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Yuri G. Mantilla

*Liberty University School of Law*

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# Francisco de Vitoria's Normative Ideas and the Beginnings of International Law: A Colonial Ethnocentric Discourse, or a Bona Fide Effort to Construct Just International Norms?

BY YURI G. MANTILLA\*

## I. INTRODUCTION

The fragmentation of international law, its legal positivist foundation, and the influence of critical approaches in its deconstruction has shaped debates about international law's present and future. To properly understand prevalent international normative ideas and to think about potential improvements in constructing a just normative international order, it is essential to analyze the genealogy of the ideas that created international law. This article focuses on the origins of international law in the 16th century normative ideas of Francisco de Vitoria and his proposal to apply them to the inter-civilizational relations between indigenous nations of the New World and European States. Considering the importance of inter-civilizational relations in the 21st century and the increasing recognition of indigenous peoples as important international actors, the analysis of these ideas is of special importance.<sup>1</sup>

Beginning in the 1910s, Spanish authors including Vicente Beltrán de Heredia, Luis Alonso Getino, Venancio Diego Carro, and Teófilo

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\* Yuri Mantilla is Professor of Law at Liberty University School of Law. Professor Mantilla holds a Ph.D. in Law from the University of Aberdeen in Scotland, an LL.M. degree from American University Washington College of Law, an LL.B. equivalent, from Taras Shevchenko University of Kiev, Ukraine. He has done undergraduate studies at the University of San Andres School of Law in La Paz, Bolivia. He was awarded a Graduate Certificate in International Relations by Harvard University Extension School.

1. This writing is the law review article version of my Ph.D. thesis. See Yuri G. Mantilla, *Francisco de Vitoria, the Spanish Scholastic Perspective on Law, and the Conquest of the Inca Empire: Universal Justice or Ethnocentric Colonialism* (Jan. 25, 2012) (Ph.D. dissertation, University of Aberdeen) (on file with author).

Urdanoz, systematically promoted the view that Francisco de Vitoria was the founder of international law.<sup>2</sup> They believed that Vitoria's international legal ideas were consistent with principles of international justice and could legitimately apply to the relations between nations from diverse civilizations.<sup>3</sup> In English-speaking countries, James Brown Scott, a leading scholar on Vitoria's ideas, also promoted this perspective.<sup>4</sup> In the 1990s, contrary to the traditional interpretation of Vitoria's ideas, a perspective emerged that indicated that he was the founder of a colonial, ethnocentric, and unjust discourse of international law.<sup>5</sup> From that viewpoint, international law was established to justify the Spanish conquest and colonization of the New World.<sup>6</sup> In 1996, Antony Anghie published his article entitled *Francisco de Vitoria and the Colonial Origins of International Law*.<sup>7</sup> Anghie's interpretation is one of the most influential sources on Vitoria's doctrines as a colonial ethnocentric international normative discourse. Well recognized international legal scholars including Antony Anghie, Bret Bowden, and Richard Williams, also believe that Vitoria's law of nations' doctrines articulate an unjust ethnocentric discourse that has greatly influenced the discipline of international law.<sup>8</sup>

## II. THE ORIGINS OF INTERNATIONAL LAW, FRANCISCO DE VITORIA, AND GLOBAL JUSTICE

In the 21st century, there is an increasing influence of political ideas that are challenging processes of global economic integration. These views also question the contributions of international law in sustaining a peaceful international order.<sup>9</sup> They contest the contributions of international law in effectively addressing issues of international trade relations, international human rights, and the protection of the environment and others. Besides the nationalist populist critique of international law, there

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2. *Id.* at 67-69; *see also* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 58-63 (1950).

3. *See* Mantilla, *supra* note 1, at 67-69.

4. *See generally* JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS (1934).

5. Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 326 (1996); *see also* Mantilla, *supra* note 1, at 36.

6. Anghie, *supra* note 5, at 326; *see also* Mantilla, *supra* note 1, at 36.

7. Anghie, *supra* note 5, at 321.

8. *See* Pablo Zapatero, *Legal Imagination in Vitoria. The Power of Ideas*, 11 J. HIST. INT'L L. 221, 268-71 (2009) (describing the nature of the critical analysis of Vitoria's ideas regarding international law).

9. *See* Anne M. Orford, *International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted By the Tools? International Law and Enlightenment*, 35 AM. U. INT'L L. REV. (2020).

is an influential perspective that sustains the view that international law is an inherently biased unjust system because of its colonial origins.<sup>10</sup> This point of view is based on strong criticisms of the writings of Francisco de Vitoria, who is considered one of the founders of the discipline of international law.<sup>11</sup>

In the Spanish 16th century setting, there were efforts to recognize the existence of normative ideas that could justly, and universally apply to all civilizations.<sup>12</sup> Regarding the 16th century view of universality and its relation to natural law, Georg Cavallar said: “[t]he core idea of *natural law* cosmopolitanism is that natural law is universal and should therefore not be limited in scope, that is, it should be applied to all human beings.”<sup>13</sup> In the Spanish 16th century historical context, there were two influential schools of thought regarding the universality of the law of nations. The first one, represented by Juan Ginés de Sepúlveda, indicated that the natural law of nations did not apply to indigenous nations because they were less than human.<sup>14</sup> The other view, represented by Bartolomé de las Casas, indicated that the natural law of nations applied to all nations including indigenous ones.<sup>15</sup>

Georg Cavallar defines intellectual cosmopolitanism as: “a way of thinking, a cognitive orientation with the key feature of impartiality.”<sup>16</sup> In the historical context of the 16th century, the concept of impartiality was expressed in the concept of universal justice, which was understood as what was owed to each person and nation.<sup>17</sup> In the 16th century, Priest Montesinos, a Spanish missionary in the New World, was one of the first to articulate a universal perspective against the conquest of the New World.<sup>18</sup> Montesinos believed that the Spanish actions in indigenous territories were against principles of universal justice in the New World because they violated the human dignity of indigenous people.<sup>19</sup> Montesinos

10. Mantilla, *supra* note 1, at 27, 143-44.

11. *Id.* at 142-44.

12. See LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 17-23 (1965); see also Mantilla, *supra* note 1, at 30-32.

13. See Georg Cavallar, *Vitoria, Grotius, Pufendorf, Wolf and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans*, 10 J. HIST. INT’L L. 181, 185 (2008).

14. See JUAN GINÉS DE SEPÚLVEDA, TRATADO SOBRE LAS JUSTAS CAUSAS DE LA GUERRA CONTRA LOS INDIOS 12 (Fondo De Cultura Económica 3d ed., Manuel García Pelayo trans., 1996).

15. See generally BARTOLOMÉ DE LAS CASAS, 1 TRATADOS 21-23 (Juan Pérez ed., Carlos Millares & Rafael Moreno trans., 2d ed. 1997).

16. Cavallar, *supra* note 13, at 185.

17. See FRANCISCO DE VITORIA, LA JUSTICIA 20-21 (Luis Frayle Delgado trans., 2001).

18. See HANKE, *supra* note 12, at 17-19.

19. *Id.* at 17-22.

also believed that it was as important to defend the interests of indigenous nations as it was to defend the interests of his own country, Spain.<sup>20</sup>

Similarly, Bartolomé de las Casas, like Montesinos, believed that the Spanish conquest of indigenous nations was contrary to principles of universal justice. This was because it was contrary to the interests of indigenous people.<sup>21</sup> Bartolomé de las Casas rejected Spanish legal justifications for the conquest and colonization of the New World. His ideas were an effort to transcend Spain's 16th century national interests and embrace a universal perspective which considered the wellbeing of indigenous civilizations. That view was based on the belief in the existence of one universal human nature and the equality of all human beings, because they were created in God's image.

Contrary to De las Casas' view of universality, Juan Ginés de Sepúlveda believed that it was in the best interest of Spain and humankind to impose Spanish colonial rule to "ethnically inferior" indigenous people. In this case, the interests of indigenous nations were irrelevant because they were not considered to be members of humankind. Based on that view, Sepúlveda defended Spanish colonial policies, which he considered to be consistent with universal justice. Sepúlveda's perspective on universal norms was based on the anthropological presupposition of the ethnic inferiority of indigenous people.<sup>22</sup> That type of ethnocentric understanding of the natural law of nations was used to impose the interests of one society and one ethnic group, as if they were universal to others.

The main difference between 16th century Spanish views of universal justice is that one view considered not only the interests of Spain, but also the interests of indigenous people, while the other view equated universal justice with Spanish national interests. For authors such as Sepúlveda, Spain was the nation that represented universal European values against "infidel" and "sub-human" cultures such as those of the indigenous people of the New World.<sup>23</sup>

If Francisco de Vitoria tried to transcend his own intellectual and cultural traditions, and the interests of his country, then his ideas could be considered an endeavour to seek internationally just results. But in the 16th century historical context, Vitoria's ideas could have been considered just and universal if he considered the interests not only of his own country, but also the interests of indigenous nations.

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20. *Id.* at 17-23.

21. *See* DE LAS CASAS, *supra* note 15, at 19-23.

22. *See* GINÉS DE SEPÚLVEDA, *supra* note 14, at 12.

23. *See generally id.* at 109-13.

Moreover, in the 16th century historical context, the concept of universal justice was closely related to the doctrine of human nature. If there was a universal human nature, then the norms of the natural law of nations could have been equally applied to Spain and the indigenous nations of the New World. If there were diverse human natures, and the indigenous nations of the New World were inherently inferior and sub-human, then those norms could not have been equally applied to nations from diverse civilizations.

The most important and original aspect of Vitoria's writings are found in his *relecciones*, in which he addressed topics of key theoretical and practical importance for the Spanish 16th century context. Once a year, as part of the academic system at the *University of Salamanca*, professors were required to lecture for the entire campus. These were known as *relecciones* (re-readings) which were conferences on topics of special importance. The *relecciones* are the main source of Vitoria's doctrines on the law of nations and the conquest of indigenous political communities. Vitoria had fifteen *relecciones*, thirteen of which were published based on notes taken by his students.<sup>24</sup>

In his writings on the law of nations and colonialism, Vitoria mentioned three concrete historical events regarding the Spanish conquest of the New World. First, in his letter to Father Arcos (1534) he addressed the issue of the conquest of the Inca Empire.<sup>25</sup> This document is one of the most important sources on Vitoria's views on law and colonialism. In that letter, Vitoria condemned the Spanish conquest of the Inca Empire and the Spanish actions in the massacre of Cajamarca. Second, in *De temperatía*, he addressed the issue of cannibalism and human sacrifice practised in the Aztec realm in the Yucatan peninsula. Third, in his writing on *De indis*, he mentioned the Spanish alliances with minority indigenous groups as a just cause for war.

