 354.

158 *Ibid*, p 360.

159 *Ibid*, p 354.

160 Quoted in Friede, note 77 above, p 177.

simply equated the sovereignties of Spain and the Indian caciques. For instance, in the matter of tribute he put the cacique's rights above the king's, for the tribute rights of the Spanish king could only rest on voluntary treaties with the natural lords. An annual payment of a token jewel would suffice to recognise Spain's suzerainty. Similarly the Spanish king had no right to the mining royalty ("the royal fifth") as the sub-soil belonged to the Indian lords (this view was at variance with Vitoria). As Friede has observed of this later development of his doctrine (after about 1560):<sup>161</sup>

His ideas on the relationship of the two *senorios* or lordships, that of the caciques and that of the King of Castille, now became more logical and, one might say, more radical.

#### **Summary: Las Casas**

Las Casas saw native title as defensible against European claims, whether based on the authority of king or pope, unless the title was voluntarily relinquished. The Lascasian doctrine represents something of a high point in the assertion of indigenous rights in law, at least until the modern era of self-determination and de-colonisation.

Las Casas conflated the rights of the individual and of the society of which the individual was a member. Such an approach reflects a natural law view which saw a benign relationship between ruler and ruled, in contrast to later views which saw the state as threatening to individual liberty and happiness. Nevertheless Las Casas' approach does suggest that a group perspective is not necessarily antithetical to individual rights.

The wide view of indigenous rights advanced by Las Casas, encompassing economic and cultural considerations within issues of jurisdiction and sovereignty, has relevance to the claims advanced by indigenous peoples today. To date, at least within English language discourse,<sup>162</sup> Las Casas' influence on the question of indigenous rights in international law, whilst generally perceived as supportive to the position of indigenous peoples, has been marginal. However the work of Las Casas provides the potential to define more clearly the basic issues and principles involved in establishing the status of indigenous peoples.

#### ***Vitoria***

##### ***"Aborigines the true owners"***

For Vitoria, as with Las Casas, the world was governed by the divinely-inspired natural law. His approach was accordingly universalistic or holistic. He allowed for the sovereignty of the Indians, but not based on their own

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<sup>161</sup> Ibid, p 200.

<sup>162</sup> See Keen, note 116 above, for the influence of Las Casas on scholarship and politics since the sixteenth century.

independent public title.<sup>163</sup> Rather their sovereignty, like that of the Spaniards, was grounded in the divine order as expressed in natural law and the law of nations (*ius gentium*).<sup>164</sup> Indian and Spanish sovereignties could not, therefore, lawfully conflict or compete. Instead they had boundaries or delimitations. It was only by a transgression of these legitimate boundaries that a wrong was created which could lead to the loss of public title, through the mechanism of just war. Unjust war could never provide the basis for a legitimate title.

It is Vitoria's purpose to show what circumstances can and cannot justify war and acquisition of title. His analysis of the rights and obligations of the Indians in *De Indis* proceeds in three stages. First he considers whether the Indians had legitimate title to their lands *viz*:<sup>165</sup>

...I ask first 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.

Vitoria's answer is an unequivocal affirmation of prior Indian ownership, based on showing that the natural law applies to pagan as well as Christian. He rebuts the (Aristotelian) argument that Indians are slaves by nature, and therefore cannot hold property. He argues that Indians are rational beings:<sup>166</sup>

...they are not of unsound mind, but have, according to their kind, the use of reason...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...all of which call for the use of reason.

As rational beings, the Indians cannot be barred from dominion "for natural dominion is a gift of God".<sup>167</sup> Following a detailed rebuttal of arguments that

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163 Which Kennedy, note 28 above, at 26 defines as "the authority to exercise public, temporal or sovereign authority."

164 International law and natural law are not really differentiated in the Vitorian system – or rather international law is grounded on and must be consistent with natural law, even though such law is found in exercises of sovereign authority. International law is, according to Vitoria (Vitoria F, *De Potestate Civili*, quoted in Scott JB, *The Spanish Conception of International Law and Sanctions* (1934), p 1), universally authoritative:

... it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.

As Kennedy points out, note 28 above, at 18:

Just as Vitoria does not differentiate the moral and legal orders, he does not differentiate international law from divine or natural law.

165 Vitoria, note 84 above, p 120.

166 *Ibid*, p 127.

