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FRANCISCO DE VITORIA AND THE COLONIAL ORIGINS OF INTERNATIONAL LAW

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WHILE HUGO GROTIUS is generally regarded as the principal forerunner of modern international law, historians of the discipline trace its primitive origins (Kennedy, 1986) to the works of Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist.¹ Consequently, it is entirely appropriate that the Carnegie endowment commenced its renowned series of 'Classics of International Law' with Vitoria's two famous lectures, 'De Indis Noviter Inventis' and 'De Jure Bellis Hispanorum in Barbaros'.² Vitoria's contributions to the discipline are various, and scholars examining the issue have pointed, among other things, to Grotius's indebtedness to the teachings of Vitoria (Scott, 1934) and to Vitoria's identification of certain fundamental theoretical issues confronting the discipline. Scholars still refer to the enduring significance of Vitoria's thinking on the law of war (Franck, 1995: 248) and on the rights of dependent peoples (Wright, 1930; Weeramantry, 1992: 78).

Vitoria's two lectures, as their titles suggest, are essentially concerned with relations between the Spanish and the Indians³. Colonialism is the central theme of these two works designated as the founding texts of international law. It is hardly possible to ignore the fact that Vitoria is preoccupied with a colonial relationship. While traditional approaches to Vitoria duly acknowledge this fact, they fail to appreciate the extent to which Vitoria's jurisprudence is constructed around his attempts to resolve the unique legal

problems arising from the discovery of the Indians. Instead, these traditional approaches essentially characterize Vitoria as extending and applying existing juridical doctrines developed in Europe to determine the legal status of the Indians.⁴

My argument, in contrast, is that while Vitoria's jurisprudence relies in many respects on existing doctrines, he reconceptualizes these doctrines or else invents new ones in order to deal with the novel problem of the Indians. The essential point is that international law, such as it existed in Vitoria's time, did not *precede* and thereby effortlessly resolve the problem of Spanish-Indian relations; rather, international law was created out of the unique issues generated by the encounter between the Spanish and the Indians. It is in this context that the question arises: What is the relationship between the origins of international law and the colonial encounter in these the first teachings on international law?

The classical problem confronting the discipline of international law is the problem of how order is created among sovereign states (Henkin et al., 1987: 1). The identification of this problem as the defining dilemma of the discipline has encouraged scholars to explore Vitoria's work in terms of his understanding and treatment of this problem.⁵ My argument is that Vitoria does not interpret the problem of Spanish-Indian relations as a problem of creating order among sovereign states, of deciding how the competing claims of the sovereign Spanish and the sovereign Indians are to be resolved. Rather, Vitoria's work addresses, a prior set of questions. Who is sovereign? What are the powers of a sovereign? Are the Indians sovereign? What are the rights and duties of the Indians and the Spaniards? How are the respective rights and duties of the Spanish and the Indians to be decided?

In dealing with these issues, Vitoria focuses on the social and cultural practices of the two parties, the Spanish and the Indians. He assesses and formulates the rights and duties of the Indians, for example, by examining their rituals and customs and ways of life. The problem confronting Vitoria, then, was not the problem of order among sovereign states, but the problem of creating a system of law which could be used to account for relations between societies which he understood to belong to two very different cultural orders, each with its own ideas of propriety and governance. Sovereignty doctrine – by which I broadly refer to the complex of rules deciding what entities are sovereign, and the powers and limits of sovereignty – was not already formulated and then simply applied by Vitoria to resolve the problem of creating order between different societies. Rather, for Vitoria, sovereignty doctrine emerges through his attempts to address the problem of cultural difference.⁶ I explore the relationship between colonialism and international law, cultural difference and sovereignty doctrine, by focusing on four broad issues.

First, I focus on Vitoria's repudiation of traditional techniques of accounting for relations between the Spanish and the Indians. Having dismissed the old medieval jurisprudence based on the notion that the Pope exercised universal authority, Vitoria clears the way for his own version of secular international law. Second, I focus on the techniques by which Vitoria creates a

universally binding system of law by evoking a notion of natural law; this system resolves Vitoria's problem of creating a common framework binding both Spanish and Indian alike. Third, I consider the rules and norms prescribed by this system, and the effect of their application to Spanish-Indian relations. Fourth, I examine the question of enforcement and the sanctions applied once the norms prescribed by natural law have been violated. In examining each of these areas, I attempt to delineate how Vitoria's understanding of cultural difference and the identity of the Indian shapes his jurisprudence and how, in turn, this jurisprudence determines the legal status of the Indians.

