VITORIA AND INTERNATIONAL LAW

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The Spanish Dominican philosopher Francisco de Vitoria is widely recognized as a seminal influence on the modern system of international law. This paper examines the place that Vitoria occupies in the tradition of modern international law and his contribution to its development. The discussion of Vitoria and international law begins with a review of the pre-modern currents of theorizing about natural law and justice in war, as these are exemplified in the thought of St Thomas Aquinas. It is then explained how Vitoria took up the concepts of natural law and the just war in consideration of the legal issues to do with the question of Spanish rights and interests in respect of the presence of the Spanish in the New World and their relations with the Native American peoples as settled there. In working through these legal issues, Vitoria was led to identify certain fundamental principles that were to become central to the modern international law system; and, as it is argued in the paper, Vitoria was led also to expound a fully universalist conception of international law such as is consistent with the thrust and direction of modern international jurisprudence.

The subject of the present paper is the contribution to the founding of the modern system of international law as made by the Spanish Dominican philosopher Francisco de Vitoria (c.1483–1546). The emergence of the modern system of international law was bound up with certain underlying processes of change that took place in Europe, and in the international sphere generally, during and after the period of the late fifteenth and sixteenth centuries. Central among these was the formation of the modern states system that, following the social and political upheavals as brought about by the Renaissance and the Reformation, came to be established in Europe with the Peace of Westphalia that concluded the Thirty Years' War (1618–48). This is the international system where states were understood to be sovereign and, as such, formally exempt and independent from the sort of universal jurisdictional authorities that had earlier been asserted and exercised through the two great political institutional structures of the Middle Ages: the Holy Roman Empire and the Catholic Church.

A further momentous process of change impacting on the development of international law came with the penetration and conquest by the European powers of the newly discovered lands of Africa, the Americas and the Far East. For this necessitated the elaboration of a system of laws that would have proper application to the nations and peoples falling outside the confines of European Christendom, and one that would be effective in the regulation of the ever increasing growth in international trade and commerce as brought about by

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the overseas expansion of the European powers. The overseas expansion of the European powers was a crucial concern for Vitoria, as given the complex jurisprudential issues arising from the position of Spain in relation to the New World and to the situation of the native inhabitants of the Americas. In Part 1 of the paper, the context for the discussion of Vitoria is set through attention to the pre-modern currents of theorizing, as to do with international law matters, on which he was to draw in formulating his international jurisprudence. In Part 2, the substantive views of Vitoria as regarding the subject of international law are presented in detail. In Part 3, there is a summary assessment provided as to the place of Vitoria in the modern tradition of international and his contribution to its development. The works of Vitoria that are considered are the contemporaneous notes on three of his university courses, known as readings or relections, that were made by his students and that were published some years after his death. These are the relection on civil power thought to date from 1528, *De Potestate Civili*, and the two relections delivered in 1539 concerning the native inhabitants of the Americas and the rights of the Spanish conquerors in respect of them: *De Indis* and *De Jure Belli*.[1)]

i.

With the pre-modern currents of theorizing as bearing on the law applying in the international sphere, there are two concepts that are of cardinal importance. These are the concept of natural law and the concept of the just war. The origins of the pre-modern tradition of natural law theory go back to the classical period, and to the great Greek thinkers Plato and Aristotle, the Stoic philosophers and the Roman jurists; whereas the essential conceptual framework of just war theory, in its specifically Christian form and tradition, was set out by the early Church father and theologian St Augustine of Hippo. However, the concepts of natural law and the just war were to receive their classic formulation in the thirteenth century with the work of the thinker who, for the purposes of the discussion here, is to be taken as providing the key point of reference: the Dominican theologian and philosopher St Thomas Aquinas (1224/5–74).

The pre-modern tradition of natural law, as regarding issues of political thought, involved a quite particular view as to the individual and the relation of individual men to state and society. Thus in specific terms, the state was understood to be founded in a normative order that was to be identified with the objectively given order of nature as such. In accor-

1) Francisco de Vitoria: *De Potestate Civili*, *De Indis* and *De Jure Belli*, in Vitoria, *Political Writings*, edited and translated by Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), pp. 1–44, 231–92, 293–327. On Vitoria's international jurisprudence, see especially: James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934). See also: Arthur Nussbaum, *A Concise History of the Law of Nations*, 2nd edition (New York: Macmillan, 1954), Chapter 4, pp. 79–84; Martin C. Ortega, 'Vitoria and the Universalist Conception of International Relations', in *Classical Theories of International Relations*, ed. Ian Clark and Iver B. Neumann (London: Macmillan, 1996), pp. 99–119. For a discussion of Vitoria of which the present paper is a modified version, and as where Vitoria is placed together with Suarez, Gentili and Grotius as the founders of the modern international law system, see: Charles Covell, *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (Basingstoke, Hampshire and New York: Palgrave Macmillan, 2009), Chapter 1.

dance with this, it was assumed that association in the state, and subjection to the legal and political order that it maintained, were natural to men in their status as rational beings. As concerning the state itself, this was presented as a moral, or ethical, form of association, and with its justification lying in its advancing the common good of its members, and, through this, the setting of the conditions for the realization of the good life by individual men within an organized political community. Further to this, the state was thought of as being prior to the individuals forming it, both as to the order of nature, and as to the political community and the forms of the good life that this embodied. It followed from this, as by implication, that the state was to be considered as exercising a direct, and naturally generated, authority as to its members that remained independent of any voluntary act or acts on their part such as involved, or presupposed, their explicit consent and agreement. These various ideas relating to the individual, state and society, as exemplary of the pre-modern natural law tradition, are present with Aristotle and to be found in the argument of his *Politics*.[2] They are also to be found present in the writings of Aquinas on law, the state and civil government, as is so, most notably, with the exposition of the principles of law that comes in the *Summa Theologiae* (c.1265–73).[3]

