THE RIGHTS OF INDIGENOUS PEOPLES IN EARLY INTERNATIONAL LAW

J S Davidson

Senior Lecturer in Law, University of Canterbury

INTRODUCTION

On 18 December 1990 the General Assembly of the United Nations adopted a resolution proclaiming 1993 the International Year for the World's Indigenous People.[1] The timing of the International Year was not accidental. As early as 1982 Martinez Cobo, the author of a substantial and wide–ranging report on indigenous peoples,[2] had recommended that the year following the anniversary of the Europeans' first intrusion into the Western Hemisphere should be recognised by dedicating it to the peoples whose lives had been dislocated, and in many instances destroyed, by the period of European colonial expansionism which followed in the post–Columban era.[3] The dedication of 1993 to indigenous peoples was also supposed to coincide with the presentation of a Declaration on the Rights of Indigenous Peoples to the General Assembly of the United Nations for approval.[4] This, however, was not to be, since progress by the Working Group on Indigenous Peoples on the proposed Declaration was extremely tardy, largely as a result of fundamental disagreement between states' representatives and the representatives of indigenous peoples on a number of matters, especially the meaning to be attributed to the right to self–determination. While the indigenous peoples' representatives argued that self–determination should mean the right of self–government by such peoples, states would not countenance agreement to such an enhanced level of autonomy. Encapsulated in this dispute is the five hundred year struggle by the world's indigenous people to regain and retain control over their political destinies.

While current concern with indigenous peoples' rights may appear to be the product of a more enlightened and rational age, it is clear that neither the issues themselves nor the debates about such rights are novel. Immediately following the fifteenth century Spanish encounter with the 'New World', questions were raised about the proper relationship between the Spanish colonists and the aboriginal populations which they found established there, especially whether it was just to subjugate them and to confiscate their lands and other property. These questions taxed the theologian–jurists of the period, and, indeed, it is arguable that modern international law owes its origins to the early publicists who grappled with these

1 A/Res. 45/164.

2 E/CN.4/Sub.2/1986–87/Add. 1–3.

3 For early description of the depredations waged by the Spanish colonists in the Americas see two works by Bartolome de Las Casas: *History of the Indies* (hereafter 'History'), transl A M Collard (1971) and *The Devastation of the Indies* (hereafter '*Devastation*'), transl H Briffault (1992). For more recent analyses see Independent Commission on International Humanitarian Issues, *Indigenous Peoples* (1987) and Julian Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (1987).

4 The text of the most recent draft of the Declaration on the Rights of Indigenous Peoples is E/CN.4/Sub.2/1993/29. This was drafted by the Working Group on Indigenous Populations at its Eleventh Session in 1993. The Working Group was established by ECOSOC Resolution 34 of 7 May 1982. See D Sander, 'The UN Working Group on Indigenous Populations' (1990) 11 *Human Rights Quarterly* 406.

problems. The work of the Dominican father, Francisco de Vitoria, in particular, is frequently cited as providing the foundations of the modern discipline of international law,[5] with the natural law tradition established by him being followed in the seventeenth and eighteenth centuries by writers such as Grotius, Vattel and Pufendorf.[6] Given the similarity of the issues and the arguments addressed by the classical writers on international law with those being canvassed today, it is perhaps appropriate to review them for a number of reasons.

First, concern with the nationhood of indigenous peoples echoes across the centuries. A number of the early writers and disputants argued that since indigenous peoples were evidently well–organised political communities, they should be regarded as having clear juridical status within the law of nations. The consequences of this view were that such peoples were free and independent, that they owned their property both in public and private law, and that their princes were competent to rule over them and to make agreements on their behalf. To use modern terms, indigenous peoples possessed sovereignty in all its manifestations and their princes enjoyed jurisdiction within their territories.[7] To stray further down the path of modernity, it could be said that such recognition of the rights of indigenous peoples comprehended, in the widest sense, their right to self–determination, that is, the right to determine their own political destiny in its fullness. Care must be taken, however, when seeking to draw upon the works of writers of the sixteenth and seventeenth centuries in this area, for not only are their concepts different from those currently in use, but their philosophical framework, indeed their whole view of the world, differs considerably from that held in contemporary Western thought.[8] The Spanish publicists were first and foremost theologians whose juridical premises were based upon a mixture of Roman law, positive domestic law and Aristotelian philosophy. The whole, however, was subordinated to the doctrine of natural law as elaborated by Saint Thomas Aquinas.[9] The task of the early writers was therefore to declare what was just or unjust by reference to the higher principles of natural law. The eclecticism of their thought and writing is obvious, but it is also equally clear that they felt no discomfort in moving from the realms of Aristotelian assertion to premises of positive and natural law. This approach undoubtedly derived from their theological training and their view of the world as a divinely ordered whole.

Despite this caveat, the early writings provide us with insights into the problems of indigenous peoples and how the theologian jurists of the time attempted to deal with them. The similarities of the problems and the proposed principles which ought to govern relations between the Spanish monarchs and the native peoples of the Americas bear a striking resemblance to the discourse which is in progress today. The Spanish theologians may have been working within a framework which freed them from doubt

5 See J B Scott, *The Spanish Origins of Modern International Law* (1932) and *The Catholic Conception of International Law* (1934); J L Brierly, *The Law of Nations* (6th edn, 1963), 25–6; A. Nussbaum, *A Concise History of the Law of Nations* (hereafter '*Concise History*') (1947), 58–64; E Nys ed, 'Introduction' in Francisco de Vitoria, *De Indis et De Iure Belli Relectiones* (1928).

6 See below 30–32.

7 Both Vitoria and Las Casas devoted substantial areas of their discourses to the question of jurisdiction. See below.

8 For a timely warning that 'history is a foreign land' see M E Marty, 'Foreword' in Bartolome de Las Casas, *In Defence of the Indians* (hereafter *Defence*) transl by S Poole (1992), xiii–xvii.

9 For a succinct statement of the Thomistic principles of natural law see V D Carro, 'The Spanish Theological–Juridical Renaissance and the Ideology of Bartolome de Las Casas' in J Friede and B Keen eds, *Bartolome de Las Casas in History* (hereafter '*Las Casas in History*') (1971), 251.

about the way in which their world was ordered, and their theoretical bases would undoubtedly be accepted uncritically by very few today, but the problems and the proposed solutions represent a coherent attempt to offer an holistic way of thinking about these complex issues.

A second reason for reviewing the work of the early writers is to provide an accurate index of their thinking and conclusions. As Marks has pointed out, modern writings which refer to the thinking of jurists such as Vitoria and Bartolome de Las Casas frequently present 'a degree of superficiality, confusion and even error'.[10] An explanation for this is not difficult to find. The early writers have, to some extent, been 'rediscovered' in recent years, and their thinking has been identified as providing appropriate solutions to today's problems without considering the social and intellectual milieu within which their analyses were conducted. Vitoria, for example, is frequently cited as an unqualified supporter of the rights of indigenous peoples,[11] but close scrutiny of his work shows that this reputation is not entirely justified. When reading Vitoria it should be borne in mind that he was no enlightened liberal modernist. He was a senior Spanish Catholic theologian of his age who, among other things, supported the Inquisition against the Dutch humanist Erasmus. It might also be pertinent to observe at this point that his views on indigenous peoples' rights were much more equivocal than is often represented in modern literature on the subject. This is an issue which will be considered in greater detail later in this piece.[12]

It should not be thought, however, that all contemporary writers necessarily take the same view of the early publicists. While some authors, such as those cited above, find that Vitoria is representative of an enlightened view of indigenous peoples' rights, others find within his work a pernicious tendency which was used to justify colonialism both at the time of his writing and subsequently.[13] Other contemporary writers adopt a variety of approaches to the early writings on indigenous peoples' rights. A significant number of modern publicists take the view that the recognition of indigenous peoples' rights in international law represents an established theme of international law which can be discerned in the writings of the major early writers such as Vitoria, Las Casas, Grotius, and Pufendorf, and that it was only in the nineteenth century with the emergence of the juridically supreme state, that such rights were relegated from a matter of international concern to that of simply domestic concern.[14] This latter point goes, in fact, to the heart of the matter. Indigenous peoples in overseas colonies were in the nineteenth century, without their consent, converted from colonial peoples to the citizens of the successor states of the Spanish empire. Whatever separate international legal status they had was subsumed by the new state. Thus, in many ways, current indigenous claims may perhaps be represented as a reassertion, and in some instances simply a reaffirmation, by these peoples of a status which they claim never to have lost. The ordering of the world by means of a state system, however, has

10 G C Marks, 'Indigenous Peoples in International Law: The Significance of Vitoria and Bartolome de Las Casas' (hereafter '*Indigenous Peoples*') (1992) 13 *Australian Yearbook of International Law* 1 at 9.

11 See, for example, Nussbaum, *Concise History,* 58 and J E Falkowski, *Indian Law/Race Law: A Five Hundred Year History* (1992) 137; J Henderson, 'The Doctrine of Aboriginal Rights in Western Legal Tradition' (hereafter '*Aboriginal Rights*') in M Boldt and J A Long (eds), *The Quest for Justice* (1965) 188; J Stone, *Human Law and Human Justice* (1965) 61.

12 See below.

13 For a review of this literature see Marks, *Indigenous Peoples* 9–18.

14 See, for example, Henderson, *Aboriginal Rights* 188–90.

clearly operated to diminish indigenous peoples' rights and to transform them from matters of international concern to matters of domestic concern, so much so, that beyond the international human rights dimension attaching to such peoples, their treatment is a matter of domestic jurisdiction and fully dependent upon the law of the states in which they live.

The question which arises for contemporary writers, however, is whether the espousal of the state based system of international law destroyed the tradition of indigenous peoples' rights which had been established by earlier publicists. For some writers, the international community in the nineteenth century decisively rejected the alleged Vitorian and Lascasian view of the world in which humanity was regarded as a whole, and installed a state based system in which the state was the only subject of international law and all other entities were simply objects of that law. In this schema, non–state political groups lacked legal status. For others, the development of the state system merely held indigenous peoples' rights in abeyance. As Marks comments:[15]

> In this perspective the contemporary emergence of indigenous rights is not so much the progressive development of new law, but rather the restoration of rights previously existing and acknowledged.

Yet other contemporary publicists, such as Richard Falk,[16] see the notion of indigenous rights as being a direct challenge to the whole theory of a state–based international system. In Falk's view indigenous peoples are imprisoned in a state centred system which was not of their own making, thus the reassertion of their rights requires a 'direct assault upon positivist and neo positivist views of international law'.[17]

If, however, one takes indigenous peoples' rights as a facet of international human rights law, then it seems the theoretical bases which can be used to justify them might be viewed in a different way. By reverting to the writings of the early publicists which were based on natural law premises, it is clear that the rights of indigenous peoples both as individuals and as groups or political communities derived from natural law itself. As we saw earlier, natural law was regarded as a higher law against which all earthly law was to be measured either for its justice or injustice. In this system unjust laws could have no validity. While this theistic view of natural law is no longer accepted uncritically today, some writers appeal to a 'higher law' by virtue of which indigenous peoples' rights enjoy superiority over contrary domestic legal norms.[18]

It is not my intention in this essay to comment in detail upon the way in which contemporary writers and theorists have employed the thought and writing of the sixteenth and seventeenth century publicists to support their own particular positions in the modern world, but simply to draw attention to the fact that the influence of the early writers has made a significant impact not only upon the development of international law, but also upon the ways in which questions concerning indigenous peoples' rights are approached today. It is imperative therefore if one is to understand how contemporary writers have been influenced by, and how they utilise the classical writers, to have an accurate understanding of what these writers

15 Marks, *Indigenous Peoples* 4–5.
16 R Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)' in J Crawford ed, *The Rights of Peoples* (1988) 16.
17 Ibid at 19.
18 G Kamenka, 'Human Rights, Peoples' Rights', in Crawford, *Rights of Peoples* 127.

actually said (as opposed to what commentators assume they said), and also to have some awareness of the intellectual climate which informed their thinking and writing.