I conclude by suggesting how this reinterpretation of Vitoria's work may be used as a means of rethinking the relationship between colonialism and international law.

VITORIA AND THE PROBLEM OF UNIVERSAL LAW

The issue of accounting for Spanish title over the Indies was conventionally decided by applying to the Indian the jurisprudence developed by the Holy Roman Church to deal with the Saracens. Within this framework, the Indians could be characterized as Saracens, as heathens, and their rights and duties determined accordingly. Vitoria criticizes this traditional framework, which had emerged out of the several centuries of interaction and confrontation between the Christian and heathen worlds, and replaces it with his own. The traditional framework relied basically on two premises.

First, it was asserted that human relations were governed by divine law. As Vitoria's jurisprudence suggests, the medieval western world relied on three different types of law: divine law, human law and natural law (Rubin, 1992). Of these, divine law was asserted to be primary by many scholars and theologians of the fifteenth century. Second, it was argued that the Pope exercised universal jurisdiction by virtue of his divine mission to spread Christianity. Consequently, sovereigns, the rulers of Europe, relied upon the Pope's authority to legitimize their invasions of heathen territory; in expanding the Christian world by military conquest, these rulers were making real the jurisdiction which the Pope possessed in theory (Rubin, 1992; Williams, 1990: 45). Pope Alexander VI's papal bull, which divided the world into Spanish and Portuguese spheres, exemplified the application of this set of doctrines: the rule of the sovereign was legitimate only if sanctioned by religious authority.

Vitoria vehemently denies each of these assertions and, in the course of refuting the conventional basis for Spanish title, creates a new system of international law which essentially displaces divine law and its administrator, the Pope, and replaces it with natural law administered by a secular sovereign. Thus, the emergence of a secular natural law – the natural law which was proclaimed to be the basis of the new international law – is coeval with, occurs at the same time as his resolution of the problem of the legal status of the Indian, for it is this problem which initiates Vitoria's inquiry.

Vitoria commences his construction of a new jurisprudence by posing the question of whether 'the aborigines in question were true owners in both private and public law before the arrival of the Spaniards' (Vitoria, para. 315, p. 120). Could the Indians, the unbelievers, own property? Rather than adopt the traditional approach of dismissing the Indians as lacking in rights merely because of their status as unbelievers, Vitoria reformulates the relationship between divine, natural and human law. Having examined numerous theological authorities and incidents in the Bible, he concludes that whatever the punishments awaiting them in their afterlife, unbelievers such as the Indians were not deprived of their property in the mundane realm merely by virtue of their status. Vitoria concludes:

Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law or human law; therefore they are not destroyed by want of faith. (Vitoria, para. 322, p. 123)

Crucially, then, Vitoria places questions of ownership and property in the sphere of natural or human law, rather than divine law. As a consequence of the inapplicability of divine law to questions of ownership, the Indians cannot be deprived of their lands merely by virtue of their status as unbelievers or heretics.⁷ Vitoria's argument that vital issues of property and title are decided by secular systems of law – whether natural or human – inevitably diminishes the power of the Pope, for these secular systems of law are administered by the sovereign rather than the Pope.

Vitoria further undermines the position of the church by refuting another justification for Spanish conquest of the Indies: the argument based on the proposition that 'the Emperor is lord of the whole world and therefore of these barbarians also' (Vitoria, para. 340, p. 130). Vitoria denies that the sovereign, Emperor, could have acquired universal temporal authority through the universal spiritual authority of Christ and the Pope. He questions whether divine law could provide the basis for temporal authority, methodically denies a number of assertions of papal authority, and concludes that 'The Pope is not civil or temporal lord of the whole world in the proper sense of the words "lordship" and "civil power"' (Vitoria, para. 351, p. 153) and then goes even further to assert that even in the spiritual realm, the Pope lacks jurisdiction over the unbelievers (Vitoria, para. 353, p. 136). The Pope's authority is partial, limited to the spiritual dimension of the Christian world.