167 *Ibid*, p 122.

the Indians' barbarism and paganism deny them right to title, Vitoria concludes<sup>168</sup>

...that the aborigines in question were true owners, before the Spaniards came among them, both from the public and private point of view.

It is this aspect of Vitorian doctrine, indeed almost this statement on its own, which accounts for Vitoria's reputation as an early and forthright proponent of indigenous rights. It can be seen why his views (which in this aspect are virtually identical with Las Casas) are of interest to, and frequently cited by, modern writers on indigenous rights. Vitoria, as Lindley points out, denied the applicability of *terra nullius* to America:<sup>169</sup>

Thus Franciscus de Victoria (sic), Professor at Salamanca, writing in the first half of the sixteenth century, maintained that the continent of America upon its discovery was not *territorium nullius* because the Indians were the veritable owners, private and public, of their lands.

By the late nineteenth century this view had been so vitiated that writers like Westlake propounded:<sup>170</sup>

...a doctrine which denies that International Law recognises any rights in primitive peoples to the territory they inhabit.

Having established the legitimacy of Indian ownership, Vitoria opens the second section of *De Indis* by asking by what title the Spaniards could have come into possession of the Indians and their country, given that the Indians are or were true owners. He proposes to deal first with<sup>171</sup>

the titles which might be alleged, but which are not adequate (sic) or legitimate.

Vitoria refutes the claims of the Holy Roman Emperor (the Spanish king) as "Lord of the Whole Earth", and of the Pope through delegation to the Emperor, to have sovereignty over the world, including the Indians. Vitoria does not allow for an automatic assumption of title against the Indians, based on the alleged superior authority. As far as the Emperor is concerned, according to Vitoria, he is not the Lord of the whole earth and even if he were such jurisdiction would not:<sup>172</sup>

go so far as to warrant him in converting provinces to his own use or in giving towns or even estates away at his pleasure.

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<sup>168</sup> Ibid, p 128.

<sup>169</sup> Lindley, note 3 above, p 12.

<sup>170</sup> Ibid, p 20.

<sup>171</sup> Ibid, p 129.

<sup>172</sup> Ibid, p 134. See also Scott, note 31 above, pp 115-120 for a detailed discussion of Vitoria's refutation of the claims of the Emperor; and Goebel J, *The Struggle For the Falkland Islands*, 2nd ed (1982), at pp 64-65 who notes "the effort of the European monarchs to free themselves from all implications of suzerainty arising from the notion of universal monarchy inherent in the Holy Roman Empire...".

In respect of the Pope, it was noted earlier, in discussion of Las Casas' interpretation of the Bull *Inter Caetera* of 1492, that Papal donation was an important basis of Spanish justification for colonial expansion in the Americas. This claim to title was clearly rejected by Vitoria. Goebel notes:<sup>173</sup>

...the robust manner in which he [Vitoria] combatted the claim of a title through the papal bulls...

Williams observes that:<sup>174</sup>

Victoria (sic) boldly cast aside the dubiously regarded hierocratic premises underlying Spain's hegemony in the New World.

The Pope's claims to power to dispose of lands was a mixture of an assertion of the temporal powers of the Pope, stretching back to the Donation of Constantine, which purported to convey to Pope Sylvester I and his successors sovereignty over, among other lands, the islands of the world, and of the Pope's spiritual powers.

Generally the bulls providing for Spanish jurisdiction in the Americas are seen to be based on the temporal powers – hence they are referred to as "Papal Donations". However by the fifteenth century the Pope's temporal powers had come to be resisted by the temporal rulers, at least as far as Europe was concerned. The more effective basis of the Pope's authority to create exclusive rights in the New World was the spiritual role, as head of Christendom, to encourage conversion of non-believers. *To this end* the Pope could assert control over temporal matters, and indeed, Goebel contends:<sup>175</sup>

The Spaniards themselves regarded the bull *Inter Caetera* as resting primarily upon the jurisdiction of the Pope over the unbelievers.

He notes that the bull does not refer:<sup>176</sup>

...to the spurious Donation of Constantine for its validity, although the doctrine which had been evolved from the latter was undoubtedly a circumstance of some political importance.