Vitoria's international jurisprudential doctrines on the laws applicable to the relations between nations of diverse civilizations should be evaluated by considering philosophical, theological, and anthropological presuppositions which influenced his legal doctrines. Regarding the concept of doctrine, Professor Anthony Carty writes:

An essential element of doctrine is that it is supposed to have authority. The theory, opinion, etc. must be capable of exercising influence. Coming from the tradition of Roman law and

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24. See LUIS G. ALONSO GETINO, 1 RELECCIONES TEOLÓGICAS DEL MAESTRO FRAY FRANCISCO DE VITORIA viii-ix (1933) (analyzing Vitoria's lectures).

25. Francisco de Vitoria, *Letter to Miguel Arcos, OP Salamanca, 8 November (1534)*, in 1 POLITICAL WRITINGS 331-33 (Jeremy Lawrence & Anthony Pagden eds., 12th prtg, 2010).

canon law, particularly in French and German legal communities, doctrine has authority not as a source of law as such, but as freely and spontaneously held opinion, which is likely to become accepted.<sup>26</sup>

In the 16th century, when Spain conquered the Inca and other indigenous nations of the New World, there was not an international system of positive law applicable to the international relations between Spain and the nations of the New World. To find out the nature of Vitoria's international normative doctrines, it is necessary to consider diverse systems of law that applied to nations from diverse civilizations and its mutual relations in the 16th century historical context. It is important to analyze Vitoria's ideas not only on the law of nations, but also on Spanish colonial laws, which were applied to indigenous nations, and on natural law which was applicable to all human beings.

Francisco de Vitoria's normative ideas, which influenced the Spanish scholastic perspective on law, were shaped by his philosophical, theological, and anthropological views of the Inca and other indigenous nations. The facts about the history of the Andean and other indigenous civilizations were gathered by Spanish historians who were witnesses of the Spanish conquest of the New World.<sup>27</sup> The historical writings of Spanish authors were the source of information that shaped the normative doctrines of Vitoria and other Spanish scholastic thinkers on indigenous nations.<sup>28</sup>

In analyzing the normative relations between Spain and the indigenous nations of the New World, Francisco de Vitoria highlights the key

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26. ANTHONY CARTY, *PHILOSOPHY OF INTERNATIONAL LAW* 1 (2007).

27. Authors such as Fray Bernardino de Sahagún, Fray Gerónimo de Mendieta, Fray Diego de Duran, Bernabé Cobo, Pedro Sarmiento de Gamboa, and other Spanish historians wrote about the Inca and Aztec empires from a biased perspective. Despite this, their works are fundamental sources for the study of the Inca and Aztec societies. *See generally* JUAN DE BETANZOS, *SUMA Y NARRACIÓN DE LOS INCAS* (1968); BERNABE COBO, *HISTORY OF THE INCA EMPIRE: AN ACCOUNT OF THE INDIANS' CUSTOMS AND THEIR ORIGIN, TOGETHER WITH A TREATISE ON INCA LEGENDS, HISTORY, AND SOCIAL INSTITUTIONS* (Roland Hamilton trans., Univ. of Texas Press rev. ed. 1979); BERNARDINO DE SAHAGUN, *FLORENTINE CODEX: INTRODUCTIONS AND INDICES* (Arthur J.O. Anderson & Charles Dibble trans., Univ. of Utah Press 1982); JOSE DE ACOSTA, *HISTORIA NATURAL Y MORAL DE LAS INDIAS* (1986); FRAY GERÓNIMO DE MENDIETA, *HISTORIA ECLESIASTICA INDIANA II* (2002); PEDRO SARMIENTO DE GAMBOA, *THE HISTORY OF THE INCAS* (Brian S. Bauer & Vania Smith trans., Univ. of Texas Press 2007).

28. *See* Arnoldo Mora Rodriguez, *La Identidad Latinoamericana: Enfoque Filosófico*, 14 REVISTA COMUNICACION, Aug.-Dec. 2005, at 27, 29. Professor Mora provides an excellent analysis of the contributions of Spanish historians and philosophers to the formation of the Latin American ideas.

importance of theology as the source of all other areas of knowledge.<sup>29</sup> Theology had a direct influence in his doctrines on the law of nations and natural law.<sup>30</sup> Vitoria believed in the existence of universal objective norms applicable to all human beings and nations. He was concerned with the renewal of the image of God (*imago Dei*), of human beings, and the eternal implications of the extreme violent actions of Spanish conquerors and indigenous nations in the New World.

### III. FRANCISCO DE VITORIA AND THE IMPORTANCE OF HISTORICAL CONTEXT

On October 4, 1483, Francisco de Vitoria was born in the city of Burgos, Castile, Spain.<sup>31</sup> He became one of the most influential authors in the history of international law. Vitoria, together with Hugo Grotius and Alberico Gentili, is considered one of the founders of international law.<sup>32</sup> In 1526, Vitoria became a professor of theology at the University of Salamanca and taught there until he died in 1546.<sup>33</sup> He replaced the *Sentences of Peter Lombard* for Thomas Aquinas' *Summa Theologiae* as the main text for the study of theology.<sup>34</sup> In his lectures, he applied general theological principles to concrete and important issues of his time such as the Spanish conquest of the indigenous nations of the New World. As a result of these lectures, Vitoria developed original ideas about the Spanish conquest and colonization of the New World. His views on the law of nations were expressed in his lectures titled *De indis*, *De iure belli*, and *De temperatia*, among others.

To assess Vitoria's ideas, it is important to consider the specific historical context which influenced his thinking. His ideas were those of a

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29. See, e.g., VICENTE BELTRAN DE HEREDIA, LOS MANUSCRITOS DEL MAESTRO FRAY FRANCISCO DE VITORIA (1928) (demonstrating the prevalence of theology in Vitoria's legal doctrines).

30. POLITICAL WRITINGS, *supra* note 25, at 3, 10, 40. For example, regarding the doubt about the justice of the conquest of the New World, he wrote:

It is not the province of lawyers, or not of lawyers alone, to pass sentence in this question. Since these barbarians we speak of are not subjects [of the Spanish Crown] by human law (*iure humano*), as I shall show in a moment their affairs cannot be judged by human statutes (*leges humanae*), but only by divine ones, in which jurists are not sufficiently versed to form an opinion on their own.

*Id.* at 238.

31. See, e.g., RAMÓN HERNÁNDEZ MARTÍN, FRANCISCO DE VITORIA: VIDA Y PENSAMIENTO INTERNACIONALISTA 17 (1995).

32. See, e.g., ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 58 (1950).

33. JUAN BELDA PLANS, LA ESCUELA DE SALAMANCA Y LA RENOVACION DE LA TEOLOGIA EN EL SIGLO XVI 326 (2000).

34. *Id.* at 328.



Spanish Catholic theologian who lived in the 16th century.<sup>35</sup> Thus, Vitoria wrote about the conquest of the New World and the laws applicable to nations as a reaction to the Spanish conquest of the Inca realm. To find out if Vitoria's international normative ideas were inherently unjust, or if they provided a beginning for just norms applicable to international relations between different civilizations, it is essential to understand Vitoria's views of concrete indigenous nations such as the Inca.

If Vitoria made a *bona fide* effort to transcend his cultural settings and proposed ideas which could have benefited the interests of indigenous nations, then his ideas could have been internationally just in the 16th century Spanish context. If his ideas were a normative discourse to justify the Spanish conquest and colonization of indigenous nations under a false claim of international justice, then he was one of the main contributors to the establishment of a biased, unjust, and ethnocentric international law.

To answer the question regarding the nature of Vitoria's international normative ideas, it is important to attempt to understand his views as they were understood in the 16th century Spanish historical context.<sup>36</sup> Consistent with Professor Quentin Skinner's view of history, it can be noted that Spanish scholastic thinkers, including Vitoria, were focused on certain issues that were specific to their historical and ideological context.<sup>37</sup> To interpret the facts of the Spanish conquest of the New World, Vitoria used theological and philosophical concepts which were meaningful to his 16th century Spanish audience. Vitoria's audience believed in a Christian/Catholic worldview of reality. These theological and philosophical concepts became the basis of Vitoria's normative ideas on the laws applicable to nations from diverse civilisations.

Here, applying Quentin Skinner's historical approach in this article, the justice of Vitoria's and other Spanish scholastic thinkers' ideas should be measured consistently with 16th century views.<sup>38</sup> In regards to the importance of analyzing ideas consistently with the intellectual context in which they were written, Skinner writes:

I am only pleading for the historical task to be conceived as that of trying so far as possible to think as our ancestors thought and to see things their way. What this requires is that we should recover the concepts they possessed, the distinctions they drew

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35. See generally 1 QUENTIN SKINNER, VISIONS OF POLITICS: REGARDING METHOD 3 (2002) (explaining the importance of historical context).

36. *Id.*

37. *Id.*

38. *Id.*

and the chains of reasoning they followed in their attempts to make sense of their world.<sup>39</sup>

The nature and intentions of Vitoria's writings can be interpreted by understanding his audience. Vitoria communicated to an audience of 16th century Spanish government officials, professors, and church leaders. Therefore, to comprehend his ideas, it is essential to know the legal, theological, and philosophical languages which had a rational meaning for his 16th century European audience. As a professor and friar, he often interacted in the Spanish cities of Valladolid and Salamanca with former catholic missionaries and former Spanish conquerors. In their dialogues with Vitoria, they wanted to appease their consciences and receive forgiveness for their crimes to ensure their eternal salvation.<sup>40</sup>

Historical facts about the indigenous nations of the New World, which Vitoria knew or should have known, are essential to understanding the nature of Vitoria's international normative ideas.<sup>41</sup> Vitoria specifically only mentioned the conquest of the Inca Empire, the indigenous nations' practice of human sacrifice in Yucatan, and the Spanish alliances with the Tlaxcala, a minority indigenous group. The consideration of these facts helps understand the implications of Vitoria's international normative ideas for the relations between civilizations. It also helps answer the question of the application of norms, which emerged in one civilization, to the international relations between diverse civilizations.