Vitoria's rejection of the argument that the Pope exercised universal authority which empowered sovereigns to pursue military action against heathens and infidels such as the Indians results in a novel problem:

Now, in point of human law, it is manifest that the Emperor is not lord of the world, because either this would be by the sole authority of some law, and there is none such; or if there were, it would be void of effect, inasmuch as law presupposes jurisdiction. If, then, the Emperor had no jurisdiction over the world before the law, the law could not bind someone who was not previously subject to it. (Vitoria, para. 348, p. 134)

The Spanish and the Indians are not bound by a universal, overarching system; instead, they belong to two different orders, and Vitoria interprets the gap between them in terms of the juridical problem of jurisdiction. The resolution of this problem is crucial both for Vitoria's new jurisprudence and his construction of a common legal framework which would enable him to resolve the problem of the status of the Indians. The two techniques by which Vitoria addresses the issue of jurisdiction are made up essentially of two related parts: first, of his complex characterization of the personality of the Indians and, second, of his elaboration of a novel system of universal natural law.

Vitoria first focuses on the issue of Indian personality. As his own work suggests, the writers of the period appear to have characterized the Indians as being, among other things, slaves, sinners, heathens, barbarians, minors, lunatics and animals. Vitoria repudiated these claims, humanely asserting instead that,

... the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion. Further, they make no error in matters which are self-evident to others; this is witness to their use of reason. (Vitoria, para. 333, p. 127)

For Vitoria, then, the Indians established their own versions of many of the institutions found in Vitoria's world, in Europe itself (Pagden, 1982). They are governed by a political system, which has its own coherence, and possess the reason necessary not only to create institutions but to determine moral questions which are 'self-evident' to others.

Vitoria's characterization of the Indians as human and possessing reason is crucial to his resolution of the problem of jurisdiction. He argues that 'What natural reason has established among all nations is called *jus gentium*' (Vitoria, para. 386, p. 151). The universal system of divine law administered by the Pope is replaced by the universal natural law system of *jus gentium* whose rules may be ascertained by the use of reason. As a result, it is precisely *because* the Indians possess reason that they are bound by *jus gentium*. Vitoria hardly mentions the concept of *jus gentium* in his earlier discussion. Nevertheless, the problem of jurisdiction is resolved by his simple enunciation of this concept which he elaborates primarily by demonstrating how it creates doctrines which govern Spanish-Indian relations. Natural law administered by sovereigns rather than divine law articulated by the Pope becomes the source of international law governing Spanish-Indian relations.

The character of this natural law is illuminated in Vitoria's argument that the Spanish have a right under *jus gentium* to travel and sojourn in the land of the Indians and that, providing the Spanish do not harm the Indians, 'the natives may not prevent them'. Vitoria argues that:

... it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not to be taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common user which prevailed among men, and indeed, in the days of Noah, it would have been inhuman to do so. (Vitoria, para. 386, p. 151)

The natural law which solves the problem of jurisdiction is based on something akin to a secular state of nature existing at 'the beginning of the world'. As this passage suggests, *jus gentium* naturalizes and legitimates a system of commerce and Spanish penetration. Spanish forms of economic and political life are all-encompassing because ostensibly supported by doctrines prescribed by Vitoria's system of universal law. The gap between the two cultures now ceases to exist in that a common framework by which both Spanish and Indian behavior may be assessed is established. Equally important, the particular cultural practices of the Spanish assume the guise of universality as a result of appearing to derive from the sphere of natural law.

The Indians seem to participate in this system as equals. The Spanish trade with the Indians 'by importing thither wares which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance' (Vitoria, para. 389, p. 152). The exchange seems to occur between equals entering knowledgeably into these transactions, each meeting the other's material lack and possessing, implicitly, the autonomy to decide what is of value to them. The Indian who enters the universal realm of commerce has all the acumen and independence of market man, as opposed to the timid, ignorant childlike creatures Vitoria presents earlier. The fairness of the system and the equal status of the Indians is further suggested by Vitoria's argument that the Indians are subject to the same limitations imposed on Christian nations themselves: 'it is certain that the aborigines can no more keep off the Spaniards from trade than Christians can keep off other Christians' (Vitoria, para. 390, p. 153). Reciprocity, it seems, would permit the Indians to trade freely in Spain.