Thus control over territory was only incidental to the stated main purpose – conversion of the heathens. However the Spaniards were interested in more than conversion, and, as Goebel notes:<sup>177</sup>

...the political purposes which the grant was made to serve almost immediately tended to give the matter a pseudolegal significance that in no way coincided with the original purpose of the grant. In other words, the bull *Inter Caetera*, instead of being construed as a charge to convert the heathen, was treated as a grant of territory.

This is the "rationalizing" function of the missionary endeavour suggested by Johnson, as described above. Even at this late stage, where the power of Pope

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<sup>173</sup> Goebel, *ibid*, p 113.

<sup>174</sup> Williams, note 56 above, at 84.

<sup>175</sup> Goebel, note 172 above, p 81.

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid*, p 84.



and Emperor had waned significantly, it was necessary for both Las Casas and Vitoria to contend against doctrines such as Papal Donation if they were to be able to maintain an independent status for the Indians. Vitoria dismisses the Pope's temporal power by arguing that it is based on his spiritual power:<sup>178</sup>

...For he has no temporal power [over the Indians or other non-believers] save such as subserves spiritual matters.

He asserts that the Pope has no spiritual power over the Indians as non-believers: "Therefore he has no temporal power [over them] either".<sup>179</sup> The Indians, and their lands, are not the Pope's to give away, either on a temporal or spiritual basis. Thus Vitoria denies the force of the theory of Papal Donation:<sup>180</sup>

What has been said demonstrates, then, that at the time of the Spaniards first voyages to America they took with them no right to occupy the lands of indigenous populations.

The third title considered and rejected by Vitoria is that of jurisdiction by the "right of discovery". This is significant given the importance attached to this root of title in later practice and theory.<sup>181</sup> Vitoria gives this title short shrift, dismissing it in two brief paragraphs. He points out that whilst it was "in virtue of this title alone that Columbus the Genoan first set sail",<sup>182</sup> such a title cannot be applied to America as America was not without an owner – discovery only applies to deserted lands. Vitoria concludes that discovery:<sup>183</sup>

...gives no support to a seizure of the aborigines any more than if it had been they who discovered us.

Later, the title conferred, or potentially conferred, by discovery, was seen as regulating rivalry between third states over the territory in question.<sup>184</sup> In this view, as formulated by Chief Justice Marshall, the claim against the indigenous populations was based on their lack of civilization and Christianity, whilst the claim amongst rival European states was regulated by the discovery doctrine. Hence:<sup>185</sup>

The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of

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<sup>178</sup> Vitoria, note 84 above, p 137.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*, p 138.

<sup>181</sup> See Lindley, note 3 above, Chapter XVIII – "Discovery"; and Evatt, note 9 above, for a discussion of discovery as a basis for sovereignty.

<sup>182</sup> Vitoria, note 84 above, pp 138–139.

<sup>183</sup> *Ibid.*, p 139. The same point was of course being made by Paul Coe and other Aborigines when they planted the Aboriginal flag on the beach at Dover in 1976, proclaiming Aboriginal sovereignty over Great Britain. See Para 23A of the Amended Statement of Claim in *Coe v Commonwealth of Australia* (1979) 24 ALR 118 at 127.

<sup>184</sup> Lindley, note 3 above, at pp 136–138 – discovery gives "inchoate title".

<sup>185</sup> *Ibid.*, p 129.

the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves.

This principle was discovery. However Marshall's distinction draws a fine line, and is perhaps somewhat artificial. If discovery asserted a right against other potential colonisers, it also asserted, at the same time, a claim against the indigenous population. Whether such a claim was necessarily associated with benevolent attitudes towards "civilizing" the local population is doubtful, although the two were often quite closely linked. Vitoria was concerned to dispose of any pretensions to discovery *per se* as a claim to sovereignty over the indigenous peoples whose lands had been, so to speak, discovered.

Vitoria also refutes a fourth title based on refusal by the Indians to convert to Christianity, and a fifth on crimes committed against natural law. His arguments are similar to those of Las Casas, although more briefly put. The use of force for conversion is wrong, and inefficacious.<sup>186</sup>

...the Indians cannot be induced by war to believe, but rather to feign belief and reception of the Christian faith.

Like Las Casas he argued that the Spaniards lacked jurisdiction over the Indians in matters of belief and moral behaviour.