Aquinas identified and discussed four distinct forms of law: eternal law (*lex aeterna*), natural law (*lex naturalis*), human law (*lex humana*), and divine law (*lex divina*). As Aquinas explained the matter, the eternal law embodied God's conception of the final end of the entire created universe, and, as such, it stood as the ultimate metaphysical foundation of all other forms of law.[4] The natural law, for Aquinas, was a universal law that comprised the part of the eternal law that was transparent to human reason and that, as such, reflected the degree of involvement in the eternal law that was appropriate to men as rational beings.[5] The human law was the law brought into being by men for their government within the condition of social and political order. Thus did the human law comprise the sphere of positive law (*ius positivum*). There were two forms of human law as recognized by Aquinas: the civil law (*ius civile*) and the law of nations (*ius gentium*). The civil law was the law laid down in states for the common good, as through the stipulations of rulers. The law of nations was the law that pertained to the general norms of just conduct, such as those of justice in buying and selling, which, as established through natural reason, were followed on a common basis by all men and to the furtherance of their mutual society.[6] The divine law was the law contained in the word of God as revealed through the Scriptures, and, as such, it supple-

2） Aristotle, *Politics*, trans. Benjamin Jowett, in *The Complete Works of Aristotle*, The Revised Oxford Translation, ed. Jonathan Barnes, 2 volumes (Princeton, New Jersey: Princeton University Press, 1984), Volume 2, pp. 1986–2129. See particularly Book 1, Chapters 1–2, for Aristotle on the state as founded in nature and established for the common good, and on the state as existing prior to the individuals comprising it.

3） Aquinas' discussion of law comes in Questions 90–97 of the first sub-part of the Second Part of the *Summa Theologiae* that is called the Prima Secundae. For the original Latin text of this with an English translation by Thomas Gilby, see: *Summa Theologiae*, Blackfriars edition, Volume 28: *Law and Political Theory* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1966).

4） Aquinas, *Summa Theologiae*, Prima Secundae, Question 91, Article 1; Question 93.

5） *Ibid*., Prima Secundae, 91.2; 94.

6） *Ibid*., Prima Secundae, 91.3; 95–97.

mented the natural law in directing human beings as to the meaning and implications of the eternal law.[7)]

For Aquinas, the principles of human association in political society and the state, and the principles of the common good maintained therein, were universal principles comprehended within the natural law. In particular terms, the natural law embodied the first principles of practical reason as relating to the basic human goods, such as life, the procreation and nurture of offspring, knowledge of God, and participation in human communities, and as relating to the naturally determined inclinations of human beings to pursue these goods and to avoid what was opposed to them.[8)] In addition, it was the natural law that Aquinas took to constitute the normative foundation for the state and the final ground of justification for the subjection of men to the rulers established within states. Crucially here, the natural law was assumed to ground the laws stipulated by rulers for the common good within political society. Thus, for example, the natural law stood as the basis for the derivation of human laws: and with the precepts of the law of nations being derived in the manner of conclusions deduced from natural law principles as their premises, and with the precepts of the civil law being derived in the manner of constructions placed on natural law principles in their aspect as general directions for human conduct.[9)] At the same time, the justice of human laws was held by Aquinas to depend on their conformity with, or their lack of significant divergence from, the principles of natural law, and with this being to the effect that human laws that ran counter to the natural law were tainted with injustice, and not so much laws as outrages against law.[10)]

The idea of international law was something that Aquinas gave recognition to formally in reference to the law of nations, which he held was human law, and hence a part of positive law, and, as such, distinct from natural law even though derived from it. As explained, the substance of the law of nations, for Aquinas, comprised general principles of just conduct, as with those to do with commercial transactions, which were observed in common among men such as to maintain their social interactions. However, there was nothing about this account of the law of nations that involved the modern view of international law as the law having application to the external relations among states and rulers. The context where Aquinas treated of law as something applying to the external relations of states and rulers in the international sphere was in discussion of the law concerning the principles of justice in war.

In the exposition of the principles of justice in war, Aquinas based himself on Augustine, who had before him identified and explained the three essential ideas that run through classic just war theorizing. Thus Augustine had held that state rulers had the authority to wage war, so as to preserve the natural order conducive to peace. In addition, war was to be waged by state rulers in response to wrong-doing, and hence with a view to the punishment of offences and the recovery of things unjustly appropriated by enemy parties. Finally, it

7）*Ibid*., Prima Secundae, 91.4–5.
8）*Ibid*., Prima Secundae, 94.2, pp. 81–3.
9）*Ibid*., Prima Secundae, 95.2, pp. 105–7; 95.4, pp. 111–15.
10）*Ibid*., Prima Secundae, 96.4, pp. 131–3.

was held that war was to be waged only as a matter of necessity, and then always for the end of bringing about the restoration and the maintenance of peace as the state of things natural to human beings. These ideas are to be found given expression to by Augustine, and most notably in his late fourth-century polemical work *Contra Faustum Manichaeum*.[11] They are also to be found present in the statement of the principles of the just war that Aquinas provided as part of his consideration of the effects of charity in the *Summa Theologiae*.[12]

According to Aquinas, war was permissible, but only subject to certain conditions that served to determine its justice or lawfulness. The conditions that Aquinas focused on in this respect were ones falling within the part of just war doctrine that is referred to as the *ius ad bellum*, and with the principles relating to this setting out the conditions for the justice of war as to the circumstances of, and the objectives for, the resort to the waging of it. The *ius ad bellum* conditions were fundamental within just war theorizing, although they were closely bound up with the principles pertaining to the part of just war doctrine known as the *ius in bello*. The principles at issue here were such as to set out the conditions for justice as in the actual conduct of war by the belligerent parties.