While appearing to promote notions of equality and reciprocity between the Indians and the Spanish, Vitoria's scheme finally endorses and legitimizes endless Spanish incursions into Indian society. Vitoria's apparently innocuous enunciation of a right to 'travel' and 'sojourn' extends finally to the creation of a comprehensive, indeed inescapable, system of norms which is inevitably violated by the Indians. For example, Vitoria asserts that 'to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war' (Vitoria, para. 382, p. 151). Thus any Indian attempt to resist Spanish penetration would amount to an act of war which would justify Spanish retaliation. Each encounter between the Spanish and the Indians therefore entitles the Spanish to 'defend' themselves against Indian aggression and, in so doing, expand Spanish territory.

Vitoria further endorses the imposition of Spanish rule on the Indians by another argument which relies explicitly on the cultural differences between the Spanish and the Indians. In establishing his system of *jus gentium*, Vitoria

characterizes the Indians as having the same ontological character as the Spanish. This is a crucial prerequisite for his elaboration of a system of norms which he presents as neutral and founded upon qualities possessed by all people.

According to Vitoria, Indian personality has two characteristics. First, the Indians belong to the universal realm as do the Spanish and all other human beings because, Vitoria asserts, they have the faculty of reason and hence a means of ascertaining *jus gentium* which is universally binding. Second, however, the Indian is very different from the Spaniard because the Indian's specific social and cultural practices are at variance with the practices required by the universal norms, which in effect reflect Spanish practices and which are applicable to both Indian and Spaniard. Thus the Indian is schizophrenic, both alike and unlike the Spaniard. The gap between the Indian and the Spaniard, a gap which Vitoria describes primarily in cultural terms by detailed references to the different social practices of the Spanish and the Indians, is now internalized; the ideal, universal Indian possesses the capacity of reason and therefore the potential to achieve perfection. This potential can only be realized, however, by the adoption or the imposition of the universally applicable practices of the Spaniard.

The discrepancy between the ontologically 'universal' Indian and the socially, historically 'particular' Indian must be remedied by the imposition of sanctions which effect the necessary transformation. Indian will regarding the desirability of such a transformation is irrelevant: the universal norms Vitoria enunciates regulate behavior, not merely between the Spanish and the Indians but among the Indians themselves; thus the Spanish acquire an extraordinarily powerful right of intervention and may act on behalf of the people seen as victims of Indian rituals: 'it is immaterial that all the Indians assent to rules and sacrifices of this kind and do not wish the Spaniards to champion them' (Vitoria, para. 403, p. 159).⁸ Thus Spanish identity is projected as universal in two different but connected dimensions of Vitoria's system; Spanish identity is both externalized, in that it acts as the basis for the norms of *jus gentium*, and internalized in that it represents the authentic identity of the Indian.

WAR, SOVEREIGNTY AND THE TRANSFORMATION OF THE INDIAN

War, the central theme of Vitoria's second lecture, is vitally important to an understanding of his jurisprudence first, because the transformation of the Indian is to be achieved by the waging of war and, second, because Vitoria's concept of sovereignty is developed primarily in terms of the sovereign's right to wage war.

War is the means by which Indians and their territory are converted into Spaniards and Spanish territory, the agency by which the Indians thus achieve their full human potential. Vitoria, I have argued, displaces the realm of divine law and thereby diminishes the power of the Pope. Nevertheless, once Vitoria

outlines and consolidates the authority of a secular *jus gentium* which is administered by the sovereign, he reintroduces Christian norms within this secular system; proselytising is authorized now, not by divine law but the law of nations, and may be likened now to the secular activities of traveling and trading. Vitoria elegantly presents the crucial transition:

... ambassadors are by the law of nations inviolable and the Spaniards are the ambassadors of the Christian peoples. Therefore, the native Indians are bound to give them, at least, a friendly hearing and not to repel them. (Vitoria, para. 396, p. 156)

Thus all the Christian practices which Vitoria dismissed earlier as being religiously based, as limited in their scope to the Christian world and therefore inapplicable to the Indians, are now reintroduced into his system as universal rules. This astonishing metamorphosis of rules which are condemned by Vitoria himself as particular and relevant only to Christian peoples into universal rules endorsed by *jus gentium* is achieved simply by recharacterizing these rules as originating in the realm of the universal *jus gentium*. Now, Indian resistance to conversion is a cause for war, because it violates not the divine law but the *jus gentium* administered by the sovereign.