FRANCISCO DE VITORIA (1480–1546)

Francisco de Vitoria was a Dominican friar who held the post of Professor of Theology at the University of Salamanca in Spain from 1526 until his death in 1546.[19] In the late 1530s, the Holy Roman Emperor Charles V submitted to Vitoria a number of questions concerning the rightfulness of certain Spanish activities in the Americas which were by that time predominantly under the control of Spain. In 1541, however, the Emperor placed before Vitoria an extremely important question which had been raised by another Dominican theologian, Bartolome de Las Casas, concerning the legitimacy of baptising the children of the unbelievers found in the Americas against the wishes of their parents.[20] It was this question which gave rise to Vitoria's most famous *relectiones* or formal lectures: *De Indis Noviter Inventis* and *De Iure Belli*.[21] The first of these lectures, which were not published by Vitoria himself but were posthumously published from notes taken by his students,[22] purported to answer the question posed by the Emperor. In it, Vitoria dealt not only with the question of baptism, but also with the general question of what principles ought to govern the Spaniards' relations with the peoples of the Americas. Thus, although the Emperor's inquiry was concerned solely with the issue of evangelisation, Vitoria dealt with it in a much fuller fashion than would originally appear to have been warranted.

In commencing his *relectio* Vitoria observed:[23]

> The whole of this controversy and discussion was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards, not having previously been known to our world.

It will be noted here that Vitoria's immediate assumption was the Indians[24] had 'come into the power of the Spaniards' which seems to imply his *prima facie* recognition of Spanish jurisdiction, if not dominion, over these people. In dealing with the Emperor's inquiry, however, Vitoria posed three questions:[25] First, by what right had the Indians come under Spanish sway? Second, what rights had the Spanish sovereigns obtained over the Indians in temporal and civil matters? Third, what rights had the Church or the Spanish sovereigns obtained over the Indians in spiritual matters? The first of these questions again seems to assume that the Indians were viewed as being already subject to the power of Spain. Notwithstand-

19 Nussbaum, *Concise History* 58–9.
20 See Nys, *Introduction* 72.
21 See above note 5.
22 Nys, *Introduction* 81; Nussbaum, *Concise History* 58.
23 *De Indis* 116.
24 It will be noted that Vitoria refers to all aboriginal peoples of the Americas as Indians. The name derives from Columbus's initial error in thinking that by sailing westwards he had discovered a new route to India. He therefore described the people he encountered as Indians. It should also be noted that Vitoria and Las Casas did when using the term did not differentiate between the aboriginal peoples of the Caribbean Island, the Arawaks and Caribs, who lived in simple societies and the more sophisticated social structures of the Aztecs and Incas of the American mainland. While the use of the term 'Indians' is today becoming increasingly unacceptable as a description of the native peoples of the Americas, it is retained in this essay to accord with the usage of the early writers.
25 *De Indis* 116.

ing this assumption, Vitoria posed the question of whether this inquiry was indeed simply academic or, as he put it, 'useless'.[26] While he was at pains to point out that he considered Ferdinand and Isabella and Emperor Charles V would have been 'just and scrupulous'[27] in the assessment of their title to the Americas, nonetheless, it was appropriate in matters of doubt to consult the wise in order to avoid doubt about the lawfulness or otherwise of a proposed course of action. As Vitoria observed, 'in doubtful matters a man is bound to seek the advice of those whom the Church has appointed for that purpose, such as prelates, preachers, and confessors who are people skilled in divine and human law'.[28] In the case of the 'barbarians'[29] Vitoria took the view that their treatment was not so evidently unjust that no question about its justice could arise nor evidently so just that no question about its injustice could arise. He said:[30]

> For, at first sight, when we see that the whole of the business has been carried on by men who are alike well-informed and upright we may believe that everything has been done properly and justly. But then, we hear of so many massacres, so many plunderings of otherwise innocent men, so many princes evicted from their possessions and stripped of their rule, there is certainly ground for doubting whether this is rightly or wrongly done.

Before analysing whether or not the Spanish could acquire title to the Indians' territories, Vitoria was obliged to consider whether or not the Indians were true owners of their property in public or private law. Here he was compelled to consider a number of propositions which had evidently been alleged by some of those who had argued that the Indians had no recognisable title. The first of these was that the Indians were in the position of slaves and could not, according to Roman law, be regarded as true owners.[31] This proposition was based on the Aristotelian notion that some persons were by nature slaves.[32] Proponents of this view also argued that it was irrelevant that the Indians were not subject to any master prior to the arrival of the Spanish, since Roman law again provided justification for a person to take into ownership a slave who had no master, which was by the 'brute nature'[33] of the Indians the obvious situation in the Americas. Vitoria, however, rejected this view saying simply:[34]

> On the opposite side we have the fact that the people in question were in peaceable possession of their goods, both publicly and privately. Therefore, unless the contrary is shown, they must be treated as owners and not be disturbed in their possession unless cause be shown.

It is of course the latter part of Vitoria's observation 'unless cause be shown' which provides the escape clause for those who wished to allege that there were good reasons; reasons, supported by Vitoria himself to some extent in his subsequent arguments, which permitted the Spanish to enter

26 Ibid.
27 Ibid.
28 Ibid 118.
29 This is the term which Vitoria occasionally substitutes for the word Indian. It should not be regarded as excessively pejorative since it was employed largely in a restricted Aristotelian sense. See below pp412-414.
30 *De Indis,* 119.
31 Ibid 120.
32 Here he quotes from Aristotle, *Politics, Book I,* 'Some are by nature slaves, those, to wit, who are better fitted to serve than to rule.' This was the subject of considerable debate among the Spanish following their conquest of the Americas. For a review of the arguments see L Hanke, *Aristotle and the American Indians* (hereafter '*Aristotle*') (1959).
33 *De Indis,* 120.
34 Ibid.

into ownership of the Indians' property. It is also interesting to note that Vitoria returns to the topic of 'slaves by nature' after considering other arguments concerning whether the Indians could be regarded as true owners of their property. This was by way of explaining what Aristotle really meant by the term. Here Vitoria argued that Aristotle did not have in mind those who were weak by nature, and whose property as a logical consequence, could therefore be seized and sold by those who were stronger, rather 'what he means is that by defect of their nature they need to be ruled and governed by others and that it is good for them to be subject to others, just as sons need to be subject to their parents until of full age, and a wife to her husband'.[35] Thus people of 'strong intelligence' could arrogate sway over other peoples because nature had given them 'a capacity for rule and government'.[36] In this Vitoria was clearly paving the way for some kind of trusteeship concept in which 'inferior' peoples would be placed under the tutelage of those who were by nature 'superior'. Indeed, this is a theme to which Vitoria returns at the very end of his consideration of legitimate titles over Indian territory. He takes care, however, to make clear that 'even if the Indians are as inept and stupid' as is alleged they still did not lose ownership. It did, however, give 'some right to reduce them to subjection'.[37]

Vitoria was also obliged to consider the argument that by reason of their sinful unbelief the Indians might be relieved of their property. Again he rejected this view, stating that it was founded on theological 'error'.[38] He argued that while human law might operate to deny a heretic title to his or her property, in the forum of conscience persons remained nonetheless true owners. It therefore followed that Indians could not be barred from being true owners in public or private law by reason of the sin of unbelief, or indeed any other mortal sin, nor did such a situation permit Christians to seize either their goods or their lands.[39]

It had also been alleged that the Indians could not enjoy ownership of property either because they were evidently of unsound mind or, given their barbarous state, irrational. While Vitoria was prepared to accept that irrationality would preclude ownership 'this is clear because dominion is a right ... and irrational creatures can not have a right'[40] and to leave the question of whether persons of unsound mind could enjoy dominion to the jurists, he was not, however, prepared to concede that Indians were, in fact, irrational. He said, and there is nothing to suggest that Vitoria had direct evidence of this himself but rather was relying on hearsay, that 'according to their kind'[41] the Indians enjoyed the use of reason. This was so because it was evident that there was:[42]

> ... 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 calls 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.

35 Ibid 128.
36 Ibid.
37 Ibid.
38 Ibid 121.
39 Ibid 122–5.
40 Ibid 127.
41 Ibid.
42 Ibid.

So why did the Indians appear to be intellectually inferior to the Spanish? Vitoria argued that it was not the Indians' fault that they had remained outside the 'pale of salvation', rather he attributed 'their seeming so unintelligent and stupid' to 'a bad and barbarous upbringing'. He even went on to say that 'even among ourselves we find many peasants who differ little from brutes'.[43]

From all this, Vitoria reached the conclusion that the Indians enjoyed full dominion in both public and private law over their property, and that they could not be deprived of it on the ground of their not being true owners. As he observed:[44]

> It would be harsh to deny those, who have never done any wrong, what we grant to Saracens and Jews, who are the persistent enemies of Christianity. We do not deny that these latter peoples are true owners of their property, if they have not seized lands elsewhere belonging to Christians.

Starting from the premise that the Indians were indeed true owners of their land, Vitoria then went on to inquire 'by what title the Spaniards could have come into possession of them and their country'.[45] He then went on to state that there were seven illegitimate titles which had been put forward to justify Spanish possession, and seven, or possibly eight, legitimate titles. The terminology which is used here is undeniably of interest. If it is assumed that the use of the word 'possession' (*possessionem*)[46] accords with the usage in Roman law, then Vitoria is talking about Spanish rights which are short of ownership, since in Roman law, *possessio* implies the right to hold and use property without necessarily having *dominium* or full rights of ownership over it. Given the general tenor of Vitoria's subsequent discussion, this would appear to be a justifiable conclusion.

The seven illegitimate titles

The first two titles described as illegitimate by Vitoria possessed a degree of similarity. The first alleged title was that as the Holy Roman Emperor Charles V was 'lord of the world' he enjoyed dominion over those territories already ruled by native princes.[47] The fact that the territories in question were already subject to the government of native princes did not in Vitoria's view necessarily mean that the Emperor was precluded from enjoying sovereignty over them. He said:[48]

> For, even if we assume that the Indian aborigines may be true owners, yet they might have superior lords, just as inferior princes have a king and as some kings have the Emperor over them.