The first condition that Aquinas picked out for justice in war was that of lawful authority, and with this concerning the authority of the sovereign rulers on whose command war was waged. For Aquinas, the authority to wage war was an authority that belonged exclusively to sovereign rulers. Hence private individuals were not authorized to wage war, as given that they were able to secure redress for wrongs done to them through their having recourse to the laws enforced by their political superiors. It fell to sovereign rulers to exercise the authority to wage war for the reason that they were entrusted with the care of the states subject to their jurisdiction. For this trust was such that rulers were required to apply force not only to preserve states from internal domestic crime and disorder; but there was also the requirement, as carried within their trust, that rulers were to defend states against external attacks, and as in line with the position of Augustine that the right of war served to maintain the condition of peace as the natural order of human affairs.

The second condition for justice in war was that a just cause for war was required to be present. Essential to this condition was the principle that war was to be waged against parties guilty of wrong-doing and as in line with their deserts, and with Aquinas here citing Augustine explicitly as to punishment and recovery of property being the causes at issue in regard to wars waged on account of wrongs perpetrated. The third condition for justice in war was that of right intention, and with this providing that the parties to war were required to act such that they intended through their actions to promote the good and to avoid evil.

11) St Augustine, *Contra Faustum Manichaeum*, Libri XXXIII, trans. Richard Stothert, in St Augustine, *The Writings Against the Manichaeans and Against the Donatists*, ed. Philip Schaff (Grand Rapids, Michigan, 1887), pp. 155–345, and especially Book XXII, Sections 74–79. For Augustine on the just war, see also: Letters CLXXXIX, CCXXIX, in *Letters of Saint Augustine*, trans. J.G. Cunningham, 2 Volumes (Edinburgh, 1872, 1875), Volume 2, pp. 366–71, 435–7.

12) Aquinas set out the conditions necessary for the just war in Question 40 of the second sub-part of the Second Part of the *Summa Theologiae* that is called the Secunda Secundae. For the original Latin text with an English translation by Thomas R. Heath, see: *Summa Theologiae*, Blackfriars edition, Volume 35: *Consequences of Charity* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1972).

The right intention principle Aquinas explained with reference to the as stated view of Augustine that wars were to be waged to secure peace, and to suppress evil and to uphold the good. It followed from this that wars could be contrary to justice by reason of flawed intention, and with this being so, and as Aquinas quoted Augustine direct, when wars were embarked upon from the desire to injure people, the pursuit of cruel revenge or the lust for the domination of others. The overriding consideration with this for Aquinas, as it had been for Augustine, was that parties waging a just war were to have peace as their aim and were to conduct themselves in war, as mindful of the end of peace, such that they might bring their enemies back to the condition of peace.[13)]

In regard to the question of Aquinas on natural law and the just war in relation to the idea of international law, it is to be noted, first, that the natural law conceptualization, as he formulated this, was highly serviceable for the development of a system of international law. Thus the natural law, as Aquinas explained it, was a law based in principles of human reason that were universal, and directed towards universally applicable principles of justice and political morality. This aspect of universality, as attaching to natural law, was such as to point to the possibility of a system of law, as in conformity with the essential idea of international law, which could be thought of as involving a jurisdiction with a universal reach and application. Again, Aquinas took the natural law to stand as the normative basis for the laws enacted by state rulers, and with it thereby constituting the containing normative framework for the acts and engagements of states and rulers. Here, also, did the natural law conceptualization point to the possibility of a system of international law. For there was thus implied the possibility of a body of law, as conforming with the international law ideal, that would establish normative constraints and limitations on states, and on the rights and powers of their rulers, and that would possess a binding normative force for states and rulers which remained independent of their own consent and agreement to be bound.

As to the subject of the just war, it is evident that the tradition of just war theorizing, as in the form that Aquinas represents it, contributed to the setting of the framework principles for the modern system of international law. For central to the tradition was the idea that the relations between states and rulers were not only determined by considerations of power, but were also to be regulated through law such that the exercise of power by states and rulers could always be thought of as standing in need of some legal basis and justification. This meant that law applied to the relations between states and rulers in the sense that war involved the enforcement of law, and, through this, the maintenance of an order of justice among states in the international sphere as where their rights and interests would receive recognition, and objective validation, within a self-sufficient normative system embodying the rule of international law. More specifically, the connections between just war theorizing and modern international law are brought out with the conditions for justice in war, as Aquinas identified them. Thus the condition of lawful authority confirmed that the right of war was a monopoly right or power of states, as in line with the privileged juridical status ac-

13) Aquinas, *Summa Theologiae*, Secunda Secundae, Question 40, Article 1, pp. 81–5. On Aquinas and the just war, see: William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), Chapter 2.

corded to states as the subjects of international law; whereas the condition of just cause confirmed the necessity of the distinction, as cardinal to international law, between the lawful and the unlawful exercise of power by states and rulers. As for the condition of right intention, this is notable for the reason, among others, that it confirmed that the law of war was to include constraints and limitations applying to the belligerent parties in the prosecution of war: and with the right intention principle looking forward to such central core principles of modern international humanitarian law as the principle of proportionality, and the principle of discrimination as providing for the due and conventional non-combatant immunities and protections.

ii.