The sixth illegitimate title is that of a voluntary choice to surrender sovereignty. Vitoria, typically, analyses the criteria for a truly voluntary choice in terms of the requirements of natural law *viz*:

- fear and ignorance should be absent from such choice (but Vitoria shows that they are in fact present in the relationship between the Indians and the Spanish)
- the populace cannot elect to replace their real lords and princes without other reasonable cause
- likewise the Indian princes cannot dispose of sovereignty without consent of the populace.<sup>187</sup>

He concludes that these elements have not all been present in the Indies, precluding any title having passed on the basis of consent. This is a good example of how Vitoria sees all parties as subject to the natural law – he does not allow the possibility of consent being properly a subjective matter, at the prerogative of each sovereign, and outside the canons of natural law.

The last ground he considers, that the Indies are some sort of gift from God to Spain is dismissed cursorily, almost with contempt.

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<sup>186</sup> Vitoria, note 84 above, p 145.

<sup>187</sup> *Ibid*, p 148.

### Adequate titles

Vitoria's third section – "On the lawful titles whereby the aborigines of America could have come into the power of Spain"<sup>188</sup> is the basis of Vitoria's ambivalent reputation in respect of indigenous rights. It is, as noted above, where Vitoria and Las Casas parted company, Las Casas explaining this third section in terms of political expediency on the part of Vitoria.

*The first possible title* is the right to sociability and trade. The Spanish, as foreigners, have a right to visit, sojourn and trade with the Indians. As long as these activities are carried out in a peaceable manner and without injury to the Indians, the Indians have an obligation not to refuse or obstruct such activity.

The scope of these activities as elaborated by Vitoria is wide, including citizenship of the Indian country to children of Spanish residents, and exploitation of natural resources such as gold in the ground and pearls in the rivers and seas. Spaniards are to be accorded *no lesser rights* than any other foreigners, providing a type of "most favoured nation" rule:<sup>189</sup>

If there are among the Indians any things which are treated as common both to citizens and strangers, the Indians may not prevent the Spaniards from a communication and participation in them.

JB Scott, in line with his view of Vitoria as a founding father of international law comments:<sup>190</sup>

The third proposition [concerning this title] is that of the lawyer, or rather that of the first international lawyer of our time dealing consciously with the law of nations, and with that phase of it known as 'the favoured nation' clause.

The title can be seen as a right to the Spanish, or, conversely, a set of conditions or rules applying to the exercise of Indian authority – "they are boundaries to Indian sovereignty".<sup>191</sup> If the Indians overstep this boundary, they can be punished by the loss of their public authority, effected through the agency of war. However, Vitoria insists, such breaking of the rules must be conscious and deliberate. Hence if Spaniards are hindered in the exercise of rights of sociability and trade they do not have immediate recourse to war – they must first persuade and explain, and they can take limited measures for self-protection. However if the Indians persist, knowingly, in refusing the Spaniards' rights, for Vitoria an untenable situation exists:<sup>192</sup>

...the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, then they can make war on the Indians, no longer as an innocent folk, but as against forsworn enemies, and may

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<sup>188</sup> Ibid, p 150.

<sup>189</sup> Ibid, p 153.

<sup>190</sup> Scott, note 31 above, p 124.

<sup>191</sup> Kennedy, note 28 above, at 28.

<sup>192</sup> Vitoria, note 84 above, p 155.

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 owners.

Thus a quite thorough and brutal justice can be brought to bear. Of the propositions put forward by Vitoria as possible grounds for title, sociability and trade is of major importance, as it deals with the legal framework for the economic relationship between the colonizing power and the indigenous people.<sup>193</sup> The question of access to, and exploitation of, the natural resources on land which is under some form of control by indigenous peoples (for example as a result of treaties or agreements, though custom, land rights legislation, or simply remoteness) remains highly contentious.<sup>194</sup>

Las Casas did not directly oppose the principle of free and unhindered communication espoused by Vitoria, but he was conscious of the potentially devastating effect on the Indians of co-existence with the Spaniards (whose activities were rarely restricted to simple trade), and he opposed the imposition of obligations on the Indians to allow free intercourse. His concerns were rooted in the practical realities of the colonial situation. Friede sees the differences between Vitoria and Las Casas on the sociability issue as central:<sup>195</sup>

He [Las Casas] did not disavow the theory of sociability as such, but he rejected the harmful obligation consequently imposed on the Indian. And herein lies the difference between Las Casas and Vitoria. Sociability, if it is imposed without proper cognizance of reality and facts, is imperialism – and such a theoretical system was approved in the teachings of Vitoria.

