

INDG429/Crim429

Indigenous Peoples and International Law

1500s

- Considerable shift in legal/theological discourse
 - Rejection of Papal claims to secular jurisdiction; and
 - Application of “natural law” principles to all human relationships, including relations between nations/kingdoms

1500s

- Las Casas and de Vitoria lead the way
 - Las Casas had been to the New World and fought for Indigenous rights; main focus was on the abuses
 - de Vitoria had never visited the New World and maintained a more abstract legalistic focus

Franciscus de Vitoria late 1400s-1546



- Dominican scholar
- U of Salamanca
- First Spanish thinker to apply humanist natural law to Spain’s treatment of Indians in the New World

Franciscus de Vitoria



- Influenced by St. Thomas Aquinas; rooted in egalitarianism
- *De Indis noviter inventis (On the Indians Recently Discovered)* 1532

On the Indians Recently Discovered (1532)

- Sought to develop an international legal system
- Influence seen hundreds of years later (e.g., in Marshall decisions)
- Looking for principles binding on all people and nations; rights and responsibilities

On the Indians Recently Discovered (1532)

- Were the Indians owners of the land before the Spanish arrived?
 - Yes, because they are rational beings
 - Non-belief in Christianity does not invalidate dominion
 - Therefore: inhabitants of the Americas possess the natural legal rights shared by all free and rational people

On the Indians Recently Discovered (1532)

- Is the Pope “Ruler of the world”? And thereby also ruler of the Indians?
 - No.
 - Spain’s title based on “discovery” of lands occupied by non-Christian peoples
 - But as rational people, the Indians had rights
 - Law requires jurisdiction; Pope has none
 - Therefore: The Pope’s donation to Spain of title in the Americas was “baseless”

On the Indians Recently Discovered (1532)

- Is there *any* basis on which the Spanish could initiate a just war?
 - Can defend territory, or if the universally binding Law of Nations are violated.
 - Law of Nations generated by civilized societies. With rights come obligations. Must allow:
 - a. natural society and fellowship, travel
 - b. free and open commerce
 - c. anything common to both citizens and strangers

On the Indians Recently Discovered (1532)

BUT

On the Indians Recently Discovered (1532)

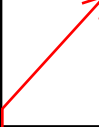
- But Professor/Father de Vitoria, are you saying that the Indians are the rational “equals” of the Spanish?
- Of course not. And therefore ...
 - Posited a sort of **cultural evolution**
 - **Benign guardianship** is okay, but only if it is truly to the Indians’ benefit.

On the Indians Recently Discovered (1532)

- The **upside**:
 - Indigenous peoples have rights, including rights of dominion
 - The Indigenous peoples are the “true owners” of their territories
 - Neither the Pope nor the King has jurisdiction
 - Spanish title is baseless
 - Refusal to accept the faith does not justify war

On the Indians Recently Discovered (1532)

- The **downside**:
 - Makes European/Christian mores/standards the measuring stick for “civilization”
 - Indigenous peoples have rights but they are lesser rights
 - “**Benign guardianship**” opens the door for trusteeship doctrines because they are “unfit” for true dominion



A notion Canada would be using 300 years later: "They're not ready yet; they need us to show them the way."

Hugo Grotius



- Dutch
- Wrote a century after de Vitoria
- Two main treatises
 - *Freedom of the Seas* (1608)
 - *On the Law of War and Peace* (1625)

Hugo Grotius



- *Freedom of the Seas* (1608)
 - Seas are international territory that no one can own (1608)
 - Becomes an important allegory when it comes to arguing Indigenous rights in North America

Hugo Grotius



- *On the Law of War and Peace* (1625)
 - No one has right of dominion through “discovery” when someone already there

Hugo Grotius

- Neither can the wickedness, and impiety, nor any other incapacity of the original owner justify such a claim. **For the title and right by discovery can apply only to countries and places, that have no owner.** [Book 2 at IX]
- ...
- Neither moral nor religious virtue, nor any intellectual excellence is requisite to form a good title to property. Only where a race of men is so destitute of reason as to be incapable of exercising any act of ownership, they can hold no property, nor will the law of charity require that they should have more than the necessities of life. For the rules of the law of nations can only be applied to those, who are capable of political or commercial intercourse; but not to a people entirely destitute of reason, though it is a matter of just doubt, whether any such is to be found. [Book 2 at X].