The fundamental principles that came to be established with the pre-modern currents of natural law doctrine and just war theorizing were to be adopted by Vitoria, in what was his own original contribution to extending the terms of international jurisprudence. This contribution lay in the articulation of a general conception of the law that Vitoria saw as applying in the international sphere, and in his efforts to explain certain of the actual practical effects and implications of this body of international law. The general conception of international law was presented by Vitoria as part of his discussion of the principles of civil power in the relection *De Potestate Civili*. In its essentials, the view of civil power set out in this relection was in agreement with the standpoint of Aquinas as to the state and the character of its authority. Thus Vitoria maintained that the civil power exercised through the state was just and legitimate, as such and in principle. In addition, the civil power was a power that was ordained by God and founded in the order of nature, as in the respect that it was not conditional on the consent of men; and, as in line with the natural law as underwritten by God, the civil power was a power directed towards the common good of men as within the form of human association constituted by states.[14] The concern of the civil power was with laws. For Vitoria, the laws and constitutional order established by the rulers of states possessed a binding normative force, and, as he argued, the civil laws were binding for the rulers who created them through their own voluntary acts, as in the manner of the parties concerned being bound by the terms of the agreements that they entered into through their own free will.[15]

It was in the context of the question of the subjection of state rulers to legal constraints and limitations that Vitoria addressed the matter of international law. This law, he argued, had the full force of law proper. It was to be thought of as being established throughout the whole world, and with this considered as forming a single political entity or state. The law was not to be violated, except on pain of the commission of serious criminal iniquities. And as regarding its most fundamental provisions, such as those relating to the immunities of embassies, the law possessed a strict normative application to states and rulers, and as where this overrode any refusal on their part to be bound by it. Thus did Vitoria put the mat-

14) For Vitoria on these various aspects of the civil power, see: *De Potestate Civili*, Question 1, Articles 1–7.
15) Vitoria, *De Potestate Civili*, 3.1–6.

ter after having observed that rulers were free to make laws but not free to choose whether to be bound by them once made, just as rulers were free to enter into treaties but not free to choose whether to be bound by their terms once the treaties were formed:

> From what has been said we may infer the following corollary: that the law of nations (*ius gentium*) does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment (*lex*). The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing mortal crimes, at any rate in the case of the graver transgressions such as violating the immunity of ambassadors. No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.[16)]

The view of international law that Vitoria assumed here conformed with the terms of the natural law conceptualization to which reference has been made, and with this being such that it was a view of international law as a form of law possessing universal reach and application. It is this essentially universalist ideal of international law that informs the discussion by Vitoria of the substantive elements of the law, as in the context of the jurisprudential issue in the international politics of his time with which he was most urgently taken up. This was the issue of Spain in relation to the Americas and to their native inhabitants. The aspects of this issue on which Vitoria focused were to do with the basis in law for the presence of the Spanish in the Americas, and with the merits in law of the claims in justification, as asserted by the Spanish, for the forcible conquest of the native inhabitants, as in accordance with the rights of war, and for the exercise of the rights of dominion over them and their lands and possessions.

The critical work on the subject-matters pertaining to Spain as in relation to the Americas is the relection *De Indis*. In the first part of the relection, Vitoria gave detailed consideration to the legal status of the native inhabitants of the Americas as prior to the coming of the Spanish. As to this question, he argued that the Native Americans had held legitimate rights of ownership as to their land and property, as from the perspective of both public law and private law. In addition to this, he acknowledged that there had been established indigenous rulers exercising legitimate rights of dominion with respect to the Native American peoples. In Vitoria's view, the rights of the Native Americans as to the ownership of their lands and property, and as to their own self-government, were authentic rights, and these rights were not to be thought of as being negated or qualified on such grounds as the sinfulness of the Native Americans, or their unbelief or their alleged or presumed unsoundness of mind.[17)]

16) *Ibid*., 3.4, p. 40.
17) Vitoria, *De Indis*, Question 1, Articles 1–4, Conclusion.

As Vitoria explained it, the negation or qualification of the rights of the native Americans, and their subjection to the power of the Spanish, stood in need of valid grounds or titles that might justify the Spanish in making war on the Native Americans and then exercising the rights and powers of rulership over them. In the second part of *De Indis*, Vitoria examined, and rejected, certain of the titles as invoked by the Spanish to validate their rights of war and claims of dominion as to the Native Americans. There were seven such defective titles treated of, which were as follows: first, the title based in the status of the King of Spain as the Holy Roman Emperor, who was as such to be accepted as exercising lordship over the whole world and to whom the Native Americans were, in consequence of this, to be thought of as being bound in subjection; second, the title based in the argument that the Pope exercised a temporal authority throughout the world, and with this being such that the Pope was to be accepted as competent to confer on the Spanish Kings full sovereign rights over the Native Americans and their lands and property; third, the title based in the claim of the Spanish to rights of discovery over the Americas; fourth, the title based in the refusal of the Native Americans to accept the Christian faith after it had been expounded to them; fifth, the title based in the alleged sinfulness of the Native Americans; sixth, the title based in some presumed act of consent on the part of the Native Americans to Spanish rulership; seventh, the title based in the argument that the Spanish were to hold sway over the Native Americans as through a special endowment from God. In the account that Vitoria gave of the matter, these various titles were all illegitimate. In some cases, there was substantial falsehood, as so with the kind of universal political competences assigned to the Holy Roman Emperor and to the Pope. And in the case of all the titles reviewed, it was Vitoria's contention that there was in fact no justification in law made good through them for the Spanish to embark on war against the Native Americans or to deprive them of their lands and property.[18)]

In the third part of *De Indis*, Vitoria examined, and upheld, what he identified as the legitimate titles that served to provide proper legal justification for the activities of the Spanish in the Americas. These were not titles that supported the Spanish as to the rights of war and dominion as such and in the strictest terms. However, they were titles that Vitoria did regard as succeeding in establishing lawful justification for the presence of the Spanish in the Americas, and for their interactions with the Native American peoples, and that, as the effect and consequence of this, gave rise to rights of war and dominion in an indirect and secondary sense.