Vitoria elaborates on the many situations in which war is now justified:

If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, they can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withal with observance of proportion as regards the nature of the circumstances and of the wrongs done to them. (Vitoria, para. 395, p. 155)⁹

Given that any Indian resistance to Spanish presence is a violation of the law of nations which would justify sanctions, Spanish war against the Indians is inevitable and endless. The Indian is ascribed with membership within an overarching system of *jus gentium*, with intention and volition; as a consequence of this, violence originates within Vitoria's system through the deviance of the Indian.

Vitoria's exploration of the law of war raises many of the traditional questions which still occupy international lawyers. Who may wage war? When can war be waged? What limits must be observed in the waging of war? What constitutes a just war? and so forth. War is a special phenomenon, furthermore, because it is the ultimate prerogative of the sovereign.¹⁰ Thus Vitoria's most sustained and explicit exploration of sovereignty doctrine occurs in the context of his examination of the law of war.

Vitoria understands sovereignty, in part, as a relationship – the sovereign has a duty towards his or her people and the state; and as certain prerogatives

– the right to wage war and to acquire title being among the most prominent. The sovereign, the prince, is the instrumentality of the state, posited almost as the metaphysical embodiment of the people.¹¹ The prince expands the state, as the successful waging of war brings people outside the state within its scope.¹²

While Vitoria thus defined the powers of the sovereign, he had greater difficulty in identifying the sovereign himself. ‘Now the whole difficulty is in the questions: What is a State and who can properly be called a sovereign prince?’ (Vitoria, para. 425, p. 169). Sovereigns cannot be defined independently of states. The state, claims Vitoria, ‘is properly called a perfect community’ (Vitoria, para. 425, p. 169). But then ‘the essence of the difficulty is in saying what a perfect community is’ (Vitoria, para. 425, p. 169). Vitoria’s answer is tautologous; ‘By way of solution be it noted that a thing is called perfect when it is completed whole, for that is imperfect in which there is something wanting, and, on the other hand, that is perfect from which nothing is wanting’ (Vitoria, para. 426, p. 169). Neither does it help to define the sovereign as the ultimate authority within the community, for even this proposition is subject to complex qualifications; the complicated hierarchies of the time defy Vitoria and he acknowledges that a

... doubt may well arise whether, when a number of States of this kind or a number of princes have one common lord or prince they can make war of themselves without the authorization of their superior lord. (Vitoria, para. 426, p. 169)

Amid this confusion, Vitoria finally resorts to empiricism, citing as examples of sovereignty the kingdoms of Castile and Aragon, communities which have their own laws and councils.

The foregoing suggests that the power of the state has not been consolidated in any significant way. Authority is too dispersed and hierarchies, while established theoretically, are too confusing and uncertain for Vitoria to use them convincingly as a means of structuring sovereignty doctrine.

Vitoria’s discussion of sovereignty is at its most detailed, however, in his analysis of the laws of war, this as a consequence of the fact that it is the sovereign who declares war and exercises all the rights of war.

Just war doctrine is a crucial aspect of the whole complex of issues relating to the law of war, as the sovereign is entitled to go to war only in certain circumstances. Hence Vitoria poses the question: Does the sovereign’s subjective belief in the justice of the war ensure that the war is indeed ‘just’? (Vitoria, para. 434, p. 173).

Vitoria rejects the argument that subjective belief in the justness of a war would suffice to render it truly just because ‘were it otherwise, even Turks and Saracens might wage just wars against Christians, for they think they are thus rendering God service’ (Vitoria, para. 435, p. 173). Instead of examining the issues of subjective belief and just-war doctrine and then deciding whether they applied to the Saracens, Vitoria arrives at his conclusion by first establishing the proposition, the fundamental premise of his argument, that *the Saracens are inherently incapable of waging a just war*. The initial exclusion

of the Saracens – and, in this case, by extension, the Indians – then, is fundamental to Vitoria's argument. In essence, only the Christians may engage in a just war; and, given Vitoria's argument that the power to wage war is the most important prerogative of sovereigns, it follows that the Saracens can never be truly sovereign.

Earlier, in his first lecture, Vitoria had argued that the Indians too possess their own form of rulership, that they 'have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops' (Vitoria, para. 333, p. 127). Such a passage may suggest that Indian communities are governed by sovereigns; but Vitoria's insistence, in his analysis on just war, that only Christian subjectivity is recognized by the laws of war, ensures that the Indians are excluded from the realm of sovereignty and exist only as the objects against which Christian sovereignty may exercise its power to wage war.