Because of this Vitoria argued it was possible for many persons to enjoy dominion over the same thing. While this conclusion might sound strange to common lawyers, it is certainly not the case for civil lawyers, since Roman law recognised a wide variety of forms of shared *dominium* over property.[49] Vitoria was, however, able to circumvent this discussion by

43 Ibid 127–8.
44 Ibid 128.
45 Ibid 129.
46 Ibid.
47 Ibid.
48 Ibid.
49 Ibid. Even Las Casas, whose views on indigenous peoples' rights were more radical than those of Vitoria, acknowledged that the Spanish crown might exercise a form of *super dominium* over the Indians making them thereby the vassals of the crown. See below 28–9.

finding that there was no authority either in natural or human law for finding that the Emperor was lord of the whole earth, and he was therefore not entitled to seize the lands of the Indians, nor could he install new lords after putting down the former rulers nor could he levy taxes.[50]

The second title which had been alleged was that the Pope was temporal as well as spiritual monarch of the earth and thus able to make donations of territories to the Spanish monarchs. What Vitoria probably had in mind when considering this ground of title was the infamous Papal Bull *Inter Caetera* of 1493 by which the Borgia Pope, Alexander VI, purported to grant the Americas (barring Brazil where Portugal had already established a foothold) to Isabella and Ferdinand of Spain, and Africa to the King of Portugal.[51] Although Las Casas in his *Defence of the Indians*[52] interpreted *Inter Caetera* to mean that the Pope intended to grant these monarchs spiritual jurisdiction for the purposes of proselytization, the wording appears to suggest that he was in fact attempting to grant temporal sovereignty. The relevant part of the Bull provides:[53]

> ... by the authority of Almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ which we hold on earth, do by tenor of these presents give, grant, and assign forever to you and your heirs and successors, kings of Castile and Leon, all and singular the aforesaid countries and islands thus unknown and hitherto discovered by your envoys and to be discovered hereafter, provided however they at no time have been in the actual temporal possession of any Christian owner, together with all their dominions, cities, camps, places and villages, and all rights, jurisdiction and appurtenances of the same. And we invest in you and your aforementioned heirs and successors with them, and make, appoint, and depute you lords of them *with full and free power, authority and jurisdiction of every kind* ...

While Vitoria acknowledged that the Pope enjoyed spiritual power over the earth, he argued that this did not confer any temporal power upon him, and any donations made in pursuance of such a presumed temporal power were of no effect.[54]

The third illegitimate title considered by Vitoria was that of discovery. As he remarked, 'it was in virtue of this title alone that Columbus the Genoan first set sail'.[55] As Vitoria observed, discovery was an adequate title for those regions of the world which were deserted, and by virtue of the law of nations and natural law such areas became the property of the first occupant. In the case in question, however, it was manifest that the land was subject to the ownership of the indigenous inhabitants and could not therefore be classified as *territorium nullius* or land belonging to no one.[56] In this regard Vitoria stated that this title 'in and by itself ... gives no support to a seizure of the aborigines any more than if it had been they who had discovered us'.[57]

50 Ibid 131. This was a position with which Las Casas agreed. *Defence* 152–3.
51 For the full text of the Bull see F G Davenport and C P Paullin eds, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (1967) 35.
52 Las Casas, *Defence* 349–362.
53 Emphasis added.
54 *De Indis,* 134. The Indians also regarded the Papal donation with some scepticism. L Hanke, *All Mankind is One* (hereafter '*Mankind*') (1974) reports that the Cacique or Chief of Cena on being told of the donation by Pizzaro remarked that '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'.
55 Ibid 138–9.
56 Ibid 139.
57 Ibid.

The fourth spurious title analysed by Vitoria was that of refusal by the native peoples of the Americas to accept the Christian faith.[58] In so doing, it was clear that Vitoria was paving the way for his subsequent examination of the valid or legitimate titles, for here he found that the instant case constituted a *prima facie* lawful reason for occupying Indian lands.[59] As Vitoria opined, it would appear that the Indians, on Papal authority, might be compelled to receive the Christian faith, and that if they did not do so they could be proceeded against by reason of a just war.[60] Furthermore, Christian princes could undertake such action under their own authority since they were the emissaries of God. Vitoria also observed that Christian princes could similarly make war against the Indians if they blasphemed against Christ.[61]

This part of Vitoria's analysis appears to deal, at least in part, with the notorious *requerimiento*. This curious document was intimately linked with the purported Papal Donation in that it was required to be read to the Indians before the *conquistadores* could begin hostilities against them. Since *Inter Caetera* demanded that the Spanish sovereigns convert the Indians to Christianity, it was necessary for their representative (an *escribo* or notary) to call upon the native peoples to embrace the faith.[62] Failure to convert would immediately allow the Spanish to wage a just war against the indigenous peoples, and, following a successful conclusion reduce the Indians to slavery and seize their lands and goods. The *requerimiento* was therefore a call to the Indians to convert. Part of the document provided that if the Indians did not embrace the faith then:[63]

> ... I certify to you that, with the help of God, we shall forcibly enter into your country and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their Highnesses; we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them as their Highnesses may commend; and we shall take away your goods, and shall do all the harm and damage that we can, as to vassals who do not obey and refuse to receive their lord, and resist and contradict him ...

As some commentators have observed, the *requerimiento* was frequently read to the Indians in languages they did not understand and, occasionally, at night when they were sleeping.[64] The question which arose, however, was whether the reading of the *requerimiento* was of itself sufficient to initiate all the consequences of unbelief which the Spanish felt justified in unleashing to their fullest extent against the Indians. This was a matter with which Vitoria dealt extensively.

Vitoria took the view first, that the Indians did not commit the sin of unbelief before they had heard of Christ and second, even if they had heard of Christ, they were not bound to accept the Christian faith simply upon

58 Ibid 143.
59 Ibid.
60 Ibid.
61 Ibid.
62 See L Hanke, 'The Requerimiento and Its Interpreters', *Revista de historia de America,* vol. 1, 1958, 25–34. See also, L Hanke, *The Spanish Struggle for Justice in the Conquest of America* (hereafter 'Struggle') (1965) 31–6.
63 Ibid 28.
64 See Falkowski, *Indian Law* 12–13. As Hanke writes, 'So familiar did the Indians become [with the reading of the *requerimiento*] that they fled at once upon observing Spaniards draw our a piece of paper, for bitter experience had taught them that such ceremonies usually portended an assault against them'. L Hanke, *Bartolome de Las Casas: An Interpretation of His Life and Writings* (hereafter '*Life and* Writings') (1951) 7.

annunciation; they must have some miracle, proof or other persuasion as an incentive to believe.[65] Citing Cardinal Cajetan,[66] Vitoria stated:[67]

> It would be rash and imprudent for any one to believe anything, especially in matters which concern salvation, unless he knows that this is asserted by a man worthy of credence, a thing which the aboriginal Indians do not know, seeing that they do not know who or what manner of men they are who are announcing the new religion to them.

Furthermore in order to provide a justification for the commencement of a just war against the Indians, it must be demonstrated in accordance with Augustinian principles that some wrong was being avenged 'as where a people or a state is to be punished for neglect, to exact amends from its citizens for their wrongdoing or to restore what has been wrongfully taken away'.[68] Here, Vitoria argued, there had been no previous wrongdoing by the Indians, and he invoked a number of propositions to prove that force should not be used to require unbelievers to accept the Christian faith. Belief, in Vitoria's view, required the operation of the will and that the exercise of the will should be entirely voluntary and not subject to coercion for 'it is a sacrilege to approach under the influence of servile fear as far as the mysteries and sacraments of Christ'.[69]

While Vitoria's analysis here appears to be both liberal and rational in the light of sixteenth century theological thought, it cannot be read in isolation, but must be considered in conjunction with his examination of the legitimate titles which the Spanish might claim over the Indians. Here, as we shall see later, he adduces a number of reasons justifying the right of the Spaniards to make war upon the Indians and to seize their lands and possession under the doctrine of the just war.[70] This view is further buttressed by his observation in introducing his second famous relectio, *De Iure Belli,* that the 'seizure and occupation' of Indian lands can best be defended under the laws of war.[71]

The fifth illegitimate title which Vitoria considered was that based on the assertion that the Indians might be attacked on the basis of their mortal sins against divine positive law and sins against the law of nature such as 'cannibalism and promiscuous intercourse with mother or sister and males'.[72] Here Vitoria asserted that 'Christian princes can not, even by the authorisation of the Pope, restrain the Indians from sins against the law of nature or punish them because of those sins'.[73] The reasons for this were twofold. First, the Pope had no jurisdiction over these peoples and therefore any authorisation to attack them would be invalid. Second, Vitoria pointed to a confusion in terminology. He observed that some things which were regarded as sins of nature were in fact simply 'uncleanness' within the Pauline meaning of the term.[74] Among such actions were 'intercourse with boys and with animals or intercourse of woman with woman'.[75] For the

65 *De Indis,* 143.
66 Cajetan (1468?–1534) was an eminent theologian famous for his commentaries on Aquinas's *Summa Theologiae* and for his inquisition of Luther at Augsburg in 1518. He was Master–General of the Dominican order from 1508–1518.
67 Ibid. This doctrine was clearly in accordance with Thomistic theology which stated that belief was an exercise of the free will.
68 Ibid.
69 Ibid 145.
70 See below 13–16.
71 *De Iure Belli* 165.
72 *De Indis* 145.
73 Ibid.
74 Ibid.
75 Ibid.

Christians to employ forcible coercion resulting in homicide to require the Indians to desist from these practices would, in Vitoria's view, simply open them to the charge of a greater sin: murder.[76]

The next, sixth, claim to title by the Spanish which Vitoria declared as illegitimate was that of a voluntary choice exercised by the Indians to recognise the Spanish monarchs as their overlords.[77] It is clear that voluntary choice in itself was not an invalid ground of obtaining title since Vitoria deals with it as a legitimate ground for territorial acquisition subsequently, it is rather the claim that the choice was indeed voluntary which exercises his mind. According to Vitoria in order for a proper voluntary choice to be made by the Indians there ought to be an absence of 'fear and ignorance' since these 'vitiate every choice'.[78] He found, however, that these elements were 'markedly operative' in the Americas since 'we find the Spaniards seeking it in armed array from an unwarlike and timid crowd'.[79] Furthermore, Vitoria argued that the Indians could not procure new lords in the form of the Spanish themselves without reasonable cause since this would be to the 'hurt of their former lords' and the lords themselves could not appoint a new prince without the assent of the general populace.[80] This latter view has a dual aspect. Vitoria would be well aware that princes were themselves part of the natural order and therefore had a right to rule, unless they offended against some tenet of natural law. The second aspect of Vitoria's assertion appears, however, slightly more radical in that it appears to introduce an element of democratic assent by the population to the appointment of a new ruler by a previous ruler.

The seventh and final illegitimate title was disposed of quickly by Vitoria. Here, it was alleged that the Indians had been delivered into the hands of the Spanish by virtue of a special grant from God.[81] Rejecting this view, Vitoria stated that he would be 'loath to dispute hereon at any length, for it would be hazardous to give credence to one who asserts a prophecy against the common law and against the rules of Scripture, unless his doctrine were confirmed by miracles'.[82] In Vitoria's view there was no such evidence.