The first of the legitimate titles available to be claimed by the Spanish as to the Americas that Vitoria identified was what he referred to as the principle of the natural society and commerce, or the natural association and inter-communication, among men. This was a principle of the law of nations, and of natural law, that related primarily to the right of visitors to foreign lands to receive humane treatment from the native inhabitants. Thus as it was explained by Vitoria, the principle provided, essentially, that the Spanish had the right to travel to the lands of the Americas, and to reside there, but with this being subject to the

18) *Ibid*., 2.1–7.

condition that the native inhabitants suffered no harm as the outcome of this.

The principle of the natural association and inter-communication among men contained within itself, and gave rise to, a number of other related rights. Prominent among these was the right of freedom of trade and commerce. This was the right by which the Spanish were to be considered as entitled to enter into trading and commercial relationships with the Native Americans, as through the importing of goods that the Native Americans were in need of and through the exporting of goods, such as gold and silver, that the Native Americans possessed in large amounts. A further right was the right of common use. This right served to establish the entitlement of the Spanish to have access to, and the use of, such commodities in the Americas as were common both to the native inhabitants and to themselves as foreign visitors, and with these including the gold extractable from the land and the pearls to be found present in the seas and rivers. In addition, there were the civil and domicile rights of the children born to Spanish parents in the Americas, as based in the law of nations. The rights of the Spanish, as contained within the principle of the natural association and inter-communication among men, were such that the impeding by the Native Americans of their proper exercise provided the Spanish with lawful grounds for war. Thus the Spanish were permitted to wage war against the Native Americans for the purposes of their peace and security. In the event that the Native Americans were to persist in their obstructing of Spanish rights through hostile acts, the Spanish were entitled to subjugate the Native Americans and to seize their land and possessions, as by force of arms. In consequence, the Native Americans were liable to be treated as lawful enemies of the Spanish, and to have enforced against them all the rights of war, and with this involving their being reduced to the status of captives and the removal of their rulers.[19)]

The second legitimate title that Vitoria saw as supporting the Spanish policies in the Americas was the general right of Christians to preach and declare the Gospel in the lands of peoples who were to be considered as heathens. As Vitoria elaborated it, this right was such that the Pope might entrust it to the Spanish and withhold it from others, and with this being properly the case, as he argued, with regard to the Americas and their native inhabitants. Vitoria recognized that where the Native Americans permitted the Spanish to preach the Gospel without interference, then the non-acceptance of the Christian faith by the Native Americans did not, in and of itself, establish a lawful ground for the Spanish to make war on them and to assert rights of dominion over their lands and property. In the event, however, that the Native Americans, or their rulers, acted to obstruct the Spanish from preaching the Gospel, then in such circumstances, Vitoria insisted, the Spanish might lawfully wage war on the Native Americans to prevent this. So also were the Spanish entitled to wage war against such Native Americans who hindered any of their own number from conversion to the Christian faith or who subjected converts to sanctions. Closely connected to this, there were the third and fourth of the legitimate titles supporting the Spanish in the Americas. Thus the third legitimate title provided that the Spanish might exercise the rights

19) For Vitoria on the principle of the natural association and inter-communication among men, see: *De Indis*, Question 3, Article 1.

of war against the rulers of the Native Americans, and even depose them, in cases where the indigenous rulers in question used force or fear to compel Native American converts to the Christian faith to return to heathen beliefs and observances. As to the fourth legitimate title, this was based in the consideration that where a large number of Native Americans had been converted to Christianity, and irrespective of the means used for this, then the Pope might, and with or without a formal appeal from them, authorize the removal of their established heathen rulers in preference for Christian rulers.[20)]

A fifth legitimate title basing Spanish actions that Vitoria set down was to do with the tyranny of the Native American rulers as to their own subjects, and the existence of tyrannical laws such as those licensing human sacrifices and cannibalism. Here, it was argued, there was proper justification for the Spanish to apply the rights of war in order to protect the Native Americans, considered in their status as innocents. As a sixth legitimate title, it was suggested by Vitoria that Spanish dominion over the Native Americans might be construed to derive from the consent of the latter, as though the Native Americans, both the peoples and their rulers, had been brought to accept the King of Spain as their sovereign and as in recognition of the wise and benevolent government of the Spanish. There was a seventh legitimate title, such as was implied through the intervention of the Spanish in the wars that took place among the different Native American peoples. In the case of this sort of intervention, the Spanish might thereby acquire lawful dominion rights over Native American land and property as a reward for their support for the parties among the Native Americans having right on their side. Finally, Vitoria discussed an eighth legitimate title, but one that he admitted to be doubtful. This title related to a possible argument as to the effect that the Spanish were to be allowed to undertake the administration of the lands of the Native Americans, and to exercise sovereign rights over them, as in the interests of the Native Americans themselves as given the limited state of their social, cultural and political development.[21)]

Much of the concern that Vitoria had with the legitimate titles of the Spanish, as in relation to the Americas and the Native American peoples, lay with the justification for their resort to war in establishing rights of dominion as to the native inhabitants and their land and possessions. Thus it was that the argument of *De Indis* led directly to the discussion of the principles of the law of war in the relection *De Jure Belli*. This discussion was taken up with the foundational principles of the law of war, and specifically so the *ius ad bellum* principles as these had been treated of by Aquinas and identified by him as lawful authority, just cause and right intention. Hence Vitoria examined what he saw as the four core problems to do with war: the lawfulness for Christians of resorting to war as such; the lawful authority to wage war; the just causes of war; and, as pertaining to issues of right intention, the lawful instrumentalities or means of war. In the event, however, it is to be noted that Vitoria was to move beyond Aquinas as to the completeness of his exposition of the principles of the law of war, and with this being true in particular as to his account of the lawful means of war.