Vitoria believed that one of the first widespread violations of natural law and the law of nations during the invasion of the Inca realm occurred in the city of Cajamarca. In a letter written on November 8, 1534, to his friend Miguel de Arcos, Vitoria expressed his rejection of Francisco Pizarro and other Spanish conquerors' violent actions against the Inca people in the city of Cajamarca.<sup>42</sup> This was the beginning of his intellectual task to develop a discourse on the laws applicable to Spain's international relations with the indigenous nations of the New World.

Vitoria's letter to Father Arcos shows the critical importance of the concept of human nature in Vitoria's view of the conquest of the Inca

39. *Id.* at 47.

40. LUCIANO PEREÑA, *LA ESCUELA DE SALAMANCA, PROCESO A LA CONQUISTA DE AMERICA 19-22* (1986); *see also* FRANCISCO DE VITORIA, *RELECTIO DE INDIS O LIBERTAD DE LOS INDIOS XXXI-XLI* (Luciano Pereña & Jose M. Pérez Prendes eds., 1967).

41. *See* HORACIO ZAPATER, *AMERICA LATINA: ENSAYOS DE ETNOHISTORIA 71-91* (Marcelo Rojas Vasquez ed. 2007) (explaining and analyzing historical facts regarding the Aztec and Inca civilizations during the 1519-1621 period).

42. *See* ESCUELA DE SALAMANCA, *CARTA MAGNA DE LOS INDIOS: FUENTES CONSTITUCIONALES 1534-1609*, at 35-40 (Luciano Pereña & Carlos Baciero eds., Consejo Superior de Investigaciones Científicas 1988).

Empire. Vitoria's view of human nature is a central aspect of his theological and philosophical doctrines, which served as the foundation for his ideas on political communities and the laws applicable to nations from diverse civilizations. For Vitoria, if indigenous people were sub-human, then they could not violate the laws applicable to human beings.<sup>43</sup> However, if they were fully human, then natural law applied to them and their human dignity should have been respected.<sup>44</sup> Vitoria's letter entails a strong criticism of the Spanish conquerors' actions in the Inca realm. The Spanish wars in the Andean region were contrary to Francisco de Vitoria's scholastic perspective on the laws applicable to nations; Vitoria had reasonable doubt about the legality of the conquest of the New World.<sup>45</sup> This perspective was contrary to the Spanish government's colonial policy, which was justified by normative instruments such as the *Requerimiento*, *Alexandrian Papal Bulls*, and *Capitulation of Toledo*.

#### IV. VITORIA'S REJECTION OF SPANISH COLONIAL LAW DOCTRINES AND THE CONQUEST OF THE INCA EMPIRE

In the 16th century context, prevalent European medieval normative doctrines were applied to justify the conquest of indigenous people's nations, which also included the Inca. The legal ideas reflected in the *Alexandrian Papal Bulls*, *Requerimiento*, and the *Capitulations of Toledo* served as a normative discourse to justify the Spanish conquest of the New World. Vitoria criticized the doctrinal foundations of these legal instruments. Also, Vitoria's rejection of the *Requerimiento* was especially relevant concerning the conquest of the Inca Empire, since this document was the main legal foundation for the Spanish conquest and unjust use of force in the Andean Region.

Along with its political and military powers, Spain also used its laws to justify its conquest and subsequent colonization of overseas territories. The Spanish laws used to justify Spain's conquests in the New World reflected the influence of theological and philosophical presuppositions about the nature of indigenous people and political authority. The *Alexandrian Papal Bulls*, *Requerimiento*, and *Capitulations* were based on the doctrine of the Pope's universal authority on earthly matters and the

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43. *Id.* at 39.

44. *Id.*

45. *Id.* at 37.

view of indigenous people as ethnically inferior and in need of Spanish protection.<sup>46</sup>

The doctrine of universal papal authority, on spiritual and earthly matters, served as one of the main foundations for the creation of norms applicable to the international relations of Spain with indigenous nations of the New World. The laws, which justified the Spanish actions for the conquest and colonization of the New World, were also based on theological and philosophical presuppositions on human nature and political authority. One of the main presuppositions of normative colonial Spanish instruments was the inherent superiority of Spain's political authority over indigenous nations.<sup>47</sup>

In 16th century Spain, Jews, Muslims, Incas, and other non-Christian people were considered infidels.<sup>48</sup> Unlike Muslim and Jewish people, the Incas never lived in Christian territories, did not know about Christianity, and never took over European territories. Nonetheless, normative instruments such as the *Requerimiento*, *Alexandrian Papal Bulls*, and *Capitulations* were based on similar theological and philosophical presuppositions as the ones used in the normative doctrines, which justified the use of force against Jews and Muslims by European nations.<sup>49</sup>

After the success of Christopher Columbus in "discovering" new territories, the Spanish Crown decided to expand its geopolitical influence in the New World.<sup>50</sup> For this expansion, Spain used normative justifications such as the papal bulls. One of the presuppositions reflected in the papal bulls was the right of Christian kings to take over territories that did not belong to other Christian nations. This was known as the "right of discovery" which was based on Roman law concepts.<sup>51</sup>

The *Inter caetera divinai* was one of the main papal bulls used by Spain to justify the conquest of the New World. This normative instrument recognized Spain's victory against Muslims who occupied Christian Spanish territories in Granada.<sup>52</sup> Because of this recognition, Spain was rewarded with the authority to conquer the territories of "infidel"

46. See, e.g., Robert A. Williams Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 55-56 (1991).

47. See, e.g., SILVIO ZAVALA, *LA FILOSOFÍA POLÍTICA EN LA CONQUISTA DE AMÉRICA* 50 (3d ed. 1984).

48. See JAMES MULDOON, *POPES, LAWYERS AND INFIDELS* 45-48 (1979).

49. *Id.* at 141.

50. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 81 (1990).

51. *Id.* at 99.

52. *Id.* at 80.

nations in the New World.<sup>53</sup> From the Inca's perspective, as an indigenous people, Spain was a mysterious foreign authority from an unfamiliar place, and granted their territory and other indigenous peoples' territories to an unknown king. These unjust actions were done to change the Inca culture, and military force was used to diminish the indigenous population.<sup>54</sup>

The papal bull *Inter caetera divinae* indicated the pope had an apostolic power, which was initially given by Jesus Christ to the Apostle Peter. It also asserted that the pope granted jurisdiction over the New World to the Spanish Crown. The papal bulls' coercive force was based on the threat of excommunication for Christian rulers who violated their provisions.<sup>55</sup> Additionally, the *Capitulations of Santa Fe* was an important normative instrument for the relations between Spain and the New World. In 1491, Christopher Columbus made a request to King Ferdinand and Queen Isabella to support his efforts to travel and discover a new route to Asia.<sup>56</sup> Historian Lyle McAlister writes: "[I]n April 1492 Isabella and Ferdinand gave a patent to Columbus known as the *Capitulations de Santa Fe* . . . [i]n return for his enterprise, the Catholic Kings appointed him viceroy, admiral, and governor in all the lands he might discover . . . ."<sup>57</sup>

Capitulations were agreements between the Spanish Crown and conquerors of the New World on issues of jurisdiction, finances, and others.<sup>58</sup> Through these capitulations, the Spanish Crown both regulated Spanish citizens actions in indigenous territories, and also granted them discovery, conquest, and settlement authority.<sup>59</sup> The main normative instrument that gave jurisdiction and authority to Francisco Pizarro to conquer and colonize the Inca Empire was the *Capitulation of Toledo*. On July 26, 1529, in the city of Toledo, Spain, Queen Isabella and the *Supreme Council of Indies* signed the *Capitulation of Toledo*.<sup>60</sup> The

53. *Id.*

54. MIGUEL LEON PORTILLA, *EL REVERSO DE LA CONQUISTA: RELACIONES MEXICAS, MAYAS E INCAS* 120, 133 (Joaquin Moritz ed., 2007) (explaining indigenous perspectives on the Spanish conquest of the New World).

55. CARNEGIE INST. OF WASH., *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES* to 1648, at 63 (Frances G. Davenport ed., 1917).

56. LYLE N. MCALISTER, *SPAIN AND PORTUGAL IN THE NEW WORLD 1492-1700*, at 69 (2nd ed. 1987).

57. *Id.*

58. *See* CARLOS DEUSTUA PIMENTEL, *ENSAYOS SOBRE LAS INSTITUCIONES JURÍDICAS DEL VIRREINATO DEL PERÚ* 32-37 (Carlos Deustua Landazuri ed., 2007).

59. *Id.*

60. *See* José Antonio del Busto, *Conquista y Virreinato*, in *ENCICLOPEDIA TEMÁTICA DEL PERÚ* 28 (2004).

*Capitulation of Toledo* recognized Francisco Pizarro as governor and general Captain of Peru, and it also granted him the authority and jurisdiction to conquer and colonize the Inca Empire. Supposedly, the Castilian Crown had the authority to grant jurisdiction to Pizarro over the Incan realm because the Pope granted the Spanish Crown jurisdiction over the New World in the *Alexandrian Papal Bulls*. Regarding the *Capitulation of Toledo*, Jose Antonio del Busto writes:

On the 26th of July, 1529, the Capitulation of Toledo was signed in the city of Toledo, Castile, the New. In this document, the Crown, nominally represented by the empress Isabel . . . and the counsellors of the Royal and Supreme Council of Indies, named Francisco Pizarro governor, captain general, and main bailiff of Peru.<sup>61</sup>

The *Capitulation of Toledo* granted Pizarro the authority to create an army, acquire horses for war, grant *repartimientos* (distributions of indigenous persons), distribute gold, and evangelise indigenous people.<sup>62</sup> The *Capitulation of Toledo* also describes Pizarro's merits and mentions he discovered Peru and the city of Tumbes. Additionally, it asserts that Pizarro used his own finances in those expeditions.<sup>63</sup> In general, the *Capitulation of Toledo* authorized Pizarro to continue the discovery, conquest, and colonization of Peru.<sup>64</sup>

The norms of the *Capitulation of Toledo* clearly established the Spanish Crown's responsibility in the conquest and colonization of the Incan realm. The *Capitulation of Toledo* was based on the doctrinal understanding of the universal jurisdiction of the Pope who could grant the territories of the New World to the king of Spain. Therefore, the Spanish Crown had the authority to grant indigenous territories to its citizens.