The task of identifying sovereign authority and defining the powers wielded by such an authority, in the complex political systems of Renaissance Europe proved extraordinarily difficult, and the techniques and conceptual distinctions used by Vitoria for this purpose were problematic and ambiguous. The distinction between the Indians and the Spanish, however, was emphatic and well developed. Indeed, in the final analysis, the most unequivocal proposition Vitoria advances as to the character of the sovereign is that the sovereign, the entity empowered to wage a just war, cannot, by definition, be an Indian.

Since the Indians are by definition incapable of waging a just war, they exist within the Vitorian framework only as violators of the law. The normal principles of just war which would prohibit the enslaving of women and children do not apply in the case of the pagan Indians.

And so when a war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and women of the Saracens into captivity and slavery. (Vitoria, para. 453, p. 181).¹³

Once fault is established, as the preceding passage suggests, the war waged against the Indian is, in Vitoria's phraseology, 'perpetual'. Similarly, in his discussion of whether it is lawful and expedient to kill all the 'guilty' in the course of a war, Vitoria suggests that this may be necessary because of the unique case of the unredeemable Indian:

... and this is especially the case against the unbeliever, from whom it is useless ever to hope for a just peace on any terms. And as the only remedy is to destroy all of them who can bear arms against us, provided they have already been in fault. (Vitoria, para. 457, p. 183)

As the previous discussion suggests, it is not difficult in Vitoria's system to establish that the Indians are guilty or 'in fault'. A certain respect is extended to sovereignty in the case of wars between European powers as the 'overthrow of the enemy's sovereignty and the deposition of lawful and natural princes' are 'utterly savage and inhumane measures' (Vitoria, para. 465, p. 186). In the case of the Indians, however, such a deposition of sovereigns is not merely permitted but necessary in order to save the Indians from themselves. These conclusions stand in curious juxtaposition with other parts of Vitoria's work, where he emphasizes the humanity of the Indians. Simply, war waged against the Indians acquires a metalegal status (Onuma, 1993). Many of the legal doctrines of consent, limits and proportion which Vitoria outlines earlier, cease to apply to the Indian once the all-encompassing and inescapable obligations of *jus gentium* are breached.

In summary, then, there are two essential ways in which sovereignty relates to the Indian: in the first place, the Indian is excluded from the sphere of sovereignty; in the second place, it is the Indian who acts as the object against which the powers of sovereignty may be exercised in the most extreme ways. The most characteristic and unique powers of the sovereign, the powers to wage war and acquire title over territory and over alien peoples are defined in their fullest form by their application on the non-sovereign Indian.

CONCLUSION

Vitoria continuously alludes to the theme of the novelty of the discovery of the Indians; thus his work addresses the controversy generated by 'the aborigines of the New World, commonly called the Indians, who came forty years ago into the power of the Spaniards, not having been previously known to our world' (Vitoria, para. 306, p. 116). Later he argues 'at the time of the Spaniards' first voyages to America they took with them no right to occupy the lands of the indigenous population'. In these different ways, Vitoria seizes upon the discovery of the Indians to claim that traditional understandings of law were inadequate to deal with such a novel situation; in so doing Vitoria clears the way for his own elaboration of a new, secular, international law.

My argument, then, is that Vitoria is concerned with not so much the problem of order among sovereign states but the problem of order among societies belonging to two different cultural systems. Vitoria resolves this problem by focusing on the cultural practices of each society and assessing them in terms of the universal law of *jus gentium*. Once this framework is established, he demonstrates that the Indians are in violation of universal natural law. Indians are included within the system only to be disciplined.

The problem of cultural difference plays a crucial role in structuring Vitoria's work – his notions of personality, *jus gentium* and, indeed, sovereignty itself. Vitoria's jurisprudence can be seen to consist of three primary elements connected with this problem. First, a difference is postulated between the Indians and the Spanish, a difference which is rendered primarily

in terms of the different social practices and customs of each society. Second, Vitoria formulates a means of bridging this difference, this through his system of *jus gentium* and his characterization of the Indian as possessing universal reason and therefore capable of comprehending and being bound by the universal law of *jus gentium*. Third, the Indians, possessing universal reason and yet backward, barbaric, uncivilized, are subject to sanctions because of their failure to comply with universal standards. It is precisely whatever denotes the Indians to be different, their customs, practices, rituals, which justify the disciplinary measures of war, which is directed towards effacing Indian identity and replacing it with the universal identity of the Spanish. These sanctions are administered by the sovereign Spanish on the non-sovereign Indians.