20) Vitoria, *De Indis*, 3.2–4.
21) *Ibid*., 3.5–8.

The substantive positions that Vitoria argued for regarding the principles of justice in war were as follows. As concerning the lawfulness of war for Christians, Vitoria maintained that it was lawful for Christians to wage war with respect to both defensive wars and offensive wars; and with war being lawfully embarked on when undertaken for the defence of the person and property, the recovery of things unjustly taken, the punishment of wrong-doing, and the bringing about of future peace and security. As to the question of the lawful authority to wage war, Vitoria acknowledged that private citizens were permitted to wage war for the defence of themselves and their property and possessions. The same was true for states. However, states had the authority to declare and wage war not only for the purposes of self-defence, but also, and here in contrast to the situation with private citizens, in order to recover property and possessions, and to punish wrong-doing. The authority belonging to states in the waging of war was an authority that belonged to rulers as the representatives of states.[22)]

As to the matter of the just causes for war, Vitoria emphasized, as he had done in *De Indis*, that differences in religion, as with the refusal of heathens to accept the Christian faith, provided no just cause for war. Similarly, there was no just cause for war to be found in considerations to do with the expansion of imperial power or with the personal ambition and self-interest of rulers. In the judgment of Vitoria, there was only one just cause for war, and this related to the fact of a wrong inflicted and received. With the problem of the lawful means of war, this was understood by Vitoria to concern the nature and the extent of the force that was lawfully to be applied in war. In consideration of this, Vitoria maintained that all means were to be considered as lawful such as were required for the defence of the state and its interests. Thus, for Vitoria, it was lawful for a state waging a just war to take back all property that had been lost to the enemy, and to recover out of enemy assets the costs of the war and the damages resulting from it. In addition to this, it was lawful for the state in question to adopt appropriate measures against the enemy, such as the destruction of military facilities, so as to provide for peace and security, and to subject the enemy to punishments for any wrong-doing committed.[23)]

After the statement of the basic principles of justice in war, Vitoria devoted the remainder of *De Jure Belli* to the more detailed elaboration of certain of the principles as set out. In regard to the justification for war, he held that it was critical for a just war that a careful examination be made of the justice and the causes of the war in question and that all arguments against it be properly considered. He also argued that the subjects of a state who were convinced as to the injustice of a war, or who objected to it in conscience, were not bound to take part in it, and even when this went against the command of their ruler. Of particular interest, in this connection, is that Vitoria allowed for the possibility of doubt about the justification for war, as in cases where both parties to war had evident and credible reasons for their actions. He did not conclude from this that wars could be just on both sides

22) For Vitoria on the lawfulness of war for Christians and on the principle of lawful authority, see: *De Jure Belli*, Question 1, Articles 1–2.

23) For Vitoria on the just causes for war and the lawful means for war, see: *De Jure Belli*, 1.3–4.

as to the substance of the cause in justice at issue. However, he did underline that one or other of the parties might be ignorant of matters of fact, or of matters of law, as in respect of a given war. This had the effect that for the party to war with true justice as to its cause, the war was just in and of itself; whereas for the other belligerent party the war remained just in the sense that it was waged in good faith. In such a case, the subjects of the rulers who were the parties to the war were on both sides to be thought of as acting in good faith, and thus as doing what was lawful when they resorted to arms.[24)]

The greater part of the elaboration of the principles of justice in war was given over to the subject of the lawful means of war. This involved Vitoria in consideration of the main aspects of what stands as the central *ius in bello* principle of discrimination. This principle related to the immunities and protections in law, and in justice, for the citizens of states at war who were the innocent parties to war, that is, the non-combatant parties as opposed to the combatant parties. Vitoria affirmed that it was, in principle, lawful for the innocent to be killed in the prosecution of a just war. However, he insisted that the deliberate killing of the innocent was never lawful as an end in and of itself. Thus it was not permitted, even in wars against heathens, to kill children and women, save in circumstances where the women in question acted such that they rendered themselves liable to be considered as combatant parties. It was likewise unlawful to kill foreigners and guests residing in enemy territory, or priests and members of religious orders, except where they participated in actual combat. As against this, Vitoria accepted that it was lawful for innocent parties to be killed knowingly as the collateral effect, and hence as the indirect and unintended result, of legitimate acts of war, such as assaults on enemy military installations and cities. Even so, it was not right to kill the innocent in these circumstances save as a matter of necessity, as was the case in conditions where there existed no other means available for conducting the substantively just war in question.[25)]