The seven or eight legitimate titles

It may appear strange to entitle this section with such uncertainty as to the actual number of legitimate titles canvassed by Vitoria by which he argued the Spanish might be justified in reducing the aboriginal peoples of the Americas and their lands to their control, but Vitoria himself put forth the eighth title with such a high degree of equivocation that it is unclear whether he actually accepted its legitimacy or not. This is a matter which will be dealt with in detail below.[83]

When one examines Vitoria's analyses of the legitimate titles, it is apparent that he presents them in great detail and with a substantial degree of clarity and not a little repetition. In Las Casas' view, Vitoria may have adopted this approach because in dealing with the illegitimate titles, he had been too critical of the Emperor's party.[84] This provides a useful insight

76 Ibid.
77 Ibid 148.
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid.
82 Ibid.
83 See below 17–19.

into *De Indis*. As we saw above, the *relectiones* were given at the request of the Emperor whose conscience had clearly been troubled by the Lascasian critique of the Spanish activities in the Americas. Las Casas, in fact, had provided the imperial court with appalling descriptions of the activities of the colonialists whom he portrayed as being beyond the control of their monarch.[85] Indeed, Las Casas freely described the governors of the American colonies as tyrants, and since these governors had been appointed by the Emperor, it was clear that the implication was either that Charles himself, having appointed these persons, was a tyrant or that he condoned the use of tyranny as an instrument of government in his colonies. The Vitorian analysis of Spain's illegitimate titles to the Americas and its peoples would have done little to salve the imperial conscience, therefore it is arguable that the consideration of the legitimate titles was designed to be more appealing to the Emperor. This was certainly the view of Las Casas who claimed that Vitoria had founded his premises concerning the so–called legitimate titles on erroneous information about the Indians and their behaviour.[86]

The first legitimate title put forward by Vitoria was that of the natural society and fellowship of all human beings. The validity of this title was established by a large number of propositions which were assiduously adduced. The basic thrust of this title was that since there was friendship among all humankind deriving from natural law, it was therefore a principle of natural law that foreigners might travel to and sojourn in the territories of other peoples.[87] It was a requirement, however, that such activities should not harm the native inhabitants, but the corollary which attached to this was that the natives should not prevent foreign travellers from entering their territories or harm them unless there was good cause for so doing.[88] Thus, argued Vitoria, it would be wrong for the Indians either to keep the Spanish from their territory or to expel them therefrom without good cause, since travelling to and sojourning in Indian territory was a right of the Spanish at natural law. Vitoria said:[89]

> Any human law which tried to take away the right of the Spaniards to travel among the Indians would be contrary to natural and divine law and hence it would be inhumane and unreasonable and consequently would not have the force of law.

A number of subsequent propositions derived from these basic premises. First, that the Spanish could lawfully carry on trade among the Indians, and the latter could not, without good cause prevent them.[90] Second, if the Indians had any things which were common to both themselves and strangers, for example the right to dig for gold or fish for pearls, then they may not prevent the Spanish from doing the same.[91] The justifications for this assertion were that if the Spaniards were permitted to travel and trade among the Indians then it followed that they might make use of the laws and advantages enjoyed by all foreigners.[92] This would appear to be a form of early rule against non–discrimination which was being alleged by

84 See below 27.
85 See Las Casas, *Devastation, passim* and *History, passim*.
86 See below 27.
87 *De Indis*, 151.
88 Ibid.
89 Ibid 152.
90 Ibid.
91 Ibid 153.
92 Ibid.

Vitoria. A further justification employed by Vitoria was that under the law of nations *res nullius* were acquired by the first occupant:[93]

> It follows that if there be in the earth gold or in the sea pearls or in a river anything else which is not appropriated by the law of nations those will vest in the first occupant, just as the fish in the sea do.

The third proposition derived from the Spaniards' right to travel and sojourn in the land of the Indians was that those who wished to become citizens, for example on the basis of marriage to a local inhabitant could not be prevented form doing so, and they would thereby become subject to the privileges and burdens of citizenship.[94]

What, however, would be the position if the Indians wished to prevent the Spanish from travelling to and sojourning in their lands? Here Vitoria held that the Spanish ought in the first instance to use reason and persuasion and to show by all possible means that they had not come to harm the Indians.[95] If, however, after such recourse to reason the Indians refused to agree to these minimum obligations and proposed to use force, then the Spanish might resort to the use of force to defend themselves 'it being lawful to repel force by force'.[96] They might also build fortifications and, if they had sustained a wrong, they might resort to war against the Indians and avail themselves of all the rights of war. Vitoria, however, argued for caution and restraint here:[97]

> It is, however, to be noted that the natives being timid by nature and in other respects dull and stupid, however much the Spaniards may desire to remove their fears and reassure them with regard to peaceful dealings with each other, they may very excusably continue afraid at the sight of men strange in garb and armed and much more powerful than themselves. And, therefore, if under the influence of these fears, they united their efforts to drive out the Spaniards or even to slay them, the Spaniards might, indeed, defend themselves but within the limits of permissible self–protection, and it would not be right for them to enforce against the natives any of the other rights of war (as, for instance, after winning the victory and obtaining safety, to slay them or despoil them of their goods or seize their cities), because on our hypothesis the natives are innocent and justified in feeling afraid. Accordingly, the Spaniards ought to defend themselves, but so far as possible with the least damage to the natives, the war being a purely defensive one.

If, however, after using all diligence 'in deed and word' to show the Indians that they meant them no harm, the latter persisted in their hostility, then the Spanish would, according to Vitoria, be entitled to treat them as their 'forsworn enemies' and thus resort to the use of armed force.[98] Such force would in these circumstances amount to a just war since in accordance with Augustinian doctrine, 'peace and safety are the end and aim of war'.[99] Consequent upon the waging of a just war would be the right of the Spanish to despoil the Indians of their goods, reduce them to captivity, depose their former princes and establish new ones. But again Vitoria cautioned that all this must be done 'with observance of proportion as regards the nature of the circumstances and of the wrongs done to them'.[100]

93 Ibid.
94 Ibid 154.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid 154–5.
99 Ibid 155.
100 Ibid.

The second legitimate title put forth by Vitoria in many ways reflects the concerns of the first legitimate title in that it appears to be premised upon the pre–existing right of the Spanish to travel to and sojourn in the Indian territories. It also relates back to the fundamental aspect of the whole discourse, and that is whether the Spanish enjoyed rights of proselytization in the Americas. So it was that the second title was based upon this very point, namely, the right of the Spanish to propagate the Christian faith in the territories in question.[101] Here Vitoria had no doubt that Christians had both a right and a duty to declare the gospel in 'barbarian lands'.[102] Not only was this derived from the general right to travel among and trade with the Indians, but also from the law of nature which required their 'brotherly correction' and instruction in the ways of truth.[103] Vitoria further took the view that the Pope might authorise the Spanish in particular to undertake this task. His reasoning here appears to be entirely pragmatic, since he considered such an authorisation was likely to be more conducive to the spiritual welfare of the indigenes. He observed:[104]

> If there was to be an indiscriminate inrush of Christians from other parts to the part in question, they might easily hinder one another and develop quarrels, to the banishment of tranquillity and the disturbance of the concerns of the faith and of the conversion of the natives.

The slightly self–serving tenor of this particular justification is further reinforced by Vitoria's subsequent statement in which he says:[105]

> Further, inasmuch as it was the sovereigns of Spain who were the first to patronise and pay for the navigation of the intermediate ocean, and as they then had the good fortune to discover the New World, it is just that this travel should be forbidden to others and that the Spaniards should enjoy alone the fruits of their discovery.

Although Vitoria was clearly asserting Spanish pre–eminence in the business of proselytising the faith, he nevertheless made it clear that a refusal by the Indians to receive the faith would not give a pretext for making war upon them nor seizing their lands. This approach would appear to be consistent with Vitoria's observation concerning the illegitimate titles, and would also seem to be in accord, although this is implicit rather than explicit, with Las Casas' view that *Inter Caetera* was concerned with the granting of spiritual rather than temporal jurisdiction to the Spanish over the Americas. None the less, Vitoria continued to make it clear that the Indians must not hinder the Spanish in their propagation of the faith, for if they did, this would give the Spanish the right to 'make war, until they succeed in obtaining facilities and safety for preaching the Gospel'.[106] Thus, if there were no other way to carry out the work of religion then this would furnish the Spanish with another justification for seizing the natives and their territory and installing new lords who would ensure that the missionaries could proceed with their activities. Again, however, Vitoria was at pains to state that although the Spanish might have good cause to wage a just war in the Augustinian sense against the Indians for their refusal to allow the propagation of the faith, it must be done within the limits of

101 See above 5.
102 *De Indis* 156.
103 Ibid.
104 Ibid 157.
105 Ibid.
106 Ibid.

proportionality and necessity.[107] Indeed, Vitoria went so far as to say that the Spanish ought not to stand upon the fullness of their lawful rights, since what should be done should be directed to the welfare of the Indians rather than with an eye to personal gain. On this view, wars, massacres and spoliations 'would hinder rather than procure and further the conversion of the Indians'.[108] Given, however, that Vitoria was writing at a time when much of the Americas had already been subjugated, what was his view on the action which had been taken by the *conquistadores*? Here he observed:[109]

> I personally have no doubt that the Spaniards were bound to employ force and arms in order to continue their work there, but I fear measures were adopted in excess of what is allowed by human and divine law.

He did not proceed to discuss whether he felt that the disproportionate response of the Spaniards was sufficient to destroy the original lawfulness of the use of armed force against the Indians, but was content to offer the homily that 'what is lawful must not be used for ill purposes'.[110]

The third legitimate title canvassed by Vitoria was similarly concerned with questions of religion. Here he argued that if the native converts were compelled by force or fear to return to make them return to idolatry, then this would justify the Spaniards, should other peaceful methods fail, in using force on the Indians to prevent such misconduct. Again, should such a course of action be necessary, all the rights consequent upon a just war, referred to above, would follow.[111]

Again, the fourth title was premised upon the conversion of the Indians. Here, Vitoria stated that if large enough numbers of Indians became Christians, the Pope might for reasonable cause, either with or without request from the native population itself, instruct the replacement of an unbelieving ruler with a Christian monarch.[112] Furthermore, the fifth legitimate title was also premised on the removal of tyrannical unbelievers who promulgated or enforced laws such as those which allowed the sacrifice of innocent people or the killing of innocents for 'cannibalistic purposes'.[113] Vitoria held that the Spanish could take action to prevent such nefarious usage and ritual since God had charged every person to defend their neighbour form tyrannical and oppressive acts.[114]

The sixth title under the rubric of legitimate titles was that of voluntary choice. Here, however, the deposed lord of the state must be an unbeliever in order to be consistent with the doctrine of natural law. Thus it would be perfectly possible for the Indians to choose the Emperor to be their rightful lord.[115]

The seventh legitimate title put forward by Vitoria was that gained in the cause of allies and friends. Here the Indians who themselves might be waging a lawful war on the other indigenes might request the assistance of the Spanish. Upon a successful outcome of such a war, the Spanish would be entitled to receive whatever might fall to them under the laws of war.[116]

107 Ibid 157–8.
108 Ibid 158.
109 Ibid.
110 Ibid.
111 Ibid.
112 Ibid.
113 Ibid 159.
114 Ibid.
115 Ibid.

We now come to the eighth possible legitimate title, a title which was approached in a most cautious fashion by Vitoria. He prefaced his consideration of it in the following way:[117]

> There is another title which can indeed not be asserted, but brought up for discussion, and some think it a lawful one. I dare not affirm it at all, nor do I entirely condemn it. It is this: Although the aborigines in question ... are not wholly unintelligent, yet they are a little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims ... It might therefore be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit.

Although Vitoria appears to approach this title with the utmost equivocation, it seems from his subsequent treatment that he has quite substantial sympathy with the argument, for he posits that there would be some force in this contention if it could be shown that the Indians lacked intelligence. If such could be demonstrated, Vitoria concludes that the assumption of Spanish tutelage over the Indians would not only be desirable, but would also be a duty, 'just as if the natives were infants'.[118] The question arose, however, whether the Indians were of such limited intelligence.