Cultural difference is also crucial to Vitoria's version of sovereignty doctrine. Vitoria's attempts to outline a coherent vision of sovereignty doctrine in the shifting political conditions of Renaissance Europe encountered a number of difficulties which he tried to resolve by proposing various distinctions – between, for example, the public and the private, the municipal and international spheres. Each of these attempts fails,¹⁴ however, and ultimately, the one distinction which Vitoria insists upon and which he elaborates in considerable detail is the distinction between the sovereign Spanish and the non-sovereign Indians. Vitoria bases his conclusions that the Indians are not sovereign on the simple assertion that they are pagans. In so doing he resorts to exactly the same crude reasoning which he had previously refuted when denying the validity of the church's claim that the Indians lack rights under divine law because they are heathens. Despite this apparent contradiction, Vitoria's overall scheme is nevertheless consistent: the Indians who inevitably and invariably violate *jus gentium* are denied the status of the all-powerful sovereign who administers this law.

Clearly, then, Vitoria's work suggests that the conventional view that sovereignty doctrine was developed in the West and then transferred to the non-European world is, in important respects, misleading. Sovereignty doctrine acquired its character through the colonial encounter. This is the darker history of sovereignty which cannot be explored or understood by any account of sovereignty doctrine which assumes the existence of sovereign states.

Vitoria is an extremely complex figure; a brave champion of Indian rights in his own time (Scott, 1934), he may also be seen as an apologist for imperialism whose works are all the more insidious precisely because they justify conquest in terms of humanity and liberality (Williams, 1990). My argument, however, is that Vitoria's real importance lies in his developing a set of concepts and constructing a set of arguments which have been continuously used by western powers in their suppression of the non-western world and which are still regularly employed in contemporary international relations in the supposedly post-imperial world. In particular, we see in Vitoria's work the enactment of a formidable series of maneuvers by which European practices are posited as universally applicable norms with which the colonial peoples must conform if they are to avoid sanctions and achieve full membership.

Vitoria's jurisprudence demonstrates, furthermore, how the construction of the barbarian as both within the reach of the law and yet outside its protection creates an object against which sovereignty may express its fullest powers by engaging in an unmediated and unqualified violence which is justified as leading to conversion, salvation, civilization. Non-European peoples have been continuously characterized as the barbarians compelling the further extension of international law's ambit.

The classic question of how order is created among sovereign states and the framework of inquiry it suggests lends itself to a peculiarly imperialist version of the discipline as it prevents any searching examination of the history of the colonial world which was explicitly excluded from the realm of sovereignty. The interactions Vitoria examines occur not between sovereign states but the sovereign Spanish and non-sovereign Indians. The crucial issue then is how it was decided that the Indians were not sovereign in the first place.

Once the initial determination had been made and accepted that the colonial world was not sovereign, the discipline could then create for itself, and present as inevitable and natural, the grand redeeming project of bringing the marginalized into the realm of sovereignty, civilizing the uncivilized and developing the juridical techniques and institutions necessary for this great mission. Within this framework, the history of the colonial world would consist simply of the history of the civilizing mission.

Vitoria's account of the inaugural colonial encounter suggests that an alternative history of the colonial world may be written by adopting a different framework and posing a different set of questions.

How was it determined that the colonial world was non-sovereign in the first place?

How were the ideas of universality and particularity used for this purpose?

How did a limited set of ideas which originated in Europe present themselves as universally applicable?

How, armed with these concepts, did European empires proceed to conquer and dominate non-European territories?

Furthermore, if sovereignty is so intimately connected with the problem of cultural difference, and if it is explicitly shaped in such a manner as to empower certain cultures while suppressing others, vital questions must arise as to whether and how sovereignty may be utilized by these suppressed cultures for their own purposes. The vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures. In examining these issues as they arise in Vitoria's work, it may finally become possible to write a different history of the relationship between colonialism and international law and, thereby, of international law itself.