Father Montesinos, a Dominican missionary, spoke against the unjust treatment of the indigenous people of the New World and defended their human dignity.<sup>65</sup> As a reaction to reform movements, such as the one led by Montesinos, the Spanish Crown decided to "humanize" its treatment of indigenous people in the New World by promulgating the

61. *Id.*

62. *Id.* at 28-29.

63. See PIMENTEL, *supra* note 58, at 69.

64. ANTONIA MARIA FABIE, *Capitulación y Asiento Celebrados con Francisco Pizarro para la Conquista y Población de las Provincias del Perú, Donde se Contienen Varias Disposiciones para el Buen Gobierno e Ellas*, in 9 COLECCIÓN DE DOCUMENTOS INÉDITOS RELATIVOS AL DESCUBRIMIENTO, CONQUISTA Y ORGANIZACIÓN DE LAS ANTIGUAS POSESIONES ESPAÑOLAS DE ULTRAMAR 2, at 407, 409-10 (1895).

65. See LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* 18 (1965).

*Laws of Burgos* (1512-1523).<sup>66</sup> In describing those laws, Salord Bertrán writes:

In those laws, the Crown recognized its obligation to govern the Indians consistent with natural law and ethics. Although some historians consider that because it did not prohibit the “encomienda” (the control of land and indigenous persons by colonists), it did not establish an authentic foundation in favour of the rights of the Indians.<sup>67</sup>

The *Laws of Burgos* were promulgated considering the situation on the island of Española and expanded to Puerto Rico and Jamaica. These laws were also valid during the conquest of the Inca realm. Despite the existence of some just norms in the *Laws of Burgos*, there were also unjust ones, such as the *Requerimiento*. In regards to the *Requerimiento*, Lyle McAlister writes:

This instrument summarized the genesis of just title . . . and called on the Indians to acknowledge the pope as ruler of the world and, in his stead, the king of Castile by virtue of donation. It then informed them that if they accepted the summons they would be received as loyal vassals, but if they did not, they would be deprived of their liberty and property . . . .<sup>68</sup>

The *Requerimiento* was one of the main normative instruments used to justify the conquest of the Inca Empire. The *Requerimiento* was based on the concept of the unity of humankind as part of God’s creation,<sup>69</sup> and explained that from this common origin, the world was divided into diverse kingdoms.<sup>70</sup> According to it, “[f]rom all the people, God, our Lord, gave authority to one, who was named St Peter, to be the lord and superior over all human beings of the world and whom all should obey . . . .”<sup>71</sup> This means that according to the *Requerimiento*, St. Peter was granted all of the kingdoms and jurisdictions of the world and authority over people of all beliefs, including Christians, Jews, and Muslims among others. He was also named Pope, which meant that he was the governor of all human beings. This authority was also given to the successors of St. Peter, the subsequent Popes.

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66. See MANUEL SALORD BERTRÁN, LA INFLUENCIA DE FRANCISCO DE VITORIA EN EL DERECHO INDIANO 106 (2002).

67. *Id.* at 106-07.

68. MCALISTER, *supra* note 56, at 90.

69. See Diego de Encinas, *Provisión que se Manda al Marques Don Francisco Pizarro para que Pudiese Continuar las Conquistas de las Provincias del Perú*, in DE BELLO CONTRA INSULANOS INTERVENCIÓN DE ESPAÑA EN AMÉRICA 538-39 (Luciano Pereña ed., 1982).

70. *Id.* at 539.

71. *Id.*

The *Requerimiento* explains that the papal authority continues until the present.<sup>72</sup> The *Requerimiento* was used, by Spanish conquerors, to justify their authority over indigenous territories. According to it: “[o]ne of the last popes, who succeeded him [St Peter] . . . as lord of the world donated this Islands and lands . . . to the said King and Queen and their successors in this kingdom with all that exists in them . . . .”<sup>73</sup> The *Requerimiento* demanded that indigenous nations recognise the universal authority of the pope and European emperor.<sup>74</sup> The Spanish conquerors wanted indigenous nations to recognize Spain’s sovereignty over the New World. If indigenous nations rejected the *Requerimiento*, they would suffer the following consequences:

With God’s help, we will powerfully attack you and we will make war everywhere and in all possible manners. We will subjugate you to the yoke and obedience of the Church and our Highnesses. We will take you, your women, and your children, and we will make you slaves . . . We will also take your properties . . . The deaths and damages which will happen . . . will be your fault and not the fault of our Highnesses, ours or of the people who came with us.<sup>75</sup>

As part of the Spanish strategy for the conquest of the Inca Empire, Fray Vicente de Valverde, in the Inca city of Cajamarca, explained (through his interpreter Martinillo de Poechos) the medieval Spanish legal colonial discourse of the *Requerimiento* to the Incan King Atahualpa.<sup>76</sup> Valverde said that Atahualpa had to accept Christianity and the universal jurisdiction of the pope and the emperor. If Atahualpa rejected the *Requerimiento*, the Spaniards could use force against him. King Atahualpa rejected the conqueror’s demands. This gave the conquerors the normative excuse they needed to use force against the Incan king and his people.<sup>77</sup> Vitoria rejects the normative foundations of the *Requerimiento* and condemns the massacre of Cajamarca, which was the beginning of the conquest of the Inca Empire.

A comparative analysis between the text of the *Requerimiento* and Vitoria’s writings shows how he opposed it.<sup>78</sup> The *Requerimiento* recognized the universal authority of the pope on earthly matters.<sup>79</sup> However,

72. *Id.*

73. *Id.*

74. *Id.* at 540.

75. *Id.* at 540-41.

76. PIMENTEL, *supra* note 58, at 89-90.

77. *See infra* notes 202-05 and accompanying text.

78. PEREÑA, *supra* note 40, at 34-45.

79. POLITICAL WRITINGS, *supra* note 25, at 259.



Vitoria believed the pope did not have authority on earthly matters. The *Requerimiento* explained the universal Lordship of Jesus Christ, which was transmitted to the Apostle Peter, and then transferred to the pope to give him power. However, according to Vitoria, Christ did not transfer political power to the pope. The pope could not have universal political power by natural law, positive law, or by the law of nations.<sup>80</sup>

Contrary to the discourse of the *Requerimiento*, Vitoria believed that the pope did not have the political power to take away the sovereignty of indigenous nations and give it to the king of Spain. Moreover, even if the pope had such power, he could not grant it to the king of Spain. Regarding his rejection of the pope's authority over indigenous nations and the doctrines of the *Requerimiento*, Vitoria stated: ". . . if the barbarians refuse to recognize any dominion (dominium) of the pope's, war cannot on that account be declared on them, nor their goods seized."<sup>81</sup> Francisco de Vitoria rejected the arguments of some canon lawyers, especially Hostiensis and Silvestre Prierias, who believed in the temporal authority of the pope over the entire world.<sup>82</sup> Vitoria rejected the idea of an unlimited papal authority on earthly matters, which was the foundation of the *Requerimiento*.<sup>83</sup> Vitoria believed that the pope did not have *dominium potestate civili*.<sup>84</sup>

Vitoria indicated it was self-evident that the universal authority of the pope could not be sustained by either natural or human law.<sup>85</sup> The only possible source of the pope's authority on earthly matters was divine law. However, Vitoria believed that Christ did not give the pope universal jurisdiction on earthly matters.<sup>86</sup> Vitoria sustained his view by indicating that the pope did not have spiritual jurisdiction over non-Christians, and therefore he could not have jurisdiction over temporal matters.<sup>87</sup> He also argued that even if the pope had temporal jurisdiction, he could not have given it to secular rulers because if it existed, it would have belonged to the institution of the papacy.<sup>88</sup>

Because Francisco de Vitoria recognized the temporal authority of the pope on earthly matters, which were directly related to spiritual ones,

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80. *Id.* at 260.

81. *Id.* at 263.

82. FRANCISCO DE VITORIA, RELECTIO DE INDIS O LIBERTAD DE LOS INDIOS 43 (Luciano Pereña & Jose M. Pérez Prendes eds., 1967).

83. *Id.* at 46.

84. *Id.*

85. *Id.* at 46-47.

86. *Id.* at 48.

87. *Id.*

88. *Id.* at 49.

the pope could invalidate civil laws of Christian countries if they promoted sinful behaviour.<sup>89</sup> He could also order Christian sovereigns to stop wars which damage the spiritual wellbeing of their people.<sup>90</sup> The pope could occasionally appoint new Christian sovereigns.<sup>91</sup> If the majority of indigenous people became Christian, the pope could impose Christian sovereigns to indigenous nations. In a limited sense, the pope had access to the two sources of power, secular and ecclesiastical.<sup>92</sup>

For Vitoria, it was very clear that the pope did not have jurisdiction over non-Christian nations.<sup>93</sup> Consistent with this view, just wars could not be waged against indigenous nations and their territories could not be taken away based on papal authority.<sup>94</sup> Vitoria believed that even if indigenous nations rejected Jesus Christ as saviour, war could not be waged against them. Therefore, it would be illogical and contradictory to wage wars against them because they rejected papal authority.<sup>95</sup>

In his letter to Miguel Arcos, Vitoria recognized the limited jurisdiction of the king of Spain in the New World.<sup>96</sup> Even assuming that indigenous nations were sovereign, similar to European nations, for Vitoria, they could have been under the authority of a higher sovereign—the king of Spain. This was based on his view on the existence of higher and lower levels of territorial and political dominium (*dominium altum* and *dominium bassum*).<sup>97</sup> Despite his recognition of a certain type of *dominium* of the Spanish Crown, he rejected a European emperor's universal authority.

The recognition of a European emperor's authority over indigenous territories was another foundation of the *Requerimiento*. Vitoria argued against the view of Bartolus of Sasoferrato, who recognized the authority of the European emperor over the entire world.<sup>98</sup> If the emperor could only have *dominium totius orbis*, it could be by natural law, human law, or divine law. Based on Thomas Aquinas' views, Vitoria indicated that by natural law all human beings were free, and therefore the emperor could not have *dominium* over the entire world.<sup>99</sup> Vitoria only recognized

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89. *Id.* at 50.

90. *Id.*

91. *Id.*

92. *Id.* at 51.

93. *Id.*

94. *Id.* at 51-52.