We have noted above in considering Vitoria's approach to the seven illegitimate titles that he took the view that the Indians were not in want of reason nor that they were of unsound mind and could therefore be considered owners of their property in both public and private law.[119] Nevertheless, here he seems to retreat to some extent from that position, for he takes the view that the Indians are 'no whit or little better than [people of defective intelligence] so far as self–government is concerned, or even than the wild beasts, for their food is not more pleasant and hardly better than that of beasts'.[120] While one might quarrel both with the quality of the evidence and the assumptions upon which Vitoria was relying (and his contemporary Las Casas certainly did so in the strongest terms),[121] it is none the less clear that he was carefully working his way towards a possible justification of the Spanish position in the Americas. In some ways tutelage or, to use a more modern term, trusteeship, provided a workable solution to the actual, rather than the theoretical, situation which faced the Emperor and his adviser during the period in question. It was a fact that by the time Vitoria was expatiating his *relectiones*, the Spanish intrusion into the Americas had produced decisive and deleterious consequences. Spanish governors ('tyrants' in the view of Las Casas) were already administering the territories and their inhabitants with considerable cruelty and with little control from the centre. In addition to this, the Spanish had already introduced a system for the dispersal of Indian lands to the colonists under the *encomienda* system and had developed an institution for providing enforced labour from the native peoples: the *repartimiento*.[122] Furthermore,

116 Ibid 160. As Donovan points out in his introduction to Las Casas' *Devastation of the Indies*, thousands of Indians assisted Cortes in the conquest of the Aztecs. He writes (*Devastation* 19): Without the thousands of Tlaxcalan warriors who eagerly joined the quest to overthrow the Aztec yoke, Cortes could never have successfully besieged the Aztec capital of Tenochtitlan, the advantage of cannon and horses notwithstanding.

117 *De Indis* 160–1.

118 Ibid 161.

119 Above 6–8.

120 *De Indis* 161.

121 See below 27.

122 The *repartimiento* was the system by which an *encomendero* was given control of a number of native peoples who were to provide him with labour in exchange for instruction in the Christian

the Indian populations of the West Indies and those of the South American mainland had been devastated not only by wars of subjugation but also by disease introduced into the Americas by the Europeans. In such circumstances, any attempt to secure a return to the *status quo ante* would have been practically impossible. The advantages of arguing for a form of tutelage was that while the Spaniards remained in occupation of the territories, it could be claimed, perhaps somewhat hypocritically, that this was being done for the benefit of the indigenous peoples. Thus, while ownership theoretically remained with the Indians, practical management and exploitation of the land was left in the hands of the colonists.

As we have seen above, Vitoria had already laid the foundations for a form of tutelage or colonialism by arguing that the native peoples of the Americas were not sufficiently intelligent to manage their own affairs. He thus argued that governance should only be entrusted to people of intelligence such as the Spaniards. In furtherance of this argument he hypothesised a situation in which all the adults of the Americas had perished leaving only 'boys and youths' possessing 'a certain amount of reason, but of tender years'.[123] In such circumstances Vitoria argued that the Emperor would be obliged, according to the precepts of charity, to take charge of the children so long as they remained in that condition. As a logical consequence to this, he contended, the same could be done with the children's parents 'if they be supposed to be of that dullness of mind which is attributed to them by those who have been among them and which is reported to be more marked among them than even among the boys and youths of other nations'.[124] It is clear from this that Vitoria did not perceive such tutelage as conferring ownership of the Indians property upon Spain. It seems as if he were proposing a situation similar to that known to Roman law, whereby the *paterfamilias* administered the property of a child until he became of full age. Thus, the entitlement of Spain in the New World was simply to manage the affairs of the indigenous peoples until they reached a situation in which, according to Spanish perceptions, they would be able to govern themselves properly. Vitoria concluded his discussion of this eighth possible title in the following way:[125]

> Let this, however, as I have already said, be put forward without dogmatism and subject also to the limitation that any such interposition be for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards ... And herein some help might be gotten from the consideration, referred to above, that some are by nature slaves, for all the barbarians in question are of that type and so they may in part be governed as slaves are.

To a large extent Vitoria's consideration of the possible eighth legitimate title appears to demonstrate a retreat from aspects of his arguably more enlightened reasoning in the question of the illegitimate titles. Las Casas, as we shall see, attributed this apparent ambivalence to political expediency which derived from Vitoria's apparent unwillingness to upset the Emperor.[126] It would not, however, have been necessary for him to have done this by the circuitous route of devising a rationale for tutelage, since it is clear that in Vitoria's view the best title which Spain could adduce in favour

faith. See C B Simpson, *The Encomienda in New Spain* (1966). See also Hanke, *Struggle* 19.

123 *De Indis* 161.

124 Ibid.

125 Ibid.

126 See below 27.

of its dominion in the Americas was based on principles governing the execution of a just war.[127] It may well be, however, that Vitoria, faced with the reality of the Spanish occupation needed to find a *via media* through which the occupation might be recognised, but its worst effects mitigated. There is some evidence of this in the concluding remarks in *De Indis*. He says here, 'it is evident, now that there are so many native converts, that it would be neither expedient nor lawful for our sovereign to wash his hands entirely of the administration of the lands in question'.[128] This seems to indicate that the continued presence of the Spanish was regarded as necessary by Vitoria, and it may be that in his mind, if proselytization was the main reason for that presence, the doctrinal precepts of charity and good neighbourliness could best be effected by reliance upon a system of tutelage.

What conclusions can we draw from *De Indis*? As indicated above modern authors tend to select those elements from Vitoria's work which favour their particular views. Those who are proponents of native peoples' rights tend to draw from the discussion of the seven illegitimate titles to claim the support of Vitoria in their cause. Those who argue that within Vitoria there lies the roots of racist colonialism tend to view the eighth possible title as providing the first coherent statement of this doctrine. The reality is, however, that Vitoria's arguments in *De Indis* should be considered as a whole. Vitoria was not seeking to give a definitive answer to the question of whether or not Spain enjoyed good title to the Americas; he was simply rehearsing the arguments which were already in existence in order to advise the Emperor. He did of course identify those arguments which he preferred, and it may well be possible to support the view that in order to give his preferences a higher profile he manipulated the evidence, such as it was, in a particular way. Certainly one comes away from *De Indis* with the sense that Vitoria had a preference for the arguments supporting titles based on just war and tutelage, despite his use of highly conditional language.

Perhaps the most important aspect of *De Indis*, however, is the clear recognition by Vitoria that the indigenous peoples of the Americas possessed title to their lands: they were owners not only in private, but also in public law. Furthermore, there was implicit recognition of the fact that the Indians existed in structured political units which might be dealt with on an equal footing to those which existed in Europe and other areas of the known world. Although Vitoria is aware of the notion of statehood, it is clear that in his discourse he does not appear to require the existence of the nation state as a pre–requisite for legal dealings. However, while Vitoria was prepared to acknowledge the existence of territorial title vesting in the native peoples, and prepared to accept the existence of their nations, it is also abundantly clear that there were valid ways in which such title might be lost and the political independence of the native peoples expunged. It is equally important to note that the Vitorian discourse is both one sided and culturally loaded. Vitoria makes no excuse for viewing the question simply from the Catholic European perspective, and it would have been unreasonable to have expected him to do otherwise, for, as indicated above he was a sixteenth century Catholic theologian who would have held no doubts about the divinely ordered nature of the world; an order which compre-

127 *De Indis* 165.
128 Ibid 161.

hended both the high and the low, the natural rulers and those whom they ruled.

BARTOLOME DE LAS CASAS (1474–)

While the lives of Vitoria and Las Casas overlapped to some extent, and although they were both members of the Dominican order, there is no evidence that they ever met.[129] There is no doubt, however, that they were familiar with each other's work. As noted above, Vitoria's *relectio, De Indis*, was informed by allegations made by Las Casas about the inhumane treatment of the Indian's and, as we shall see subsequently, Las Casas had certainly read Vitoria's work in some detail.[130]

Las Casas was born in Seville in 1474 to bourgeois parentage.[131] On his father's side he claimed Jewish or *converso* origins and, as Collard suggests, this fact may account for his sensitivity to the enforced conversion of the Indians.[132] Las Casas's father and uncle both sailed to the Americas with Columbus, and, at one stage, Bartolome was given a young Indian boy as a companion. By royal *cedula* or decree commanding return of all Indian slaves to the Americas, however, Las Casas was required to repatriate this child. Although Gimenez remarks that this boy, whom Bartolome later met in the Indies, made an excellent impression on and thus powerfully influenced his good will toward the Indians, this did not prevent him from subsequently engaging in the subjugation of the Indians in Espanola and from participating actively in the *encomienda* system.[133]

In 1501 Las Casas, who had by now become a priest, travelled to Espanola with his father to act as a *doctrinero* or missionary priest. Apart from a break in 1506–1507 during which he journeyed to Rome, Las Casas acted both as *doctrinero* and soldier in Espanola[134] and subsequently established himself as an *encomendero* and *clerigo* (or gentleman cleric) first in Espanola and subsequently in Cuba. Thus it is clear that Las Casas, in his early years, differed little in his activities from other gentleman clerics of the era and was unpersuaded by his Dominican confessor (who refused to give him absolution in the confessionary because of it) that there was anything morally wrong with his participation in the *encomienda* system.[135] In 1514, however, it appears as if Las Casas experienced some kind of Pauline conversion. He concluded that the *encomienda* system was wrong, decided to give up his Indians and joined the Dominican order. From that period on, Las Casas became an implacable opponent of the Spanish colonial exploitation of the Americas. This opposition to the

129 Nussbaum, *Concise History*, 58.

130 On a number of occasions Las Casas refers to Vitoria as a 'most learned theologian'. See eg *Defence* 167, 206 and 341.

131 This short history of Las Casas's life is taken from M Gimenez Fernandez, 'Fray Bartolome de Las Casas: A Biographical Sketch', in J Friede and B Keen eds, *Bartolome de Las Casas in History* 67–125. See also G Sanderlin, *Bartolome de Las Casas: A Selection of His Writings* (1934) 4–24 and H R Wagner and H R Parish, *The Life and Writings of Bartolome de Las Casas* 1–22.

132 A M Collard, 'Introduction' to Las Casas, *History* 21.

133 'Biographical Sketch' in Friede and Keen, *Bartolome de Las Casas in History* 69.

134 This is the modern day Dominican Republic.

135 The Dominicans had protested against the iniquities of the *encomienda* since 20 December 1511 when Fray Antonio de Montesinos preached a devastating sermon against the institution:
Tell me, by what right or justice do you keep these Indians in such a cruel and horrible servitude? On what authority have you waged a detestable war against these people who dwelt quietly and peacefully on their own land?
Quoted in L Hanke, *Bartolome de Las Casas: An Interpretation of His Life and Writings* (1951) 16–19. See also Wagner and Parish, *Life and Writings*, 8–10. They describe Montesinos's sermon as 'violent'. Hanke, *Spanish Struggle* 17 declares that it was 'revolutionary'.

activities of the colonists earned Las Casas the title of Protector of the Indians:[136] a role which he was to fulfil until the end of his life in 1566.