Friede sees Las Casas' approach as not simply more humane than Vitoria's, but also as casting off the influence on law of medieval scholasticism, with its doctrinal emphasis and its "rigid juridical and philosophical concepts".<sup>196</sup> By grounding his principles in actuality, Las Casas demonstrated "the relativity of justice and juridical principles".<sup>197</sup> Therefore principles such as sociability, which create injustice, are unjust.

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<sup>193</sup> Compare to issues in contemporary international law of sovereignty over national resources, right to nationalise and expropriate. These can be seen as modern versions of the question of boundaries to sovereignty, in the economic sphere.

<sup>194</sup> Dodson, "Law of the Black People – 1985" in Hocking, note 126 above, p 137 at 137–138 has noted that, in respect of economic exploitation of remote Aboriginal lands in Australia:

Since 1950, a second invasion has taken place in Australia, particularly in the northern and central desert regions where mining companies have moved in, invested and changed the circumstances in which Aboriginal people found themselves.

<sup>195</sup> Friede, note 77 above, at 162.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

*The second title* advanced by Vitoria is propagation of Christianity:198

Christians have a right to preach and declare the gospel in foreign lands.

Indians had no right to hinder evangelization, nor punish or kill converts. Deriving from the second title, Vitoria identified a *third title*, based on intervention to protect converts to Christianity being subjected to force or fear by their rulers in order to make them renounce their conversion. Vitoria carefully distinguished these possible titles from forced conversion, which he had argued was not legitimate. However, as far as evangelization itself:199

...if there is no other way to carry on the work of religion, this furnishes the Spaniards with another justification for seizing the lands and territory of the natives and for setting up new lords there and putting down the old ones.

Las Casas did not object in principle to the exercise of the right of evangelization, but he hedged this right with so many qualifications and excuses for Indian obstruction, as in effect to nullify the right. To transgress, Indians would have to hinder preachers *as preachers*, rather than as Spaniards, whom they would, according to Las Casas, have good grounds to distrust and fear. This attitude of Las Casas is closely linked to his general espousal of a right to self-defence on the part of the Indians. Indians could resist intrusion by foreigners from fear of what might befall them:200

For every ruler must look after the security of his kingdom as I have taught elsewhere...

Vitoria's *fourth title*, allowing the substitution by force of a Christian ruler for a pagan where the population had converted to Christianity was largely theoretical speculation. The *fifth title*, however, was the influential contention that title could be based on the protection of innocent victims of crimes against the natural law, such as ritual sacrifice. The debate over this issue at Valladolid has been discussed above. Vitoria supported intervention – including the overthrow of the Indian rulers – on this ground, even where the victims do not seek rescue:201

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198 Vitoria, note 84 above, p 156.

199 Ibid, p 157.

200 Las Casas, note 103 above, p 172.

201 Vitoria, note 84 above, p 159. Very similar issues arise in the modern discussion of recognition of customary law in the context of indigenous rights eg discussion of traditionally sanctioned killing, or punishment which may appear inhumane and cruel, and thus in opposition to universal standards contained in instruments such as the ICCPR. The similarity in the arguments today to the sixteenth century discourse, is shown in the following passage from Crawford's article "Recognition of Aboriginal Customary Laws" in Hocking (ed), note 126 above, p 43 at 63, which raises much the same issues, including consent of the "victim":

The question, then, is whether the Covenant (the ICCPR) requires States Parties actively to suppress all treatment considered 'cruel' or 'degrading', even where that treatment occurs with the consent of the parties

And it is immaterial that all the Indians assent to rules and sacrifice of this kind and do not wish the Spaniards to champion them, *for herein they are not of such legal independence* as to be able to consign themselves or their children to death. So we may find a fifth lawful title here. (italics added)

This attitude evidences Vitoria's universalistic approach – the Law of Nations, "which either is natural law or is derived from natural law",<sup>202</sup> binds all nations, including the Indians, whether they have consented to be bound or not. As Williams points out, to Vitoria<sup>203</sup>

...the Indian's consent to this Law of Nations was immaterial since the majority of the world's civilized states had already consented to the norms embodied in his codification of the Law of Nations.