95. *Id.* at 52.

96. VITORIA, *supra* note 17, at 332.

97. VITORIA, *supra* note 82, at 34.

98. POLITICAL WRITINGS, *supra* note 25, at 252.

99. VITORIA, *supra* note 82, at 36.

the *dominium* parents had over their children and husbands over their wives to be consistent with natural law.<sup>100</sup>

Regarding divine law, Vitoria distinguished two possibilities: (1) there was an emperor before Christ came to earth, or (2) Christ established an emperor. Vitoria indicated that before Christ, there was no emperor over the entire world because the Jewish people were not subject to any universal emperor, such as Nebuchadnezzar. Also, Hebrew law prohibited the recognition of any foreign sovereign.<sup>101</sup> Vitoria indicated that after Noah, the world was divided into various territories and kingdoms, and the descendants of Noah created diverse nations.<sup>102</sup>

Vitoria indicated that, in Christ's humanity, it was not certain that Christ had temporal authority. Vitoria wrote: ". . . it is by no means certain that Christ was temporal master of the world according to his humanity - more probably not, since the Lord himself seems to have asserted '[m]y kingdom is not of this world' (John 18:36)."<sup>103</sup> Vitoria thought that even if Jesus Christ had temporal authority, the scriptures did not mention that he left it to an emperor.<sup>104</sup> To prove his point, Vitoria mentioned the division of jurisdiction between the Western and Eastern part of the Christian European Empire.<sup>105</sup>

Vitoria rejected the universal authority of the emperor by human law because there was not an enactment (*lex*) which could have granted him such authority. Even if there was such a law, it would be invalid because an emperor would not have jurisdiction to create it.<sup>106</sup> He wrote: ". . . the emperor did not have universal jurisdiction before the enactment of the law, the enactment could not be binding on those who were not his subjects."<sup>107</sup>

Francisco Suarez, consistent with Vitoria's views, also rejected the emperor's universal jurisdiction. He believed that the Roman emperor was neither the lord of the universe nor had universal jurisdiction over the entire world.<sup>108</sup> The emperor did not receive universal jurisdiction from God, was not elected by the nations of the world, nor did he conquer the world by war.<sup>109</sup> Suarez believed that there was no worldwide

100. *Id.*

101. *Id.* at 37.

102. *Id.* at 38.

103. POLITICAL WRITINGS, *supra* note 25, at 256.

104. *Id.*

105. *Id.*

106. *Id.* at 257-58.

107. *Id.* at 257.

108. See FRANCISCO SUAREZ, *On Laws and God the Lawgiver*, in SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ 671 (James Brown Scott ed., 1944).

109. *Id.* at 671.

consensus to grant universal power to the Roman emperor.<sup>110</sup> He was given that authority by the Roman people; therefore, his authority was limited to that jurisdiction.<sup>111</sup> Jesus Christ did not grant the pope authority over temporal matters.<sup>112</sup> Therefore, the pope could not give the emperor any power he did not have, such as secular earthly power.<sup>113</sup> In the Andean region, Solórzano de Pereira followed Vitoria's ideas and believed that the New World was not under the jurisdiction of the European emperor.<sup>114</sup>

Vitoria rejected the use of deception or coercion to force indigenous nations to accept agreements such as the *Requerimiento*, writing:

The barbarians do not realize what they are doing; perhaps, indeed, they do not even understand what it is the Spaniards are asking to them. Besides which, the request is made by armed men, who surround a fearful and defenceless crowd. Furthermore, since the barbarians already had their own true masters and princes, as explained above, a people cannot without reasonable cause seek new masters, which would be to the detriment of their previous lords.<sup>115</sup>

Vitoria's rejection of the doctrinal elements of the *Requerimiento* was a significant contribution against one of the central 16th century Spanish normative discourses which justified the conquest of the New World.

The *Capitulations of Toledo*, the *Alexandrian Papal Bulls* and the *Requerimiento* were medieval normative instruments which granted Spain legal authority to conquer the Inca and other indigenous territories. Vitoria's rejection of the doctrinal foundations of those normative instruments was based on his belief that positive laws, which contradicted natural law, were not true laws.<sup>116</sup> Vitoria's rejection of the theological and philosophical foundations of the normative instruments which justified the conquest of the New World created a doubt about the legality of the Spanish actions.<sup>117</sup> This also created the conditions for the creation of new legal instruments, known as the *New Laws of the Indies*, applicable to the

110. *Id.*

111. *Id.* at 671-72.

112. *Id.* at 672-74.

113. *Id.* at 674.

114. 5 JUAN DE SOLÓRZANA Y PEREIRA, DE INDIARUM IURE: LIBER II: DE ACQUISITONE INDIARUM: CAP. 16-25, at 281 (C. Baciero ed., 2000).

115. POLITICAL WRITINGS, *supra* note 25, at 276.

116. See VITORIA, *supra* note 82.

117. See, e.g., PEREÑA, *supra* note 40, at 23.

international relations between Spain and the indigenous nations of the New World.

Vitoria's normative doctrines influenced the making of the *New Laws of the Indies* and other normative instruments,<sup>118</sup> which shaped the actions and decisions of the king of Spain, the *Council of Indies* and other Spanish institutions.<sup>119</sup> The *New Laws of the Indies*, also known as the *Laws and Ordinances Newly Made by His Majesty for the Government of the Indies and the Good Treatment and Preservation of the Indians* or *New Laws*, addressed issues regarding the structure of the Spanish colonial regime in the New World and its treatment of indigenous persons.<sup>120</sup>

The *Council of the Indies* in Seville and the Viceroyalties of New Spain and Peru, among others, were responsible for implementing the *New Laws*. Those laws were promulgated to recognise the humanity of the Incas and other indigenous nations. The Spanish conquerors in Peru rejected the *New Laws* and refused to abolish the *encomienda* which was an institution like slavery.<sup>121</sup>

The Spanish Viceroy, Blasco Núñez de Vela, was responsible for the application of the *New Laws of the Indies* in Peru to ameliorate the situation of the Incas and other indigenous people. The Spanish conquerors, led by Gonzalo Pizarro, opposed the *New Laws* and the actions of Blasco Núñez. The conquerors assassinated Núñez in order to stop the implementation of the laws.<sup>122</sup> The norms of the *New Laws* became part of a codification of the general *Laws of the Indies*, a body of colonial Spanish law, which was applied since the conquest of the New World until the formation of independent Latin American nations.<sup>123</sup>

For Vitoria, before the Spanish arrival to the New World, there were no legal justifications for the conquest of indigenous nations. Therefore, consistent with Vitoria's ideas, the Spanish conquest of the Inca realm did not have legal justifications. If Vitoria's rejection of fundamental colonial doctrines is properly considered, it cannot be concluded that he was the founder of a colonial and ethnocentric international normative discourse. Rather than being peripheral in Vitoria's doctrinal structure,

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118. See José Manuel Pérez-Prendes & Muñoz de Arraco, *El Derecho Indiano, Modelador de la America Española*, in FORUM HISPANO AMERICANO, ESPAÑA Y LOS VALORES ÉTICOS EN LA FORMACIÓN DE AMERICA: CASINO DE MADRID, FEBRERO-MAYO 1999, at 91 (2000).

119. For one of the best studies on the Council of Indies, see ERNESTO SCHAFFER, EL CONSEJO REAL Y SUPREMO DE LAS INDIAS: SU HISTORIA, ORGANIZACIÓN Y LABOR ADMINISTRATIVA HASTA LA TERMINACIÓN DE LA CASA DE AUSTRIA (2003).

120. See MCALISTER, *supra* note 56, at 162.

121. See BERTRÁN, *supra* note 66, at 208.

122. ENCICLOPEDIA TEMÁTICA DEL PERÚ, *supra* note 60, at 167.

123. See, e.g., MCALISTER, *supra* note 56, at 162.

his rejection of the pope and European emperor's authority in the New World is of central importance.

V. FRANCISCO DE VITORIA, THE CONQUEST OF INDIGENOUS PEOPLES,  
AND THE LAW OF NATIONS

Even though Francisco de Vitoria recognised that the law of nations was a part of natural law, he also acknowledged its positive law elements. How was he able to integrate the natural and positive aspects of the law of nations? Vitoria integrated will and reason based on his view of eternal law as the source of integration and unity of all systems of law. He also used the scholastic dialectic method to reconcile opposite concepts. Regarding integrative jurisprudence, Professor Harold Berman believes that “[p]rior to the eighteenth century, positivist, naturalist, and historicists theories were not separate ‘schools’ but rather three complementary perspectives on law.”<sup>124</sup>

Francisco de Vitoria had an integrative perspective of law. This approach was seen in his law of nations' doctrines. For example, respect for the right to life was considered a fundamental norm of natural law, and grave violations of natural law justified the application of the law of nations to use force against countries which systematically killed innocent persons.

The scholastic dialectic method served to integrate contrary ideas. Francisco de Vitoria's use of this method is seen in his comparison of opposite perspectives to find truth. He often states his opponents' views first, then contradicts those statements, proving the logical and intellectual superiority of his perspective or asserting the synthesis of both positions.<sup>125</sup> The interaction and interrelation between natural law and positive law is seen in Vitoria's perspective on the law of nations.<sup>126</sup> According to him:

. . . there are certainly many things which are clearly to be settled on the basis of the law of nations (*ius gentium*), whose derivation from natural law is manifestly sufficient to enable it to enforce binding rights. But even on the occasions when it is not derived from natural law, the consent of the greater part of the

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124. HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 292 (1993).

125. For an explanation of the scholastic dialectic method see HAROLD J. BERMAN, *LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* 148 (1983) (explaining the scholastic dialectic method).