There is no doubt that Las Casas is a fascinating character in the history of the Americas, and a great deal of literature exists analysing the life, thought and work of this undoubtedly accomplished man.[137] It is, however, with his juridical opinions with which we are principally concerned here. One should note, however, that Las Casas's theological–juridical thinking is contained in works of a highly polemical nature: his view of the law is heavily conditioned by his overwhelming sense of moral outrage over the maltreatment of the indigenous inhabitants of the Americas.[138] It should also be noted that the views espoused by Las Casas were not unique. There were others who shared, indeed, predated his thinking on the Indians, but it was Las Casas who, through his influence at the Spanish Court and in his prolific writing, emerges as the clearest and most authoritative exponent of indigenous peoples' rights. Similarly, as Carro demonstrates, in terms of his juridical thought, Las Casas reflects the thinking of the Spanish theological–juridical Renaissance which is pre–eminently apparent in the works of Vitoria and de Soto.[139]

Although one finds references to Las Casas's juridical thought scattered throughout his numerous tracts and treatises, it is in *The Defence of the Indians* that his clearest exposition of the law which ought to govern relations between Spain and the indigenous peoples of the Americas is contained. The background to this tract is of particular importance. It was published against the backdrop of a disputation between Juan Gines de Sepulveda, a humanist scholar and confessor of the Emperor, and Las Casas. Sepulveda, who as Las Casas pointed out, had no direct experience of the Americas or its native peoples, had written a thesis entitled *Democrates alter, sive de justis belli causis apud Indos* which purported to demonstrate the just causes of the use of force against the Indians, their consequent enslavement and the use of the *encomiendas*. Much of Sepulveda's purported factual background for his argument relied upon the account of the Spanish official historian in the Americas, Gonzalo Fernandez Oviedo y Valdes, a man with whom Las Casas had previously joined battle, and whom he described as 'a deadly enemy of the Indians'.[140] Oviedo had argued that the Indians were sub–human and therefore incapable of being converted to Christianity.[141] This was an argument which had been disseminated not only by a number of colonists but also by certain clerics,[142] and Sepulveda had adopted this theme in part of his work. As Wagner and Parish observe, in Sepulveda 'the pro–conquistador and pro–encomienda faction had found an intellectual of stature to argue their case'.[143] When Sepulveda attempted to publish his *Democrates alter,* it was inevitable that Las Casas would respond, which he did forcefully with his *Defence.*

In order to resolve the dispute between the two men, and indeed the two factions the Indianists and the Colonists of which they were essentially

136 The title was conferred upon him by Emperor Charles V.
137 Much of that literature will be referred to throughout this piece.
138 Indeed, Las Casas is often attributed with having created the 'Black Legend' of the Spanish conquest of the Americas. See Donovan, 'Introduction' in Las Casas *Devastation,* 2.
139 V D Carro, 'The Spanish Theological–Juridical Renaissance and the Ideology of Bartolome de Las Casas' in Friede and Keen, *Las Casas in History* 237–77.
140 See Hanke, *Mankind* 34–40.
141 *Defence* 344–48.
142 See Hanke's discussion of this in *Mankind* 1–34.
143 Wagner and Parish, *Life and Writings* 174.

the intellectual totems, Emperor Charles V called a meeting of a *junta* composed of jurists and theologians to sit in special session with the Council of the Indies at Valladolid in 1550–51.[144] Why Charles felt it necessary to convene a special *junta* is unclear, but Wagner believes that it was, perhaps, because the Emperor's conscience was troubled by the actions of his subjects in the Americas, actions which Las Casas, who clearly had some influence at Court, had consistently denounced as unjust. Whatever the reasons for the convocation of the *junta,* Charles ordered the cessation of all conquests until it had been pronounced whether they were just or not. As Hanke has written:[145]

> Probably never before or since has a mighty emperor and in 1550 Charles V, Holy Roman Emperor, was the strongest ruler in Europe with a great overseas empire besides ordered his conquests to cease until it was decided if they were just.

Although the *junta* was called to hear the two men's arguments, Sepulveda and Las Casas did not confront each other in a formal debate before that body, rather Sepulveda presented his own arguments first, and Las Casas then presented his by way of rebuttal.[146] Sepulveda advanced four arguments in favour of waging a just war against the Indians in order to bring them to Christianity. Each of Sepulveda's arguments and Las Casas's refutation of them will be considered in turn.

Sepulveda's first argument was based upon the Aristotelian notion that the Indians were 'barbarians' and were thus slaves by nature. Because of this they were bound to submit to the control of the Spaniards 'who are wiser and superior in virtue and learning'.[147] This, in Sepulveda's view represented a facet of natural sovereignty by the superior over the inferior to which the Indians were bound to submit:[148]

> Therefore, if the Indians, once warned, refuse to obey this legitimate sovereignty, they can be forced to do so for their own welfare by recourse to the terrors of war. And this war will be just both by civil and natural law ...

Las Casas had little time for this argument. In a previous pronouncement, he had opined that Aristotle 'was a gentile burning in hell' whose opinions ought only to be accepted insofar as they accorded with Christian doctrine. Furthermore he observed:

> It is obvious from all this that they who that they who teach that these gentlest of sheep must be tamed by ravening wolves in a savage war before they are to be fed with the word of God are wrong about matters that are totally clear and are opposed to the natural law.[149]

144 Literature on the Valladolid disputation includes Hanke, *Aristotle* 38–73; A Losada, 'The Controversy between Sepulveda and Las Casas in the Junta of Valladolid', in Friede and Keen, *Las Casas in History* 279–306; Wagner and Parish, *Life and Writings*, 170–82 and Marks (1992) 13 *Australian Yearbook of International Law* 1. Hanke remarks 'The Las Casas–Sepulveda disputation of 1550 was the last important event in the controversy on Indian capacity that bitterly divided Spaniards in the sixteenth century ...' Hanke, *All Mankind is One* 9. The *junta* was composed of 14 members including Domingo de Soto, Melchor Cano and Bernadino de Arevalo, all outstanding theologians of their day. The other members were drawn from members of the Council of Castile and the Council of the Indies. See Hanke, *Aristotle* 38.

145 *Aristotle* 37.

146 Sepulveda apparently spoke for one day. Las Casas by way of rebuttal read his *Defence* chapter by chapter over a period of five days. See 'Preliminaries' in Las Casas, *Defence* 9.

147 *Defence* 11.

148 Ibid 12.

149 Ibid 27.

Despite his reservations on Aristotle Las Casas none the less argued here that Sepulveda had misunderstood his 'slaves by nature' argument. Las Casas maintained that when Aristotle talked of barbarians he used the term to connote three different categories of persons, and that this had either been misunderstood or deliberately misrepresented by Sepulveda to advance his thesis. First, there were those who because of there ostensibly savage behaviour might be regarded as barbarians.[150] In fact this term was used by groups of people to refer to those who did not share a common linguistic inheritance. The Romans had called the Greeks barbarians and the Greeks had referred to the Romans in the same way. Second, there were those who were barbarians because they had no written language by which to express themselves,[151] and third, there were those who were barbarians in the proper sense of the term who might properly be placed in Aristotle's category of natural slaves. What, then, were the characteristics of such people? In Las Casas's view such persons were those who:[152]

> ... either because of their evil and wicked character or the barrenness of the region in which they live, are cruel, savage, sottish, stupid, and strangers to reason. They are not governed by law or right, do not cultivate friendships, and have no state or politically organised community. Rather they are without ruler, laws, and institutions.

As Hanke observes,[153] 'such men are freaks of nature'.

Having thus imposed a restrictive definition upon Aristotle's notion of barbarians, Las Casas then went on to demonstrate that the Indians of the Americas in no wise fell within this category of persons. He pointed to their sophisticated social organisation, political structures and reliance upon government according to law.[154] This was in direct contrast to Sepulveda's harsh assessment of the capacities of the Indians whom he on more than one occasion described as being closer to monkeys than to men. Even the Aztecs, upon whose achievements Cortes and his conquistadores had gazed with awe, were in Sepulveda's view little better than the inhabitants of the Indies. He said:

> Nothing shows more of the crudity, barbarism, and native slavery of these men than making known their institutions. For homes, some manner of community living, and commerce which natural necessity demands what do they prove except that they are not bears or monkeys and that they are not completely devoid of reason? ... Shall we doubt that those peoples, so uncivilised so barbarous, so wicked, contaminated with so many evils and wicked religious practices, have been justly subjugated by an excellent, pious and most just king ... and by a most civilised nation that is outstanding in every kind of virtue?

To counter these assertions, Las Casas attacked the very source of Sepulveda's factual statements. While Las Casas was able to rely on the testimony of his own eyes in revealing the true capacities and institutions of the indigenous peoples of the Americas, Sepulveda was obliged to depend upon the writings of Ovieda a chronicler, who, as we have already seen, was fundamentally distrusted by Las Casas. As Losada writes,[155] the great difference between Sepulveda and Las Casas on this first issue was not so much a question of principle, but rather a question of fact. For

150 Ibid 28–9.
151 Ibid 30–31.
152 Ibid 32.
153 *Mankind* 83.
154 Ibid 42–6.
155 A Losada, 'The Controversy between Sepulveda and Las Casas in the Junta of Valladolid', in Friede and Keen, *Las Casas in History* 279 at 287.

Sepulveda the Indians were irredeemably backward and could only be saved by conquest, while for Las Casas they demonstrated a clear capacity for rational activity and organisation, and even surpassed the achievements of the colonialists in some respects.

The second argument advanced by Sepulveda was that it was necessary to conquer the Indians in order to punish them for crimes of idolatry and human sacrifice which were clearly offensive to God. Although this appears superficially similar to his third argument which purported to permit the waging of a just war to protect the innocent victims of human sacrifice, the justification here was focused upon offence to God and not offence to man. In combating these arguments Las Casas deployed his most vigorous and radical arguments, perhaps because he was aware that it was these particular allegations which were most likely seriously to damage his case.

The Lascasian approach here was to argue that in order to punish the Indians, either the Church or the Spaniards must show that they had jurisdiction so to do. After substantial discussion of the theological position, Las Casas found that neither the Church nor the Spanish crown enjoyed jurisdiction over the Indians. He wrote:[156]

> Surely, no matter how despicable the crimes they may commit against God, or even against religion among themselves or within their territories, neither the church nor Christian rulers can take cognisance of them or punish them for these. For there is no jurisdiction, which is the necessary basis for all juridical acts, especially for punishing a person. Therefor, in this case, the emperor, the prince or the king has no jurisdiction but is the same as a private citizen, and whatever he does has no force.

Las Casas's development of the doctrine of jurisdiction demonstrates one of the earliest statements of certain juridical principles which has remained largely unchanged. First, he stated that jurisdiction arose from either domicile, origin, vassalage or the commission of an offence. Here we can see the notions of territorial and personal jurisdiction.[157] Second, he defined territory as '... the totality of lands within the borders of each locality where one has a right to rule ...'[158] This is clearly a statement of the rights of territorial sovereignty, and in Las Casas's view, such rights applied as much to the Indians as they did to the Spanish.