The *sixth title*, "true and voluntary choice"<sup>204</sup> is the reverse of the earlier argument, which disallowed voluntary choice as a ground for title on the basis that the necessary criteria had not been met in the Americas. The sixth title logically follows from the earlier discussion of voluntary choice, ie if the conditions are met, this can be a ground for title, "for a State can appoint any one it will to be its lord".<sup>205</sup>

The *seventh title* allows for the possibility of an alliance with one Indian tribe engaged in a lawful dispute with another Indian tribe: title is gained by sharing the rewards of victory. As Las Casas pointed out in a number of places,<sup>206</sup> the doctrine of alliance was dubious from the point of view of Spanish motive, and because of the impossibility of the Spaniards knowing where justice lay in any dispute between Indian tribes. To Las Casas such alliances (eg Cortes in Mexico) were a sham.<sup>207</sup>

Having established seven possible titles, Vitoria goes on to discuss, in a very conditional and highly qualified manner, the possibility of a further, or eighth, title. Indeed Vitoria reserves his own position on this possible title, stating:<sup>208</sup>

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concerned, and as an aspect of the traditions and customs of the ethnic group within which it occurs, and no matter what other consequences such suppression, with its associated policing, would involve for the group in question.

<sup>202</sup> Vitoria, note 84 above, p 151.

<sup>203</sup> Williams, note 56 above, at 84.

<sup>204</sup> Vitoria, note 84 above, p 159.

<sup>205</sup> Ibid, p 160.

<sup>206</sup> Martinez, note 104 above, pp 325–327.

<sup>207</sup> Las Casas commented in general terms:

Every tyrant, lacking reason, law, and justice ... is pleased to find discord among the peoples over whom he would tyrannise, and if he does not find such discord he works to create it in order to divide those peoples and subjugate them all the more easily.

Quote in *ibid*, p 326.

<sup>208</sup> Vitoria, note 84 above, p 160.

I dare not affirm it at all, nor do I entirely condemn it.

This hesitant approach is not surprising, for having earlier affirmed the rationality and equality of the Indians, Vitoria now opens up the possibility, based on reports from the Indies, that the Indians, whilst not wholly unintelligent are a "little short of that condition,"<sup>209</sup> and, having an inferior civilization, are perhaps:<sup>210</sup>

unfit to found or administer a lawful state up to the standard required by human and civil claims.

It follows that there may be a responsibility on the Spaniards to take over control of the Indian states "just as if the natives were infants",<sup>211</sup> "so long as this was clearly for their [the Indians] benefit."<sup>212</sup>

Here is a justification for the diminution of the status of the indigenous peoples to "wards", and their subjection in terms of tutelage and trusteeship. The highly conditional wording of this proposition, and the fact that it was not included in the seven legitimate possible titles, should be noted. Nevertheless it does provide the opening through which paternalistic control can be justified.

Lindley explicitly notes this aspect of Vitoria's doctrine:<sup>213</sup>

He suggested with hesitation that, if the Indians were not capable of forming a State, then, in their own interests, the King of Spain might acquire sovereignty over them in order to raise them in the scale of civilization, treating them charitably and not for his personal profit.

Scott traced the principles of the League's mandate system to the influence of Vitoria's ideas on tutelage:<sup>214</sup>

It [the mandate system] is but one— although one of the most striking — of the many contributions which Victoria (sic) made and which silently, and without reference to him, have found their way into the international law of our day.

It seems unlikely that modern writers, citing Vitoria in support of indigenous rights, intend to support notions of inferiority of indigenous people and consequent need for tutelage. Yet the seeds of such propositions are evident in Vitoria's work, especially his delineation of a possible eighth title. Further, his section on seven clear grounds for possible title provides a quite sweeping basis by which Spanish hegemony in the New World might be justified. Indeed Williams considers that one of Vitoria's main achievements was to replace an

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<sup>209</sup> *Ibid*, pp 160–161.

<sup>210</sup> *Ibid*, p 161.

<sup>211</sup> *Ibid*.

<sup>212</sup> *Ibid*.

<sup>213</sup> Lindley, note 3 above, p 12.

<sup>214</sup> Scott, note 31 above, p 157. Note Scott was writing in 1932.

outdated, medieval "hierocratic"<sup>215</sup> conception of Papal authority which had been the basis for Spanish expansion into the New World, with:<sup>216</sup>

an ideology founded upon essentially modern, nonreligious premises that justified the extension of European cultural hegemony over the Indian.