126. *Id.*

world is enough to make it binding, especially when it is for the common good of all men.<sup>127</sup>

Regarding Vitoria's views on the law of nations, Juan Cruz indicates that Vitoria's ideas were based on the recognition of "the anthropological and ethical dimensions of original sin, which disturb human nature."<sup>128</sup> Cruz believes that Thomas Aquinas recognised the existence of a law of sin or *lex fomitis*. This was an internal inclination of human beings towards evil and selfishness, which existed in human nature because of original sin.<sup>129</sup> In his work *On Homicide*, Vitoria also recognized the existence of the law of sin.<sup>130</sup> Vitoria followed Thomas Aquinas' view that human beings, initially, received from God a law consistent with their good and rational nature.<sup>131</sup> As a result of original sin, human beings often choose to act against their nature and rational thinking.<sup>132</sup> For Cruz, the *lex fomitis* was a presupposition recognised by Vitoria and the Spanish scholastic school of thought which explains the function of the law of nations.<sup>133</sup> Regarding the differences between the law of nations and natural law in Vitoria's thinking, Juan Cruz writes:

. . . if "natural law" responds to a nature, which . . . keeps determinant aspects of human beings, the "law of nations" exists to resolve contradictory tensions which human nature is penalized and weakened with . . . Because of this, in the reasoning used to deduce each concrete "law of nations," natural law is in the main premise, the application of the theological hypothesis in the minor premise, and the formulation of the correspondent law in the conclusion. This makes a concrete "law of nations" the expression of a convenient adjustment to save the natural law formulated in the main premise. In this sense, only through the theological hypothesis, the law of nations comes closer to natural law, but it comes closer to positive law because of the deliberation and voluntary effort of human beings in the process of admitting and reaching consensus.<sup>134</sup>

For Cruz, Vitoria believed that the law of nations was convenient for the existence of human beings because of their fragility and social

127. POLITICAL WRITINGS, *supra* note 25, at 280-81.

128. Juan Cruz, *La Soportable Fragilidad de la Ley Natural: Consignación Transitiva del Ius Gentium en Vitoria*, in LEY Y DOMINIO EN FRANCISCO DE VITORIA 13, 14 (Ediciones Universidad de Navarra (EUNSA) ed. 2008).

129. *Id.*

130. FRANCISCO DE VITORIA, RELECTION ON HOMICIDE 69, 71 (John P. Doyle trans., 1997).

131. LEY Y DOMINIO EN FRANCISCO DE VITORIA, *supra* note 128, at 14.

132. *Id.*

133. *Id.* at 15.

134. *Id.*

nature.<sup>135</sup> Regarding the integrative nature of the law of nations, Teófilo Urdanoz writes: “[t]his harmonic conception of Vitoria’s law of nations prevailed in the next centuries . . . Even the first scholars distinguished an ‘ius gentium’ natural and the positive norms of ‘ius gentium voluntariou’ according to the terminology of Grotius.”<sup>136</sup>

Vitoria acknowledged the authority of the international community to create laws of universal validity reflected in the law of nations which were based on the consensus of nations. The natural law aspect of the law of nations implied the participation of humankind in eternal law. Eternal law was also the final source of authority for the positive aspect of the law of nations, and its violations were considered sins. Regarding this concept Vitoria said:

. . . international law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they, who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.<sup>137</sup>

David Kennedy’s main criticism of Vitoria’s ideas is about the unity of moral and legal concepts. For him, Vitoria was a primitive writer because of his religious worldview which integrated divine, natural, and positive law.<sup>138</sup> The problem with Kennedy’s analysis is that he does not consider Vitoria’s ideas in their historical context. In the 16th century Spanish intellectual context, the integration of natural and positive laws was possible because of the belief in the existence of eternal law which served as a foundation for the integration of all types of laws.

Francisco de Vitoria rejected the medieval doctrine of discovery, which justified the Spanish conquest of indigenous nations. However, he believed that the Spanish presence in the New World could be justified because of the natural law principle of communication and fellowship between nations. For him, the rational and social nature of human beings was the foundation for the relations between individuals and for the

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135. *Id.* at 34.

136. See Teófilo Urdanoz, *Síntesis Teológico-Jurídica de la Doctrina de Vitoria*, in RELECTIO DE INDIS O LIBERTAD DE LOS INDIOS cxxxv (Luciano Pereña & Jose M. Pérez Prendes eds., 1967).

137. SCOTT, *supra* note 4, at 172.

138. See David W. Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1, 23 (1986).



relationships between political communities. The principle of natural communication and fellowship was the foundation for the norms of free trade, travel, and evangelism. Vitoria's justification for the Spanish presence in the New World was based on these norms.<sup>139</sup> Robert Williams believes that Vitoria's proposal of international norms regarding the right to travel, trade, and religious freedom were, in fact, Spanish norms which were created to justify the Spanish conquest of the New World.<sup>140</sup>

Francisco de Vitoria accepted, in general, the validity of the medieval law norm of discovery. This norm stated that nations could occupy territories which did not belong to any other nation (*terra nullius*). However, Vitoria rejected the application of that norm in the case of the indigenous nations of the New World which had legitimate political communities and dominion over their territories.<sup>141</sup>

Vitoria's reasoning was sustained by the fact that indigenous nations were rightful owners of their territories. Therefore, Spain could not discover and take over territories which already had owners. Vitoria indicated that indigenous nations could also have discovered Spain.<sup>142</sup> However, this would not have justified the use of force against indigenous nations. Therefore, the Spaniards could not occupy territories which legitimately belonged to the Incas, Aztecs, and other indigenous nations. This aspect of Vitoria's ideas cannot be underestimated. For the 16th century Spanish context, the rejection of the right to discovery, as a norm applicable to the conquest of the New World, was an important effort to promote a universal perspective which favoured the interests of indigenous political communities.

Regarding the natural law of nations' norm of hospitality to foreign visitors, Vitoria said: "... it is considered inhumane to treat strangers and travellers badly without some special cause, humane and dutiful to behave hospitably to strangers. This would not be the case if travellers were doing something evil by visiting foreign nations."<sup>143</sup> Vitoria believed that since the creation of the world there was a common ownership of property. Because of this, every human being could travel and visit any part of the world. For him, this norm was not abolished by the division of

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139. POLITICAL WRITINGS, *supra* note 25, at 280.

140. See, e.g., WILLIAMS JR., *supra* note 50, at 106-07.

141. FRANCISCO DE VITORIA, RELECTIO DE INDIS, CARTA MAGNA DE LOS INDIOS 85-86 (1989).

142. CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM 107 (G.L. Ulmen trans., 2006) (explaining the analysis of the reciprocal application of Vitoria's doctrines to Spain and indigenous nations).

143. POLITICAL WRITINGS, *supra* note 25, at 278.

property (*division rerum*).<sup>144</sup> This natural law of nations' norm required welcoming and showing hospitality to foreign visitors.<sup>145</sup> Indigenous people, consistent with natural law, were supposed to show love to other fellow human beings and allow the free entry of Spanish visitors to their territories.<sup>146</sup> Indigenous positive laws could not contradict that fundamental norm of natural law.<sup>147</sup> Regarding this, Vitoria wrote:

. . . if the Spaniards were not allowed to travel amongst them, this would be either by natural, divine or human law. But they are certainly allowed to do so by divine and natural law. But if there were a human enactment (*lex*) which barred them without any foundation in divine or natural law, it would be inhumane and unreasonable, and therefore without the force of law.<sup>148</sup>

In the 16th century Spanish context, the norm that recognized the Spanish people's right to travel to indigenous territories was not considered inherently antagonistic to the common good of humankind or to the interests of indigenous nations. Vitoria's doctrine included the condition of the peaceful implementation of that norm and respect for the interests of indigenous political communities.<sup>149</sup> However, a more universal perspective would have considered the indigenous sovereigns' will to deny the entry of Spanish citizens to indigenous territories for any reason. Already in 1672, Samuel Pufendorf made this criticism.<sup>150</sup> In rejecting Vitoria's ideas, he said:

Furthermore, it is crude indeed to try to give others so indefinite a right to journey and live among us, with no thought of the numbers in which they come, their purpose in coming, as well as of the question whether, in passing through without harm and visiting a foreign land, they propose to stay but a short time, or to settle among us permanently, as if upon some right of theirs.<sup>151</sup>

For Vitoria, one of the main Spanish objectives in the New World was to trade with indigenous nations. Vitoria's norm, which recognized the right to free trade, could have been considered universal and just in

144. *Id.*

145. See, e.g., Ramón Hernández Martín, *Francisco de Vitoria, "Condicionantes" de su Doctrina Indiana*, in 137 CIENCIA TOMISTA 15, 27 (2010).

146. *Id.* at 28.

147. For an analysis of the imposition of natural law against the law of indigenous communities, see WILLIAMS, JR., *supra* note 50, at 101.

148. POLITICAL WRITINGS, *supra* note 25, at 279.

149. *Id.*

150. See SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 364-65 (C. H. Oldfather & William Abbott trans., 1934).

151. *Id.*

the 16th century Spanish context if trade benefited all sides. However, this was not the case. While Vitoria acknowledged the reciprocity principle in international trade, he disregarded the unequal levels of power and its impact on the relationships between Spain and indigenous nations.<sup>152</sup> Regarding Vitoria's view, Robert Williams says: "Vitoria had elevated the profit motive to an extremely privileged status in his totalizing discourse of a universally obligatory natural Law of Nations. Mercantile self-interest was conceptualized as binding nations to one another."<sup>153</sup>

For Antony Anghie, indigenous people were unable to fulfill the Spanish norm of free trade.<sup>154</sup> Therefore, any indigenous violation of that norm was considered an injury against the Spaniards.<sup>155</sup> China Mieville indicated that to talk about free trade in the 16th century historical context was absurd because of the difference of power between Spain and indigenous nations.<sup>156</sup> These criticisms are consistent with historical facts. However, Vitoria recognised that both indigenous nations and Spain had the right to reciprocal trade if this did not damage the interests of indigenous nations.<sup>157</sup> Regarding this, Vitoria wrote:

. . . the Spaniards may lawfully trade among the barbarians, so long as they do no harm to their homeland. In other words, they may import the commodities which they lack, and export the gold, silver, or other things which they have in abundance; and their princes cannot prevent their subjects from trading with the Spaniards, nor can the princes of Spain prohibit commerce with the barbarians.<sup>158</sup>

Vitoria recognized that there were certain lands in indigenous territories which were held in common between indigenous nations and Spanish people.<sup>159</sup> This clear ethnocentric view was used to justify the Spanish takeover of certain indigenous nation's goods and property.<sup>160</sup> Vitoria also applied this ethnocentric view to gold, and gold was one of the main reasons for the Spanish invasion of the New World. Vitoria justified the takeover of indigenous gold based on the principle of common

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152. Mantilla, *supra* note 1, at 167.

153. WILLIAMS, JR., *supra* note 50, at 102.

154. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 21 (2005).