Also subsumed within the Lascasian rebuttal of Sepulveda's second argument, was one of the most remarkable statements of religious tolerance to emerge from the sixteenth century. Referring to the domicile of Jews, Moslems and idolaters within the territory of Christian princes, Las Casas opined that while such persons were subject to the temporal jurisdiction of the Christian prince, they were not under either their, or the Church's, spiritual jurisdiction.[159] It followed from this, that non–Christian peoples who did not live within a Christian state were subject neither to the temporal nor spiritual jurisdiction of any other ruler. This was the situation in which the peoples of the America's found themselves. Las Casas thus concluded, 'no pagan can be punished by the Church, and much less by Christian rulers, for a crime or a superstition, no matter how abominable, or a crime, no matter how serious, as long as he commits it ... within the borders of the territory of his own masters and his own unbelief'.[160]

156 Ibid 55.
157 Ibid 54.
158 Ibid 83.
159 Ibid 55.

Sepulveda's third argument in favour of war against the Indians was that it was necessary to prevent them from the evil practices of human sacrifice and cannibalism.[161] As noted above, this argument, together with that accusing the Indians of idolatry, posed the greatest challenges to Las Casas's case in the *Defence.* How could anyone argue that it was unjust to intervene to protect the innocent victims of human sacrifice and other abominable acts such as cannibalism? It is perhaps something of a measure of Las Casas's commitment to the Indian cause, some might say his monomania, that he provided a theologically sound argument justifying the Indian practice of human sacrifice, although he did admit that the Indians were in 'probable error' for carrying out such activities.[162]

Again, Las Casas denied that the Indians were subject to the territorial or spiritual jurisdiction of either King or Pope, although he did acknowledge that there were certain well–defined circumstances under which a change in jurisdiction could occur.[163] He found, however, that none of the American indigenes fell into any of these categories. One of the categories which deserves some consideration is that in which it was alleged that the Indians would fall under the jurisdiction of the Spanish crown if they made obstacles *per se* and not *per accidens* for preachers of the faith.[164] Here Las Casas could not deny that certain clerics had been killed by the Indians, but this was *per accidens* and not *per se.*[165] He argued that the missionaries had been killed not because they were missionaries, but because they had come to preach accompanied by soldiers arrayed for battle. In such circumstances, he argued, it was only natural for the Indians to wish to protect themselves.[166] In what might be seen as a less than ingenuous observation, Las Casas took the view that the Indians were, in any event, performing a signal service to the priests they killed:

The missionaries who are sacrificed in this way by the Indians obtain the palm of martyrdom and go directly to Heaven, an immense benefit for which they must thank the Indians.

Las Casas was also obliged to canvass the possibility that the Spanish might make war upon infidels who actively opposed the spreading of the Gospel. It had been argued that it was just to wage war against the Turks and the Saracens if they maliciously impeded Christian evangelisation, and this was an argument which Las Casas was prepared to accept, indeed to have done otherwise would have opened him to Lutheran heresy.[167] Despite acceptance of this argument, however, Las Casas denied that the Indians fell within the same category as the Turks, quite simply because they were waging a defensive war against unwarranted attacks by the Spanish *conquistadores.* It was in support of the Indians' right to defend themselves from the depredations of the Spaniards that Las Casas was at his most outspoken. He wrote:[168]

Therefore it surpasses all stupidity, and smacks of dire ignorance, to say that the Indians can be warred against if they kill two hundred thousand preachers, and even if they were to kill the Apostle Paul and all the other gospel–preaching followers of Christ. For such a war

160 Ibid 97.
161 Ibid 13–14.
162 Ibid 221–2.
163 Ibid 254–66.
164 Ibid 171.
165 Ibid.
166 Ibid.
167 Ibid 183–4.
168 Ibid 172.

would smack of untamed barbarism and a fierceness greater than that of the Scythians, and it would have to be called the devil's war rather than a Christian war. Furthermore, in warring against the Spaniards the Indians would wage it in such a way that they would deserve to be praised most eloquently be all skilful philosophers.

The most difficult argument which Las Casas had to confront directly was that of the protection of innocents from the practices of human sacrifice. In approaching this issue, the Lascasian approach was to argue that although human sacrifice and cannibalism might be an evil, it was an even greater evil to wage war against the Indians, killing them in great numbers, in order to prevent the practice.[169] He argued:[170]

... the death of the innocent is better or less evil than the complete destruction of entire kingdoms, cities, and strongholds. For not all of them eat the flesh of the innocent but only the rulers or priests, who do the sacrificing, whereas war brings the destruction of countless innocent persons who do not deserve any such thing. Therefore if those evils cannot be removed in any other way than by waging war, one must refrain from it and evils of this kind must be tolerated.

He further asserted that the Indians would, in any event, be loath to believe the Spanish who had invaded and despoiled their countries. 'Why', he wrote, 'will they believe such a proud, greedy, cruel and rapacious nation?'[171] The way in which to prevent the Indians from engaging in these practices was to use peaceful persuasion, not to engage in war against them. In order to reinforce this point, Las Casas asserted that the Indian's error in resorting to human sacrifice was understandable. He referred to the use of human sacrifice in the early stages of all societies, even early Spanish society, and then propounded a number of principles.[172] First, that all nations, no matter how barbarous, have some knowledge of God. Second, by nature, people are led to worship God according to their own capacities and in their own ways: they therefore offer the Deity whatever they are able. Third, there is no better way to worship god than by sacrifice. Fourth, offering sacrifice to the God thought to be true comes from the natural law, while the things to be offered to God are determined by positive human law. In short, Indian societies were like all other early societies in that without the knowledge of Christ, they were worshipping what they believed to be the true God in the best way they knew how. Las Casas further postulated that while the Indians were in probable error by making human sacrifice, he none the less observed that it could be persuasively argued that 'from the fact that God commanded Abraham to sacrifice to him his only son Isaac, that it is not altogether detestable to sacrifice human beings to God'.[173]

As Hanke points out, this latter argument of Las Casas is 'one of the most remarkable of all his doctrines',[174] not least because the horror which all Spanish experienced when they witnessed human sacrifice was genuinely felt. Las Casas remained, however, unrepentant for his espousal of what must be regarded as a truly radical position in the sixteenth century. Indeed, even towards the end of his life Las Casas made clear that he was unapologetic for promulgating this argument. He remained wedded to the view that the Indians might only be dissuaded from resorting to the practice

169 Ibid 191.
170 Ibid.
171 Ibid 221
172 Ibid 221–48.
173 Ibid 239
174 Hanke, *Mankind* 74.

of human sacrifice and brought into the Christian fold by means of peaceful persuasion. For Las Casas, conversion was an exercise of the free will, and should be made only when all the facts were known and without coercion. In holding this view he was clearly *ad idem* with Vitorian doctrine.

Sepulveda's fourth argument was that war on the Indians was justified because it opened the way to the propagation of the Christian religion and made the task of the missionaries easier. In order to make his point here, Sepulveda relied upon the parable of the wedding feast. It will be recalled that in this parable, the lord, disappointed by the non–appearance of those guests who had been invited to the wedding feast commanded his servants to go out into the highways and by–ways and to 'force' all whom they met to come into the banquet.[175] Sepulveda argued that this amounted to a biblical injunction upon the Spaniards to engage in the forced conversion of the Indians. Las Casas on the other hand denied that the parable could be interpreted in such a way, and that to do so would produce immeasurable harm. Again, he emphasised the view that the Indians should be persuaded to convert by the use of peaceful measures, and this was the true meaning of the term 'force them to come in' which was used in the parable, for to use coercion would mean simply that the conversion would not be true and that the Indians might even resort to the secret worship of their idols:[176]

> I should like the reader to answer this question: 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 them? When I speak of the force of war, I am speaking about the greatest of all evils. 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?

How then should the Indians be treated? Here Las Casas drew a distinction between heretics and pagans. The latter must be treated with mildness and kindness and invited to enter the faith, whereas the former, who had known Christ and then rejected him, could be subjected to the use of force since this was done only to re–acquire what had been lost.[177]

These, then, were the major arguments adduced by Sepulveda and rebutted by Las Casas. While it is not clear who 'won' the debate,[178] there is no doubt that the disputation at Valladolid ensured that the Emperor was fully apprised of the issues most likely to affect his conscience in so far as the destiny of the Americas was concerned. Two major points remain outstanding, however, in the analysis of Las Casas's *Defence*. First, *Democrates alter* and the *Defence* were clearly written with the benefit of reference to Vitoria's *relectiones*. How then did the contesting parties seek to utilise Vitoria's writings to support or attack each other's position? Second, while the debate at Valladolid tells us much about Las Casas's views upon the invalidity of the use of just war to subjugate the Indians, it does not reveal very much of Las Casas's opinion upon the nature of the true relationship which ought to exist between Spain and its New World possessions.

Like Vitoria, Las Casas firmly held the opinion that according to natural law the Indians were masters of their own territories, and that within those territories their princes held lawful sway, whether they were infidels or not.

175 Luke 14: 15–24 and Matthew 22: 1–14.
176 Defence, 298.
177 Ibid.
178 See Hanke, *Aristotle* 74.

Because the Indians held such natural dominion over their own lands, Las Casas derived from this the proposition that:

> None may lawfully deprive any group of men, be they Christian or gentile, of dominion over their lands and of the right to have kings or princes in order that they may freely govern themselves. Freedom is common and natural to all men, including gentiles. The rulers of the Indians are independent and sovereign.

As might be expected, however, Las Casas parted company with Vitoria when Sepulveda attempted to use the seven legitimate titles (he failed to refer to the eighth possible title) referred to in *De Indis* to support his arguments. Here, he accused Sepulveda of being in error in using Vitoria to support his thesis. He did so not by analysing Vitoria's theology or jurisprudence in any detail, but by attacking his motivation for setting forth the just titles. In Las Casas's view, Vitoria had, in analysing the seven illegitimate titles been rather harsh on the Emperor's position and had therefore sought to moderate these views by casting the legitimate titles in a more favourable light.[179] In so doing, Las Casas alleged that Vitoria had used highly conditional language, thus indicating that he was not entirely sure of his position. If therefore Vitoria had put forward his views, which Las Casas claimed was, in any event, based on false information, then it ill behove Sepulveda to rely on this obviously insecure foundation:[180]

> Now since the circumstances that this learned father supposes are false, and he says some things hesitantly, surely Sepulveda should not have thrown up against us an opinion that is based on false information.

It is clear from an analysis of Las Casas's work that he posited the inalienable political rights of the indigenous peoples of the America's and their rulers. Unlike Vitoria he saw no possibility of Spain founding good title in the Western Hemisphere based on the conduct of a just war against the Indians. It is possible, therefore, to discern with clarity what Las Casas was against, but what exactly was he for?

At the time Vitoria was writing the conquest of the Americas was virtually a *fait accompli.* Nearly all the West Indian islands were subject to Spanish rule, and Cortes and Pizzaro's conquests of the sophisticated Aztec and Inca empires of Mexico and Peru had been completed. The *encomienda* system was in place and the *repartimiento* was well–established; indeed, the Spanish had even begun to import black African slave labour into its newly established colonies.[181] To argue in these circumstances, as Las Casas did, that the Indians were entitled to self–government seems to be at best wishful thinking. It is, however, appropriate to attempt to place Las Casas's thinking in this area in context. Las Casas, like Vitoria, was concerned with evangelisation in the New World. Unlike Vitoria, however he believed that such evangelisation should only be conducted entirely by peaceful means, even if there were resistance from the Indians. He further believed that God had emplaced a great trust in the hands of the Spanish by bringing into their care large numbers of native peoples who might, through gentle treatment, be brought into the Church.[182] That God

179 Ibid 340–41.
180 Ibid 341.
181 For Las Casas's position on the African slave–trade, a trade which he initially suggested, see M Bataillon, 'The Clerigo Casas: Colonist and Colonial Reformer' in Friede and Keen, *Las Casas in History* 353 at 415–18.
182 *Defence* 349–62.

had commissioned the Spanish to fulfil this task was not in any way in doubt, for had he not blessed Spain with the discovery of the New World? Las Casas further believed that while the Spanish approach to evangelisation was highly imperfect, he also contended that no other country was better suited to the achievement of the mission. In order to support this view, Las Casas referred to the notorious Papal Bull *Inter Caetera* of Alexander VI, which he interpreted not as granting temporal dominion over the Indians, but rather as giving a clear spiritual dominion for the purposes of peaceful evangelisation.[183] He argued that when the Bull spoke of making 'the aforementioned continents and islands, as well as their natives and inhabitants, subject to yourselves and to lead them to the Catholic faith' the word 'subject' in reality meant to 'dispose' the peoples to the faith in the sense of making them receptive to it.[184] In adopting this approach, Las Casas contended that he was simply giving expression to the spirit and intention of the Alexander's Bull. He wrote:[185]

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

In order to conduct the business of peaceful evangelisation, however, it was clearly necessary to have some form of temporal political organisation in place to facilitate the process. For Las Casas, this political organisation could, at least initially, be simply expressed. There is no doubt that he saw the Americas as an extension of Spain overseas. The colonies were linked to the Crown of Leon and Castile, and while Indian rulers were to enjoy the highest level of political autonomy, there was no doubt that they were the subjects of the Spanish crown.[186] In formal juridical terms therefore, the Spanish monarchs enjoyed a form of high or super *dominium* over the Indians, while the Indian princes themselves enjoyed a lower or subordinate form of *dominium* within their own territories and within their own political spheres of competence. Within this scheme, however, there was no room for the *encomienda* and *repartimiento* systems, since this would be to interpose between the Spanish crown and its lawful subjects in the Indies. He put his argument in these terms:[187]

> ... all peoples of that world [the Indies] are free; they do not lose that liberty by accepting and regarding Your Majesty [Emperor Charles V] as universal lord, but rather make it possible for Your Majesty's rule to cleanse away the defects from which their commonwealths suffer, that they might enjoy a better liberty.