NOTES

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1. For accounts of Vitoria's place in the discipline of international law, and his relationship to Grotius, see Scott (1934), Nussbaum (1954).
2. The titles of the two lectures may be translated as 'On the Indians Lately Discovered' and 'On the Law of War Made by the Spaniards on the Barbarians'. The two lectures are collected together in one volume, *Franciscus de Victoria De Indis et de ivre Belli Relectiones* (1557/1917), hereinafter *De Indis*. This is the first work in the series 'The Classics of International Law' published by the Carnegie Institute of Washington. 'Victoria' is more commonly referred to in the literature as 'Vitoria', and I have accordingly adopted the latter version. Citations refer to the paragraph and page numbers of this version of *De Indis*.
3. The term 'Indians' here refers to the peoples of the Americas, who were mistakenly thought by Columbus to be peoples of the East Indies.
4. Thus Kooijmans (1964: 59), for example, asserts that the doctrines which applied to relations between European states were simply extended to relations between Spain and the Indies. Kooijmans claims that

the dealings of the Spaniards with the Indians were subject to the rules that apply to intercourse between states. Vitoria introduced an essentially new element in relentlessly drawing the consequences from the theories that applied in Europe to those territories which until then had remained outside the European horizon . . . [T]he rules that apply to European interstate intercourse also apply to the intercourse with the American-Indian political communities, because there is no intrinsic difference. The small Indian states are legal persons, they enjoy the same rights as European states.

Kooijmans does make it clear, however, that for Vitoria, the Indians would acquire the rights of states once 'these communities correspond to the requirements laid down by him for the state'.

5. See, for example, Kooijmans (1964). Kennedy discusses this point at some length. As he notes,

Most historians who treat primitive texts do so in a way which both presupposes and proves the continuity of the discipline of international law – reaffirming in the process that the project for international law scholars is and always was to construct a social order among autonomous sovereigns. (1986: 11)

6. I use the unsatisfactory term 'cultural difference' to denote, in broad terms, Vitoria's characterization of the Indians as different on the basis of their different social practices, rituals and ways of life.
7. From all this the conclusion follows that the barbarians in question cannot be barred from being true owners, alike in public and private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and land (Vitoria, para. 328, p. 125).

8. Indeed, for Vitoria, it would suffice for these purposes if the Spaniards are obstructed in their attempts to convert the Indians. This affects the 'welfare of the Indians themselves', in which event the Spanish may intervene 'in favor of those who are oppressed and suffer wrong' (Vitoria, para. 398, p. 157).
9. Vitoria implies that this is how the Indians may achieve salvation; they must be destroyed in order to be saved. Donne captures the theme of violence and salvation perfectly:

Batter my heart, three-personed God; for you
As yet but knock, breathe, shine and seek to mend;
That I may rise, and stand, o'erthrow me, and bend
Your force to break, blow, burn, and make me new.
I, like an usurped town, to another due,
Labour to admit you, but oh, to no end,
Reason, your viceroy in me, should defend,
But is captived, and proves weak or untrue. . . .

John Donne, *Holy Sonnet X*

The argument that a people or a city must be destroyed in order to be saved was familiar before our time.

10. Vitoria asserts that 'Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force' (Vitoria, para. 422, p. 167). Thus, while the individual, in exceptional circumstances, exercises rights comparable to the right to wage war only the state properly enjoys all the rights both to declare war and wage war to its fullest extent. See later discussion.
11. The prince is the entity in whom all power is vested:

for the prince only holds his position by the election of the State. Therefore he is its representative and wields its authority; aye, and where there are already lawful princes in a State, all authority is in their hands and without them nothing of a public nature can be done either in war or in peace. (Vitoria, para. 425, p. 169)

12. It is, therefore, certain that 'princes can punish enemies who have done a wrong to their State and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge' (Vitoria, para. 433, p. 172).
13. It is notable that Vitoria refused to characterize the Indians as slaves in his first *relectio*. Now, however, with respect to war and the new scheme of natural law he outlines, he achieves much the same result: the enslavement of the whole Indian population, including women and children.
14. In the final analysis, as Kennedy argues, Vitoria 'does not locate the sovereign between a distinct municipal and international legal order, nor does he distinguish internal and external or private and public sovereign identities' (1986: 35).

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