Williams points out that Vitoria managed to maintain the universalistic outlook of the medieval Church, but give it a natural law rather than Papal basis. Thus:<sup>217</sup>

Henceforth the justness of Spanish rule would be assessed according to the rationalized norms of universal obligatory natural law of international conduct: the Law of Nations.

Certainly the seven titles can provide a wide basis for Spanish jurisdiction: the Indians could be subjected to Spanish rule for:<sup>218</sup>

denying the Spanish conquistadores free passage in their territory, preventing Spanish merchants from making their profit, refusing to share communally held wealth, or hindering the propagation of Christianity.

The theoretical independence and equality of the indigenous group can easily disappear in this system, and the freedom from Papal authority asserted by Vitoria becomes a freedom to be subjected to the dictates of natural law. The end result may not be very different from the indigenous point of view. The discrepancy between Vitorian and Lascasian doctrine becomes apparent, as Las Casas takes the same notion of universal freedom and equality for the Indians, and works this through to an assertion of political freedom which accords to more modern concepts of self-determination and independence. In the Lascasian system rights of sociability and trade exist, but defer to Indian prior rights and independent political and cultural status.

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215 By "hierocratic" Williams denotes the corpus of legal, political and ideological thought legitimising Papal and ecclesiastical jurisdiction in the secular political life of Christendom. See Williams, note 56 above, at 8.

216 *Ibid*, at 98. Non religious in the sense of not based on ecclesiastical authority or jurisdiction.

217 *Ibid*, at 84.

218 *Ibid*.



### **Summary: Vitoria**

The interpretations of Vitoria's work range from highly positive to quite negative assessments. Williams refers to the "bifurcated nature of these assessments of Vitoria's work",<sup>219</sup> as some writers select out either the work on titles which are not adequate to give jurisdiction, or the titles which do provide grounds for jurisdiction. There is a tendency to ignore the other, contradictory, half.

Such partial vision distorts the work of Vitoria, which presents a holistic version of the relationship between colonizer and indigenous people. This is a view which recognizes the essential equality and humanity of all mankind, but which, in stressing this equality, provides an allocation of rights and duties which is based on assumptions of the universal application of natural law, as embodied in the Law of Nations. As Kennedy states:<sup>220</sup>

Nowhere does Vitoria doubt that the Indians are bound by these doctrines.

It is no simple matter to apply Vitorian doctrine to the situation of indigenous peoples today. It does remain an option to accept part of Vitorian doctrine, and specifically and consciously reject the other part – as Las Casas did. However it is incorrect to assume that Vitorian doctrine provides a clear and unambiguous assertion of the rights of indigenous peoples in international law. Indeed the conflict inherent in the claims of indigenous peoples, which, as Crawford has pointed out, are claims against the States in which they live, is not addressed in Vitorian doctrine, which seeks to deny the possibility of such conflict:<sup>221</sup>

the mechanisms by which title is allocated serve to hide what we understand to be the potential for conflict between sovereigns.

It can be concluded that Vitorian doctrine asserts the legitimate public title of indigenous peoples – an assertion which was eroded in international law at least until the modern decolonisation era, and which remains contentious in respect of indigenous enclave groups in independent countries. However, the nature of the sovereignty so asserted was restricted by the norms of the natural law system on which it was premised. There is little room in such a system for an indigenous perspective on the rights and wrongs of the relationship with the colonizing power, or any successor state.

### **CONCLUDING NOTE**

Regardless of the doctrines of earlier international law publicists which, to varying degrees, recognized that indigenous peoples held rights to their territories and their independence, in practice such rights came to be ignored, under a variety of somewhat dubious pretexts. As McNeil has pointed out:<sup>222</sup>

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<sup>219</sup> *Ibid*, at 86.

<sup>220</sup> Kennedy, note 28 above, at 25.

<sup>221</sup> *Ibid*, at 24.

<sup>222</sup> McNeil, note 128 above, p 110.

The European powers sought to fortify shaky claims by whatever means they could, including assertions of discovery, symbolic acts of possession, papal bulls, the signing of treaties with rival States or local chiefs and princes, the establishment of settlements and outright conquest by force of arms. The juridical effect of these various acts is a matter of debate. In practical terms, however, *might made right*, so that a sovereign who succeeded in exercising a sufficient degree of exclusive control was generally regarded as having acquired sovereignty (*italics added*).