In his *Memorial de Remedios*, written in 1542, Las Casas set down a more detailed seven point programme which he thought ought to govern Spanish–Indian relations.[188] Much of this reiterates his previous thinking on the matter, but it is worth repeating here since it represents a cogent expression of his prescription. He argued first, that the New World was simply an extension of Spain overseas; second, that the Indians were direct subjects of the Spanish crown; third, that the primary aim of the crown was Christian evangelisation; fourth, that the crown enjoyed supreme sover-

183 Ibid.
184 Ibid 352–3.
185 Ibid 353.
186 See Carro, *Ideology* 274. See also Juan Friede, 'Las Casas and Indigenism in the Sixteenth Century', in Friede and Keen, *Las Casas in History* 199–200.
187 Quoted by Carro, *Ideology* 274.
188 Ibid, 274–5.

eignty while leaving immediate political autonomy in the hands of the Indians and their princes, so long as they did not hinder the practice of the Christian religion; fifth, that wars of conquest were not a proper means of evangelisation and were therefore prohibited; sixth, that Indians and Spaniards living in the Americas should enjoy equal rights, and that more Spaniards should be brought into the New World to teach the Indians how to be civilised and Christian men and, finally, seventh, that for the greater security and safety of the Spaniards, the colonists might construct fortresses and garrison them with troops. There must, however, be no raids, wars or acts of despoliation.

The *Memorial de Remedios* was not, however, Las Casas's final word on the relationship which ought to exist between Spain and the New World. In the later part of his life as he saw the condition of the Indians worsen through the ravages of the *encomienda, repartimiento* and disease, he abandoned his view of Spanish super sovereignty and began to treat the Indian princes as having equal status to the Spanish crown.[189] He placed the right of the native princes to collect tribute above that of the Spanish monarch, arguing that the latter only had a right to exact tribute insofar as that was a matter governed by treaty between the two rulers.[190] Furthermore, in recognising the dominion of Spain, where this had been agreed, it was sufficient for the native prince simply to offer a token of vassalage. Las Casas went, in fact, even further. Referring to the orderly nature of the Indian political communities prior to the intrusion of the Spaniards into the New World, he argued that in order to restore such order 'not a Spaniard must remain in the Indies'.[191] He clearly did not mean this to be taken literally, since he continued to say that there was enough land for the Spaniards to work with their own hands without dispossessing the Indians and using their labour. Of this later stance Friede comments, 'it was in this abstract and even utopian manner, as if the Indies had just been discovered and as yet had no laws and ordinances that Las Casas discussed the Indian problem'.[192]

What then are we to make of Las Casas's writings and thoughts upon indigenous peoples in early international law? Clearly he differs from Vitoria in his denial that the Indians might be subjugated and deprived of their territory and property by means of a just war should they oppose the evangelical mission of Spain. For Las Casas therefore, the political autonomy of the Indian communities and empires was to remain largely intact, subject only to a superior form of sovereignty vesting in the Spanish crown. To some extent, therefore, in his earlier writings, Las Casas seems to countenance a form of imperialism which might be better defined as some kind of protectorate system. It was not, however, the kind of thoroughgoing trusteeship scheme which Vitoria advocated in his highly equivocal style in *De Indis*,[193] rather it was a system which would permit missionaries to carry out their evangelical mission in a peaceful way. Furthermore, Las Casas's writings clearly leave no margin for arguing that the *encomienda* and *repartimiento* systems might under certain circumstances be acceptable, whereas Vitoria's reliance on a theory of just war and all its consequences does. To Las Casas, especially in his later writings, the Indians are

189 Friede, *Indigenism* 200.
190 Ibid.
191 Quoted ibid at 201.
192 Ibid.
193 See above 16–18.

to be left to develop within their own communities, with their own political and cultural systems intact, but with the overriding obligation to receive the peaceful ministrations of the proselytisers. In this sense, it might be said that Las Casas is close to giving a fair statement of the modern right to self–determination, in that he views the indigenous peoples of the Americas as having a free choice in relation to their political and economic destinies.

CONCLUSION

Whatever view one takes of the approaches of Vitoria and Las Casas to the question of how the Indians ought to be treated in early international law, it is clear that neither of their optimum positions favouring the rights of those peoples stood the test of time. The reality of the situation became one of absolute conquest by Spain's representatives in the Americas and the reduction of the conquered peoples and territories to the service of the Spanish empire. For many of the colonists the Indians were simply a source of cheap labour or, alternatively, an inconvenience. As Spain consolidated its hold on the Americas, its governmental and legal institutions were moulded in the style of the Spanish state, and applied with full rigour without taking account of the wishes or needs of the indigenous peoples. By the time of the demise of the Spanish American empire in the nineteenth century, the former colonies of Spain had achieved independence, largely through military action, and had transformed themselves into successor states. Within these successor states the *caudillo* ideal held sway,[194] and the domination of Spanish institutions was reinforced. Thus, the indigenous peoples who had once been the subjects of the Spanish crown within a colonial structure were now citizens of the new successor states. It did little to improve their subordinate position within many of these societies in which racial hierarchies had been established from the earliest days of colonisation.

Despite the failure of Vitoria's, and more particularly, Las Casas's, writings to have any profound, long–term practical effect upon the Spanish colonialists' relations with indigenous peoples in the New World, it is nonetheless clear that they established a certain intellectual tradition with regard to these issues which persisted for some time, and which, as we have seen, have re–emerged to some extent today. Grotius (1483–1685), in particular, freely adopted Vitoria's ideas concerning indigenous peoples and adapted them for use in a secular society. In his *Mare liberum*,[195] which was written in 1609 as a counterblast to the Portuguese claim that sovereignty over the high seas might be appropriated by states, he clearly espoused Vitoria's view that territories inhabited by indigenous populations could not be regarded as *territorium nullius* and were thus not susceptible to appropriation by European powers.[196] In his view only vacant lands could be acquired by discovery and actual occupation. Grotius, like Vitoria and Las Casas denied that *Inter Caetera* granted to the Pope any temporal sway,[197] and he further accepted Vitoria's assertion that war could not be waged against the Indians because of their refusal to convert to Christianity.[198]

194 That is the veneration of the military ethos, the cult of the strong, noble warrior as leader.
195 H Grotius, *The Freedom of the Seas, or, The Right which belongs to the Dutch to Take Part in the East Indian Trade*, transl RvD Magoffin (1916).
196 Ibid 11–14.
197 Ibid 15–17.
198 Ibid 18–21.

By the time of Vattel (1714–69), however, it was clear that acceptance of indigenous rights was in intellectual as well as actual decline, if not desuetude. In his *Droit des Gens* written in 1758,[199] Vattel's system of international law, although still based on a species of natural law, emphasised the superiority of the sovereign state within the system and the subordination of all else within international law to the state. Within this system therefore, it was possible not only for the European states to acquire sovereignty over hitherto unoccupied lands, but also over land inhabited by nomadic peoples. The context and the rationale for this was, however, slightly different to earlier arguments. Vattel based his position on the obligation of every nation under natural law to 'cultivate the soil which has fallen to its share'.[200] While this did not mean that a state could transgress its borders in order to acquire more land to feed an increasing population, it did mean that it could acquire the under–utilised lands of nomadic peoples. Vattel wrote:[201]

> Those who still pursue this idle mode of life [nomadic hunting and gathering] occupy more land than they would have need of under a system of honest labour, and they may not complain if other more industrious Nations, too confined at home, should come and occupy part of their lands. Thus, while the conquest of the civilised Empires of Peru and Mexico was a notorious usurpation, the establishment of various colonies upon the continent of North America might, if done within just limits have been entirely lawful. The peoples of those vast tracts of land rather roamed over them than inhabited them.

Within Vattel's writing, therefore, a bridge between the Vitorian, Lascasian and Grotian positions can be discerned. While he was prepared to acknowledge that 'civilised' nations such as the Aztecs and Incas might be respected as analogous to the European nation–states, the implication was clearly evident in his writing that 'uncivilised' nomadic nations need not be treated in the same way. In many respects, this position might be seen to hearken back to the Vitorian and Lascasian considerations of whether the native peoples of the Americas might properly be described as 'barbarians' and therefore subjected to the dominion of their 'superiors'. Certainly, it is with Vattel that the trend towards treating territories occupied by such peoples as *territorium nullius* by European jurists and European powers emerged, a trend which reached its apogee in the nineteenth century.[202] As indicated above, however, recent developments demonstrate something of a renaissance of the position adopted by the early publicists. While the activities of the UN Working Party on Indigenous Populations might be seen as the major institution where this is evident, it can also be observed in other institutions such as the International Court of Justice[203] and more

199 E de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, transl C G Fenwick (1916).

200 Ibid 37.

201 Ibid 37–8.

202 For a review of the jurists who denied the right of native sovereignty to their territory during this period see M F Lindley, *The Acquisition and Government of Backward Territory in International Law* (hereafter '*Acquisition*') (1926) 18–19.

203 See the observations of Judge Ammoun in the *Western Sahara Case* ICJ Rep. 1975, 6, where he said at 87:

> 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* [*territorium*] *nullius*. This approach by the eminent and Spanish jurist and canonist which was adopted by Vattel in the nineteenth century [sic], was hardly echoed at all at the Berlin Conference of 1885. It is, however, the concept which should be adopted today.
>
> The Berlin Conference and its attendant Final Act was the process by which the European Powers, *inter alia*, recognised each other's claims to territorial title in Africa. See Lindley, *Acquisition*, 143–7 and 298–302.

recently at the UN Vienna Conference on Human Rights where the rights of indigenous peoples were recognised as a special category of rights which required particular attention.[204] It seems likely therefore that with the re–emergence of concern for indigenous peoples' rights at the international level, the juridical positions espoused by Vitoria, and more particularly Las Casas, might be seen as the counterweight to the unbridled claims of sovereignty over their native peoples by the world's states.

204 See the Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights on 25 June 1993, UN Doc.A/CONF.157/23. The World Conference recommended that the General Assembly should proclaim an International Decade of the World's Indigenous People which should begin in January 1994.