According to Vitoria, it was lawful for a state waging a just war to seize or destroy the property and possessions of innocent parties where these were of use to the enemy and where their seizure or destruction would weaken the enemy, as was so with such things as money or agricultural produce and livestock. However, the acts of belligerent parties of this sort were not to be undertaken where an alternative course of action was available. In cases where states at war would not restore things wrongfully seized, then the aggrieved parties were permitted to recover the amount of what was due from innocent and combatant parties alike. In similar vein to these considerations, Vitoria claimed that it was lawful for innocent parties to be taken into captivity in the course of a just war, excepting that Christian subjects were not to be enslaved. In addition, it was lawful to kill enemy hostages taken during truces or at the conclusion of a war, as was so when the enemy broke faith or contravened agreements, but only if the hostages concerned had borne arms as combatants. Where non-combatant parties were held as hostages, however, it was not lawful for them to be put to

24) Vitoria, *De Jure Belli*, 2.1–4.
25) *Ibid*., 3.1.

death.[26)]

As to the rights of states waging a just war in respect of enemy combatants, Vitoria claimed that it was lawful for belligerent states to kill, on an indiscriminate basis, all those who resisted them with force as in the heat of conflict and for so long as the conflict remained unresolved. It was also lawful, after the end of hostilities, for the victorious party to a just war to kill enemy combatants to the end of punishing the perpetrators of the wrong that had brought about the war in question. Vitoria suggested that it was not necessarily lawful to kill all enemy combatants for the purpose of punishing wrong-doing. On the other hand, he did point out that it was sometimes lawful, and expedient, to kill all enemy combatants, as was so when peace and security were not otherwise to be brought about. Despite this, he still emphasized that punishment had to be proportionate to the offence, and that, in most cases, the ordinary members of the enemy armed forces were not to be killed in the aftermath of their defeat, as where it was evident that they had acted in good faith and that they represented no on-going military threat. For Vitoria, there was nothing in absolute terms to exclude the killing of those of the enemy combatants who surrendered or were captured in a just war, albeit that it was provided under the law of nations that captives, following victory in war and with all threat of danger ended, were not to be killed.[27)]

Expanding more on the question of the rights of the victorious party to a just war, Vitoria maintained that in principle everything captured in war belonged to the victor to the amount that provided adequate compensation for the things wrongfully taken by the enemy, as well as for the costs of the war. Vitoria went on to argue, further, that the movable properties of the enemy belonged to the victor, even where the value of these exceeded what was required to cover the actual war costs. As regarding immovable property, he emphasized that it was lawful for the victor to seize and hold the land, military facilities and cities of the enemy, as for the purposes of compensation and self-defence. In addition to this, it was lawful, subject to certain limits, for the victor to seize enemy territory as by way of punishment. It was also to be considered lawful for the victor to impose tributes on the conquered enemy, so as to obtain damages and to inflict punishments, and lawful, subject to qualifications, for the victor to remove the ruler of an enemy state and appoint a new ruler, or to retain the rulership for himself.[28)]

iii.

To understand the place of Vitoria in the tradition of modern international law and his contribution to its development, it is to be observed at once that he did successfully point to certain of the core substantive principles that were to gain a prominent position within the system of international law in its modern form. Thus, for example, there is the principle of the natural association and inter-communication among men that he affirmed in *De Indis* to be a general principle providing a legal basis for the presence and activities of the Span-

26) *Ibid*., 3.2–4.
27) *Ibid*., 3.5–6.
28) *Ibid*., 3.7–9.

ish in the Americas. In the exposition of the various rights bound up with the principle that Vitoria set out, there was the recognition, albeit tentative and provisional, of such central component principles of the evolving international law system as the principle of the freedom of the seas and the principle of freedom of trade and commerce among states and nations. To be sure, it is a measure of just how tentative and provisional Vitoria was with this sort of subject-matter that he moved, without jurisprudential strain, from arguing that the Spanish were entitled to travel to the Americas, without let or hindrance, to the position that they could settle there while being left subject to virtually no exclusive and restrictive territorial rights such as might be exercisable by the native inhabitants. Moreover, there is little sense to be had from Vitoria that he believed that the commercial and trading relations between the Spanish and the Native Americans, or their common use access to the natural commodities available in the Americas, were to be governed by anything approximating to a treaty regime of the sort that is familiar from modern international law practice. On the contrary, the rights of the Spanish as to free trade and commerce and to the common use of commodities were not to be based in voluntary agreements with the Native Americans, but were rather to be enforced, if obstructed, through the means of war. Nevertheless, it is not to be denied that whatever its limitations, the principle of the natural association and intercommunication among men, as Vitoria presented it, did serve to connect him directly to the future development of international law; and the principle was such that, with it, Vitoria looked forward to later prominent writers on international law such as Grotius, with his affirmation of the freedom of the seas, and to such as Kant and Bentham, with their affirmation of free trade and commerce among peoples as being essential for international peace, and for the promoting of the system of international law that would establish this condition of peace on a perpetual basis.

As concerning Vitoria and his recognition of substantive principles of international law, there is also his exposition of the elements of the law of war in *De Jure Belli*. In this connection, Vitoria served to underline the primacy of self-defence as the lawful basis and justification for war, and as in accordance with the international law doctrine of the United Nations era. Thus it was that Vitoria emphasized that it was some wrong inflicted or sustained that provided the proper occasion for war and the recourse to it. And it was in related terms, as to the essentially defensive or defence-occasioned character of the wars based in justice, that he was at pains to deny legitimacy to wars waged with religion, or the interests of states and rulers, as their cause and justification. In addition to this, Vitoria anticipated much modern thinking about war, as a general engagement of states, in his upholding of the right of freedom of conscience of citizens as a check to the sovereign command power of rulers. The same is true with respect to his allowing that lawfulness might attach to the actions of the different parties to war, and without regard to the question of the justice of war as to its cause. Most important of all, Vitoria set out in detail what he held to be the rights and duties of states at war, and their agents, as in regard to innocent or non-combatant parties, as well as the rights and duties of belligerent states as in regard to combatant parties. With certain of the principles that Vitoria here set out, such as those affirming the rights of states at war as to the killing of hostages and prisoners of war, he was plainly very much of his times

and, as such, set in opposition to what would go on to become the prevailing orthodox view of these matters within modern international law. However, there are other principles that Vitoria identified, most notably those stating restrictions as to the deliberate killing of non-combatant parties, which stand out as being among the fundamental principles stipulated within the now evolved body of international humanitarian law.