155. *Id.* at 21-22.

156. See CHINA MIEVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 177 (2005).

157. See, e.g., CIENCIA TOMISTA, *supra* note 145, at 28-29.

158. POLITICAL WRITINGS, *supra* note 25, at 279.

159. See ANGHIE, *supra* note 154, at 21-22.

160. See POLITICAL WRITINGS, *supra* note 25, at 280.

ownership.<sup>161</sup> However, Vitoria said that if the exportation of gold from indigenous territories was contrary to the interests of indigenous nations, Spanish rulers had the obligation to end that type of unjust trade.<sup>162</sup>

Vitoria believed that trade was the foundation for the relations between Spain and the indigenous nations of the New World.<sup>163</sup> He also believed that even if the Spaniards had to leave indigenous territories, trade between Spain and indigenous nations could continue.<sup>164</sup> This would have allowed the Spanish Crown to continue increasing its income by taxing gold and silver which were exported from indigenous territories.<sup>165</sup> Vitoria compared the Spanish presence in the New World with the Portuguese presence in Brazil.<sup>166</sup> The difference for him was that the Portuguese based their international relations with indigenous nations on free trade and not on colonization.<sup>167</sup>

The norm that allowed the evangelization of indigenous people was consistent with 16th century Spanish concepts of international justice. Vitoria believed that this favored indigenous people's interests because it gave them the opportunity to accept eternal salvation.<sup>168</sup> However, authors critical of Vitoria's views interpret his norm of evangelism as an instrument of colonialism and Christian oppression.<sup>169</sup> Regarding this, Robert Williams said:

Vitoria's discourse supplemented this papal power with the recognition that Christians possessed autonomously grounded rights under the Law of Nations to travel, trade, and preach the gospel in barbarian lands without first obtaining a papal license. In Vitoria's discourse of New World conquest, reason as well as Rome were granted the right to initiate enforcement of Christian Europe's universally binding norms and values in lands possessed by heathens and infidels.<sup>170</sup>

Onuma Yasuaki believes that Vitoria's efforts to impose Christianity in the New World proves the ethnocentric colonial characteristics of

161. *Id.*

162. *Id.* at 228.

163. *Id.* at 279-81.

164. *Id.* at 280.

165. *Id.* at 292.

166. *Id.* at 291-92.

167. *Id.*

168. WILLIAMS, JR., *supra* note 50, at 104-05.

169. See, e.g., Onuma Yasuaki, *Eurocentrism in the History of International Law*, in *A NORMATIVE APPROACH TO WAR, PEACE, AND JUSTICE IN HUGO GROTIUS* at 373-86 (Onuma Yasuaki ed., 1993).

170. *Id.* at 105-06.

his normative ideas.<sup>171</sup> Regarding Vitoria's justification for the conversion of indigenous people to Christianity, Anghie writes:

[O]nce Vitoria outlines and consolidates the authority of a secular *jus gentium*, which is administered by the sovereign, he re-introduces Christian norms within this secular system; proselytising is authorised now, not by divine law, but the law of nations, and may be likened now to the secular activities of travelling and trading . . . Now, Indian resistance to conversion is a cause for war, not because it violates divine law, but the *jus gentium* administered by the sovereign.<sup>172</sup>

Vitoria had complex views regarding the evangelization of indigenous peoples. He justified the Spanish use of force to protect indigenous people who converted to Christianity.<sup>173</sup> He believed that where there were a great number of indigenous converts to Christianity, the pope had the authority to replace "pagan" kings with Christian ones.<sup>174</sup> Vitoria's justification of the Spanish conquest for the evangelization of indigenous people had three elements: first, force could not be used to oblige indigenous nations to convert to Christianity; second, force could be used if indigenous nations did not allow Spanish missionaries to share their faith; and third, if the use of force would result in extreme violent actions, which could become a hindrance for the evangelization of indigenous nations, wars should not be waged.<sup>175</sup>

The rejection of using force to oblige indigenous nations to convert to Christianity, and the conditional element of Vitoria's justification to use force to allow the preaching of Christianity, was consistent with 16th century universal perspectives of Spanish authors such as Bartolomé de las Casas.<sup>176</sup> However, Vitoria's justification to use force to allow the preaching of Christianity was consistent with ethnocentric views such as Juan Ginés de Sepúlveda's.<sup>177</sup> A more universal norm would have allowed indigenous nations to have the freedom to reject or accept any Spanish religious efforts.

For Spanish scholastic thinkers such as Vitoria, the peaceful evangelization of indigenous people was a central reason for the Spanish

171. See A NORMATIVE APPROACH TO WAR, PEACE, AND JUSTICE IN HUGO GROTIUS, *supra* note 169, at 375-86.

172. ANGHIE, *supra* note 154, at 23.

173. POLITICAL WRITINGS, *supra* note 25, at 286.

174. *Id.* at 287.

175. VITORIA, *supra* note 82, at XXXIV, 52.

176. DE LAS CASAS, *supra* note 15, at 17-21.

177. GINÉS DE SEPÚLVEDA, *supra* note 14, at 11-12.

presence in the New World.<sup>178</sup> Vitoria justified the use of force to guarantee the Spanish “right” to share the Catholic faith.<sup>179</sup> Vitoria did not indicate if indigenous people, such as the Inca, should also have had the freedom to share their faith in *Wiracocha* and other deities.

Unlike Vitoria, who never lived in the New World, Bartolomé de las Casas knew well the consequences of the application of the natural law of nations to indigenous people. This was because he lived in the New World and was aware of the great injustices committed by Spanish conquerors.<sup>180</sup> Other than the peaceful evangelization of indigenous nations, de las Casas believed there was no reason for the Spanish presence in indigenous territories.<sup>181</sup>

Antony Anghie’s and other scholars’ criticism of Francisco de Vitoria’s international legal ideas as inherently unjust, ethnocentric, and colonial applies better to Sepúlveda’s views. The ideas which influenced Sepúlveda’s thinking were based on the following presuppositions: the ethnic inferiority of the people of the New World, the idolatry of indigenous nations as a sign of their inferiority, and the practice of human sacrifice as a sign of their irrationality.<sup>182</sup>

Sepúlveda’s understanding of the law of nations, which he equated with human natural law, had strong ethnocentric presumptions. For him, the law of nations did not apply to “barbarian” indigenous nations because they were outside humanity.<sup>183</sup> For Sepúlveda, natural law was determined by the opinion of intelligent persons.<sup>184</sup> Consequently, he believed “naturally and ethically superior people should determine what is just according to nature.”<sup>185</sup> Sepúlveda recognized that there was a part of natural law which was immutable, but there were also natural precepts that changed according to circumstances.<sup>186</sup> According to Sepúlveda, positive law derived from natural law.<sup>187</sup> Therefore, to him there were two types of natural law: one which applied to human beings and animals, and

178. See Carlos Baciero, *Universidad y Política Colonial*, 78 ESTUDIOS ECLESIASTICOS 549, 589 (2003).

179. *Id.* at 559.

180. DEMETRIO RAMOS ET AL., FRANCISCO DE VITORIA Y LA ESCUELA DE SALAMENCA: LA ÉTICA EN LA CONQUISTA DE AMÉRICA 262 (1984).

181. *Id.* at 254.

182. José A. Fernández-Santamaria, *Juan Ginés de Sepúlveda on the Nature of the American Indians*, 31 AMERICAS 434, 436 (1975).

183. GINÉS DE SEPÚLVEDA, *supra* note 14, at 8-9.

184. *Id.*

185. *Id.* at 9.

186. *Id.* at 10.

187. *Id.*

another that applied only to human beings, known as *ius gentium*.<sup>188</sup> Francisco de Vitoria rejected this perspective and recognized the existence of only one natural law that applied to all human beings. One of Sepúlveda's main presuppositions was that the law of nations applied only to what he considered to be "civilized" nations.<sup>189</sup> His understanding of civilized nations excluded indigenous people of the New World which he considered objects of the law.<sup>190</sup>

For Sepúlveda, to be a Christian meant to be "civilized" and European, and to be an indigenous person meant to be a "barbarian" and not part of humankind.<sup>191</sup> Therefore, Sepúlveda's cultural ethnocentric perspective on natural law was based on ethnic stereotypes and the defense of the interests of one culture. This perspective led to the disregard of violent actions committed by Spain, such as the killing of innocent indigenous people. Sepúlveda justified his view regarding the inferiority of indigenous people based on an ethnocentric interpretation of law. According to him:

[I]t will always be just and consistent with natural law that such people will be submitted to the empire of culturally superior and humane princes and nations, so that because of their virtues and the prudence of their laws, they will take away their barbarity and transform them to a more humane life and to the cult of virtue. And if they reject such empire, it can be imposed on them by weapons and such war will be just, as the natural law declares it.<sup>192</sup>

Sepúlveda's perspective on natural law was based on the survival of the fittest doctrine. This was contrary to fundamental Christian scholastic principles such as respect for the inherent dignity of human beings. For Sepúlveda, there were mainly two types of nations.<sup>193</sup> The first type were "civilized" nations which had political communities and obeyed natural law.<sup>194</sup> The second type of nations were "uncivilized" because they constantly violated natural law.<sup>195</sup> For Sepúlveda, indigenous nations could not have political communities because they were sub-human, evidenced by their primitive cultures, idolatry, and underdeveloped economic

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188. *Id.* at 12.

189. *Id.*

190. *Id.* at 8-9.

191. *Id.*

192. *Id.* at 85.

193. Fernández-Santamaria, *supra* note 182, at 436.

194. *Id.*

195. *Id.*

systems.<sup>196</sup> But, Sepúlveda disregarded the fact that supposed “civilized” nations also were capable of grave violations of the norms of natural law.