The realities of the colonial situation were such that the indigenous populations were often overwhelmed, their sovereign existence extinguished, and that sovereignty, or "radical title" passed to the colonizers, and later to their successor states.<sup>223</sup> The indigenous populations were no longer recognized as having an existence separate from the states under which they had been subsumed. Such a situation came to be widely accepted, and questions of original legality and morality were pushed to one side. This attitude, which refused to entertain any questioning of the basis of the relationship between the indigenous people and the state, was exemplified in the well-known passage of Chief Justice Marshall:<sup>224</sup>

...We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers have a right, on abstract principle, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny.

This is a view which continues to have wide currency, not only in the courts of affected states,<sup>225</sup> but also even amongst supporters of indigenous land rights, who often tend to regard such rights as property rights, devoid of any implications of wider political rights. Thus, Blum and Malbon, arguing in favour

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<sup>223</sup> Note Coe's citing of both the United Kingdom and Australia in *Coe v Commonwealth* (1979) note 83 above at 121 viz:

3C The firstnamed Defendant [the Commonwealth of Australia] came into existence in or about the year 1900 claiming sovereignty over what is now known as the continent of Australia contrary to the rights, privileges, interests, claims and entitlements of the aboriginal people both individually and in tribes and the aboriginal community and nation. The firstnamed Defendant thus became the successor in the title in Australia to rights and interests of the aforesaid King George III.

<sup>224</sup> *Johnson v McIntosh* (1823) quoted in Lindley, note 3 above, p 30. Cf *Coe v Commonwealth* (1979) 24 ALR 118.

<sup>225</sup> See Schaffer, "International Law and sovereign rights of indigenous peoples" in Hocking (ed), note 126 above, at pp 19–20 for a discussion of the application of the act of state doctrine which would exclude consideration of such issues in Australian courts.

of Aboriginal land rights in an Australian context but referring to Chief Justice Marshall, note: 226

...aboriginal title is no threat to sovereignty, as it is a possessory title underlying the Crown's radical title. In any event, the Crown's radical title cannot be impeached in the courts of the conqueror.

Indigenous peoples however continue to deny the validity of force, or superior power, as a basis for legitimizing their subjugation. Consequently indigenous peoples persist with claims to autonomy: whether expressed in terms of self-determination, cultural autonomy, customary law, or some variant. There is a continuing claim to rights which exist outside the discretion of the states within which the indigenous peoples have been subsumed.

Las Casas posed the basic issues involved clearly. In the disputation at Valladolid, he denied any right by force or conquest:<sup>227</sup>

The doctor [Sepulveda] finds [the Spaniards] rights of conquest on the fact that our arms and our physical force are superior to those of the Indians. This is the equivalent of putting our kings in the position of tyrants.

Likewise for Vitoria reliance on force to subjugate another people required justification, for example some trespass by the indigenous group beyond the jurisdiction, ordained by the natural law, of the native polity. Such a trespass might warrant retribution and even conquest. However force was never its own justification.

The re-emergence of indigenous rights as an issue in international law can be seen as the re-emergence of the question of the proper relationship between indigenous peoples and states: it is a rejection of subordination of indigenous peoples based on unbridled power, and an attempt to develop a relationship based on law, where the rights of indigenous peoples are developed as international standards, to be observed as international obligations by nation states.

The significance of Las Casas and Vitoria lies in their focus on questions of sovereignty and jurisdiction, and their recognition of indigenous societies as the "true owners" of their lands. Like Banquo's ghost, the issues of sovereignty and jurisdiction, both in terms of historical grievances on the part of indigenous peoples, and their continuing claims for autonomy, will not go away from the discussion of indigenous rights. This is despite the efforts of states and their domestic courts to refuse to acknowledge the continuing force of indigenous claims to international status.

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<sup>226</sup> Blum and Malbon, "Aboriginal Title, the Common Law and Federalism: A Different Perspective" in Ellingham M, Bradbrook A and Duggan A (eds) *The Emergence of Australian Law* (1989), p 29.

<sup>227</sup> Las Casas, *Tratados, Tratade III* quoted in Friede, note 77 above, at 178.