These various considerations notwithstanding, the crucial and overriding claim to be made for Vitoria in relation to modern international law is less to do with what he had to say about the substantive principles of the law, and very much more to do with his universalist conception of international law as such. This was the conception as where the law obtaining in the international sphere was understood to form a system of law possessing universal reach and application as to all the nations and peoples of the world. In this connection, it is to be emphasized that in discussion of the situation of the Native Americans, Vitoria presented the law that he saw as applying to them as a body of law that did not in any sense presuppose the acceptance of the Christian faith, or indeed the acceptance of any particular religious standpoint, as the condition for subject status under it and hence for the enjoyment by the different nations and peoples of its multiform benefits and protections. Nor was it a body of law that Vitoria saw as presupposing the jurisdictional authority of the European-based political institutional structures associated with the Christian religion, and specifically so the Catholic Church and the Holy Roman Empire, as its underlying organizational foundation. On the contrary, this was law that Vitoria thought of as comprising a legal framework that extended to the Native Americans and that applied to them in the securing of their rights and standing, as it applied likewise to the Spanish, on the basis of full reciprocity. Thus it was that, with Vitoria and his account of the matter, the discoveries in the Americas and the overseas territorial extension of Spanish power went together with the formulation of a jurisprudence that carried the promise of, and that looked forward towards, the bringing about of a system of international law that would embody the ideal ends of juridical universalism.

The universalism of Vitoria and his sense of international law conformed with the thrust of established natural law theorizing. However, the form of natural law doctrine that Vitoria drew on was that of Aquinas, as for whom the international law that derived from natural law consisted in norms of just conduct that were commonly observed among men. It was to be left to writers after Vitoria, and starting essentially with Grotius, to set out a conception of natural law that answered to the character of international law as law that regulated the external relations among states that were understood to be sovereign and independent as in respect of one another. In regard to this, it has to be said that it is clear that Vitoria did not think of the Native American peoples as constituting state entities with a formal independence as based in sovereign rights and powers. So likewise is it clear that Vitoria did not appear to consider that the reciprocally applicable rights and standing of the Native Americans and the Spanish, and as founded in the law to which they were subject in common, were such as to involve anything approximating to the idea of the equality of states that is central to the modern doctrine of state sovereignty. In fact, Vitoria concluded to the effect that the Spanish held what were extensive legal and political rights as in relation to the Native Americans and that were detrimental to their rights and interests. Thus, for example, there

are the evident inconsistencies as between the second and third parts of *De Indis*, and such that arguments to do with religion and consent were at first excluded as providing a basis for Spanish rights, but were then reintroduced later on as lending support for the Spanish policies. Then again, there are the specifications of the various rights relating to the principle of the natural association and inter-communication among men, and of those relating to the propagation of the Gospel. For the rights at issue here were such as to bring out that, for Vitoria, there existed a significant and extensive basis in law for the Spanish to intervene forcibly in the affairs of the Native American peoples, and to exercise wide-ranging rights of war as to the end of their acquiring of full powers of dominion over the Native Americans and their lands and possessions.

With all of this being understood, the decisive consideration with Vitoria, and as to his universalist sense of international law, still remains that he saw the basis for the relations among the Spanish and the Native Americans as taking place within a containing framework of law that set and defined rights and obligations which bound them together on the basis of mutual reciprocity. Thus it was that Vitoria began *De Indis* with an explanation as to how the Native American peoples were to be acknowledged as having authentically juridical regimes of property rights, as well as being subject to authentically juridical forms of rulership and self-government, and with this being such that these peoples were established as lawful political communities. At the same time, he restricted the range of legitimate titles providing justification for the Spanish, as in their relations with the Native Americans, in respects such that the political communities formed by the Native American peoples were to be thought of as possessing if not legal sovereignty and independence in the fully complete juridical sense of this, then at least some real and substantial measure of autonomous and independent standing as intelligible in juridical terms. Yet further, it is to be emphasized that Vitoria was everywhere concerned to demonstrate that where the Spanish resorted to the rights of war, as against the Native Americans, then these rights were not to be exercised arbitrarily, but were required to be based in principles of law relating to such matters as proper cause and justification. The requirement that the Spanish were to wage war against the Native Americans only when there existed a just cause for war stood as a requirement that, as in terms of jurisprudential logic, involved a commitment to the position that the Native Americans were to be recognized as being subject to a body of international law and as being in possession of the rights and personality secured to them under it. This was reflected, among much else, in the acceptance by Vitoria that the Native Americans were themselves competent to wage war with one another, and in the limitations that he placed on what could count as a just cause for the waging of war, and as where these limitations served to ensure the protections of law for the Native Americans, and for their rights, as in relation to the Spanish. It is with the examination by Vitoria of these different aspects of the law applying to the Spanish and the Native Americans that there is to be found the universalism in outlook in jurisprudence that is central for the purposes of understanding the place that he occupies in the tradition of modern international law, in addition to the original and creative contribution that he made to its development.