Hugo Grotius



- *On the Law of War and Peace* (1625)
 - Capacity to enter treaties is a right of all peoples
 - Three “justifiable causes” for war
 - Defence
 - Recovery of property
 - Punishment

The Treaty of Westphalia is basically where the idea of the nation state is

Treaty of Westphalia 1648



- Treaty between Catholic Church and new nation states
- Ends wars of religion
- New alliances would be diplomatic/political instead of religious

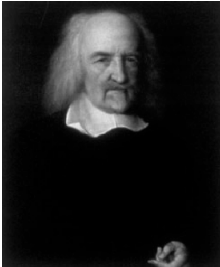
Treaty of Westphalia 1648



Treaty of Westphalia

- “Natural law” shifts from “universal moral code” to a “bifurcated regime comprised of the natural rights of individuals and the natural rights of states”
- But who would define this natural law? Well ... states, of course, because the state is the pinnacle of civilized achievement

Thomas Hobbes



- *Leviathan* (1651)
- There is
 - Chaos ... where life is “nasty, brutish and short” vs
 - Nation state ... where people can live in harmony, peace and justice

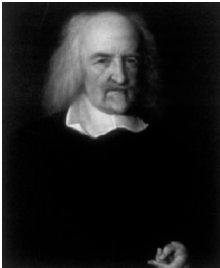
Guess which refers to Indigenous Peoples and which to European ones.

i.e., just like European nations

Thomas Hobbes

- *Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. ...*
- *In such condition there is no place for industry, because the fruit thereof is uncertain; and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.*

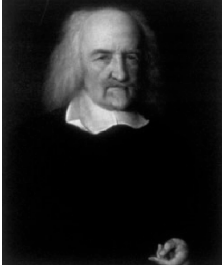
Thomas Hobbes



- The nation state is
 - Centralized
 - Hierarchical
 - Power rests in one person who holds the trust of the nation
 - Sedentary
 - Cultivation of soil and development of God’s gifts

"Nasty, brutish and short." A phrase repeated in 1991 by Chief Justice McEachern in *Delgamuukw v The Queen* in denying the Gitxan and Wet'suwet'en their claim for title.

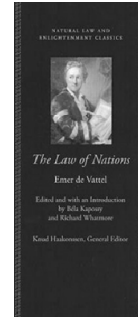
Thomas Hobbes



- Dichotomies
 - Nation state and the individual and nothing in between
 - Those who live in nature vs those who are civilized
- Indigenous modes of governance don't count

Emmerich de Vattel

- *The Law of Nations, or the Principles of Natural Law* (1758)
 - “the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights.”



Emmerich de Vattel



- Beginnings of modern doctrine of state sovereignty
- Nations are free and independent of one another
- Each nation is its own best judge of how its obligations are met

Emmerich de Vattel



- State sovereignty involves:
 - Exclusive jurisdiction
 - Territorial integrity
 - Non-intervention in domestic affairs
- i.e., European conceptions of property/sovereignty

Emmerich de Vattel



- So where did Indigenous peoples fit in this treatise of deVattel's?

Emmerich de Vattel

Chapter 01: Of Nations or Sovereign States

Emmerich de Vattel

- Ch1§4. What are sovereign states. Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *sovereign state*. Its rights are naturally the same as those of any other state. Such are the moral persons who live together in a natural society, subject to the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.

Emmerich de Vattel

- Ch1§11. Of a state that has passed under the dominion of another. But a people that has passed under the dominion of another is no longer a state, and can no longer avail itself directly of the law of nations.

Emmerich de Vattel

Chapter 07: Of the Cultivation of the Soil

Emmerich de Vattel

- Ch7§81. The cultivation of the soil, a natural obligation. The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing, if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share; and it has no right to enlarge its boundaries, or have recourse to the assistance of other nations, but in proportion as the land in its possession is incapable of furnishing it with necessaries. Those nations (such as the ancient Germans, and some modern Tartars), who inhabit fertile countries, but disdain to cultivate their lands, and chuse rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts. There are others, who, to avoid labour, chuse to live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have therefore no reason to complain, if other nations, more industrious, and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilised empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them.

No more a connection to land than if you were to catch a fish in the sea. Do you "own" the water? No. Do they "own" the land? No.

Emmerich de Vattel

Chapter 16: Of the Protection Sought by a Nation, and its Voluntary Submission to a Foreign Power

Emmerich de Vattel

- Ch16§192. Protection. When a nation is not capable of preserving herself from insult and oppression, she may procure the protection of a more powerful state. If she obtains this by only engaging to perform certain articles, as, to pay a tribute in return for the safety obtained,—to furnish her protector with troops,—and to embark in all his wars as a joint concern,—but still reserving to herself the right of administering her own government at pleasure,—it is a simple treaty of protection, that does not at all derogate from her sovereignty, and differs not from the ordinary treaties of alliance otherwise than as it creates a difference in the dignity of the contracting parties.

We are seeing a vocabulary develop surrounding international law. Pay attention when you see the word "protection" in future documents and court cases we read, and note how it is being used.

Emmerich de Vattel

Chapter 18: Of the Establishment of a Nation in a Country

Emmerich de Vattel

- Ch18§209. Whether it be lawful to possess a part of a country inhabited only by a few wandering tribes. There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? We have already observed (§81), in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies.

Use it or lose it. Or more to the point, use it the way Europeans think you should use it or lose it. Europe was already full and every corner of it "owned," while North America was so big and open