According to Sepúlveda, the most important principle of natural law was “that the perfect must prevail and dominate over the imperfect, the excellent over his contrary.”<sup>197</sup> Sepúlveda viewed the Inca, Aztec, and other indigenous nations as inferior and inhuman; therefore, the laws which regulated the relations between the superior nation, Spain, and inferior nations had to reflect that asymmetry. Manuel García Pelayo, regarding Sepúlveda’s ideological foundations that justified the conquest of the New World, writes: “[t]he problem is manifested in the incompatibility of a Natural Law which human beings know because of its quality, and another conception of the same juridical area, which is restricted to a part of humankind, and that only a selected minority can know.”<sup>198</sup>

For Sepúlveda, indigenous people were inherently evil and had an inferior intellect.<sup>199</sup> Therefore, the Spanish conquest was consistent with his version of natural law, which indicated that “barbarian” nations had to submit to civilized ones.<sup>200</sup> Contrary to Sepúlveda’s perspective, Vitoria believed that the natural law of nations applied to all nations, including indigenous nations.<sup>201</sup> This was an effort to transcend the Spanish 16th century cultural setting and find a common ground between Spain and the indigenous nations of the New World. Vitoria’s intention was to find common human nature and apply natural law norms to all nations.<sup>202</sup>

Contrary to Sepúlveda’s inherently ethnocentric views, Vitoria believed that natural law applied to nations from diverse cultures including the indigenous of the New World.<sup>203</sup> Vitoria’s view was based on the recognition of the existence of one human nature.<sup>204</sup> This was contrary to Sepúlveda’s view on the existence of a civilized European human nature and a sub-human indigenous one.<sup>205</sup> Vitoria’s natural law of nations’ doctrine was an effort to apply what he considered to be universal norms to political communities from diverse civilizations. However, that effort could also be considered a discourse which promoted ethnocentric norms as if they were universal.

196. *Id.*

197. GINÉS DE SEPÚLVEDA, *supra* note 14, at 83.

198. *Id.* at 13.

199. Fernández-Santamaria, *supra* note 182, at 437.

200. *Id.* at 436-37.

201. POLITICAL WRITINGS, *supra* note 25, at 278.

202. *Id.*

203. *Id.* at 278-79.

204. *Id.* at 279.

205. Fernández-Santamaria, *supra* note 182, at 437.



The norm of free trade could be considered just if Spain and the indigenous nations of the New World had similar levels of socio-economic development. Vitoria did not carefully consider the implications of the implementation of the natural law of nations' norms to specific historical circumstances in which Spain could have imposed its will on indigenous nations.

Vitoria lacked the historical jurisprudential component of what Harold Berman describes as the integrative jurisprudence of pre-enlightenment Christian thinkers.<sup>206</sup> Because of this, the problem with Vitoria's law of nations' ideas was that norms which could justly apply to the relations between nations, had ethnocentric consequences when applied in concrete historical and cultural settings such as the ones of the New World. In part, this was because Vitoria did not have a deep understanding of indigenous cultures. Unlike other Spanish thinkers such as Bartolomé de las Casas, he never lived in the New World. Vitoria did not properly consider the historical realities of the indigenous nations of the New World and the Spanish conquest. If he did, he could have suggested the application of free trade norms, which considered the unequal relations of power between Spain and the indigenous nations of the New World. He also could have forbid the Spanish exploitation of indigenous natural resources.

One of Antony Anghie's main criticisms of Vitoria's international legal ideas is the imposition of Spanish normative standards to the indigenous nations of the New World.<sup>207</sup> This is a valid criticism because those standards were used to subjugate and exploit indigenous nations.<sup>208</sup> However, the rejection of Vitoria's proposal about the existence of natural law norms could have been used to justify actions of extreme violence practiced by indigenous nations, such as human sacrifice, and Spanish conquerors, such as massacres. Vitoria's intention was probably not to create an inherently unjust ethnocentric system of law to justify his country's conquest and colonization of indigenous nations. Most likely, he believed that he was justly applying universal principles of natural law to diverse civilizations such as Spain and the Inca of the New World.

## VI. VITORIA'S NORMATIVE APPROACH TO WAR

In the 16th century Spanish context, one of the main conflicts of worldviews was between those who believed that only power politics was the foundation for international relations between nations, and those who

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206. BERMAN, *supra* note 124, at 292.

207. ANGHIE, *supra* note 154, at 21.

208. *Id.* at 21-22.

recognized the existence of a just universal normative order that all nations should respect. From a political power perspective, Spain's use of force to conquer and civilize "barbarian" nations was justified because of national interests. For example, regarding wars against the nations of the New World, Juan Ginés de Sepúlveda wrote:

[t]here are other just causes of war, less clear and less frequent, but because of this not less just, and not less founded in natural and divine law; and one of them is to subjugate with weapons, if it is not possible using other means, those that because of their natural condition must obey others.<sup>209</sup>

Unlike Sepúlveda, Francisco de Vitoria believed that having the force to conquer other nations was not enough; it was also necessary to obey normative precepts of the law of nations and natural law.<sup>210</sup> Francisco Suarez was one of the most sophisticated followers of Francisco de Vitoria's doctrines on the use of force.<sup>211</sup> Suarez also rejected power politics as a reason to wage wars, stating "[t]here was an old error current among the Gentiles, who thought that the rights of nations were based on military strength, and that it was permissible to make war solely to acquire prestige and wealth; a belief which, even from the standpoint of natural reason, is most absurd."<sup>212</sup>

For Vitoria, in domestic law, a political community had the authority to punish violations of the normative order.<sup>213</sup> A political community could also acquire jurisdiction over foreign political communities and could use force against them when their domestic laws did not punish widespread injuries against innocent human beings.<sup>214</sup>

Vitoria and his followers applied Thomas Aquinas' ideas regarding just war (*bellum justum*), including just causes for war (*jus ad bellum*), and the law applicable during war (*jus in bello*), to the concrete historical setting of the Spanish conquest of the New World.<sup>215</sup> For Vitoria, it was

209. GINÉS DE SEPÚLVEDA, *supra* note 14, at 81.

210. FRANCISCO DE VITORIA, *LOS PRINCIPIOS DEL DERECHO PUBLICO EN FRANCISCO DE VITORIA* 78 (Antonio Truyol Serra ed., 1946).

211. FRANCISCO SUAREZ, *SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ* 16a-17a (James Brown Scott ed., 1944).

212. FRANCISCO SUAREZ, *A Work on the Three Theological Virtues Faith, Hope and Charity*, in *SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ* 815-16 (James Brown Scott ed., 1944).

213. VITORIA, *supra* note 210, at 78.

214. VITORIA, *supra* note 82, at 43.

215. ANGELA APARISI MIRALLES, *DERECHO A LA PAZ Y DERECHO A LA GUERRA EN FRANCISCO DE VITORIA* 14-15 (2007).

not enough for a sovereign to believe that a war was just.<sup>216</sup> He also had to know the just causes for war, and had to listen to the reasoning of his enemies to find out if they wanted to negotiate peace agreements consistent with just and reasonable principles.<sup>217</sup> Sovereigns had the obligation to seek the advice of knowledgeable persons on the subject of war.<sup>218</sup> For Vitoria, wars could not be just for both sides of the armed conflict.<sup>219</sup> There was an exception when there was ignorance of the facts or the law, or when the wrong side waged a war in good faith.<sup>220</sup> The problem with Vitoria's view is that the side that had justice on its side did not always win wars, as was seen in the case of the Spanish-Inca war of the 16th century.

One of Vitoria's main concerns was to make certain that the Spanish actions in the New World were just.<sup>221</sup> He wanted to ensure that the Spanish sovereigns were not sinning by acting contrary to the law of conscience.<sup>222</sup> For Vitoria, a sovereign had to ensure the justice of his actions in war.<sup>223</sup> If a sovereign leader of a nation falsely believed that his side was just in a war, he had the obligation to restore what was taken from the enemy side upon realizing the injustice of that belief.<sup>224</sup>

In the 16th century, there were doubts about the morality of Christian involvement in wars.<sup>225</sup> Vitoria's commentaries on Thomas Aquinas show that he believed Christians could lawfully wage wars; Vitoria argued that leaders of nations were established to defend their republics.<sup>226</sup> Vitoria, consistent with Aquinas' views, believed that the republic had authority against its enemies to avenge wrongdoings, recover goods, and punish evil.<sup>227</sup> Vitoria, like Aquinas, rejected pacifist arguments which indicated Christians could not participate in wars under any circumstances.<sup>228</sup>

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216. FRANCISCO DE VITORIA, RELECTIO DE IURE BELLII O PAZ DINÁMICA: ESCUELA ESPAÑOLA DE LA PAZ, PRIMERA GENERACIÓN 1526-1560, at 139 (Luciano Pereña et al., eds., 1981).

217. *Id.* at 141.

218. *Id.*

219. *Id.* at 139.

220. *Id.*

221. POLITICAL WRITINGS, *supra* note 25, at 251-52.

222. FRANCISCO DE VITORIA, *On the Law of War, De Indis Relectio Posterior, Sive de Iure Belli*, in POLITICAL WRITINGS 293, 312 (Jeremy Lawrence & Anthony Pagden eds., 12th prtg. 2010).

223. *Id.* at 304-06.

224. *Id.* at 313.

225. VITORIA, *supra* note 216, at 215.

226. *Id.*

227. *Id.* at 217.

228. VITORIA, *supra* note 222, at 297.

For Vitoria, the sovereigns of nations had the responsibility to wage wars only when there were no other options.<sup>229</sup> This was because all human beings were created in God's image, and wars often caused the killing and persecution of innocent human beings.<sup>230</sup> Also, sovereigns had the responsibility to seek peace and not war.<sup>231</sup> Another norm indicated that, in times of war, the prince should seek justice and the self-defense of his commonwealth and not the destruction of his enemies.<sup>232</sup> Once victory was achieved, the winner should act as an impartial judge.<sup>233</sup> The decisions must be just for the injured side, but should also consider the interest of the defeated side and should not seek its destruction.<sup>234</sup>

Francisco de Vitoria believed that the "world" granted the leaders of nations the authority to punish foreign nations that violated the natural normative order.<sup>235</sup> According to Vitoria, republics had the authority to defend and avenge offenses against their citizens.<sup>236</sup> He equated the sovereign authority of the republic with the authority of the prince.<sup>237</sup> The State's authority to punish wrongdoings was not limited to its domestic jurisdiction, it could also be used internationally. Regarding this, Vitoria said:

. . . it should be noted that the prince has the authority not only over his own people but also over foreigners to force them to abstain from harming others; this is his right by the law of nations and the authority of the whole world. Indeed, it seems he has this right by natural law: the world could not exist unless some men had the power and authority to deter the wicked by force from doing harm to the good and the innocent.<sup>238</sup>

Vitoria's recognition of the legality of the use of force in cases of violations of the natural normative order was consistent with Thomas Aquinas' medieval doctrines of war.<sup>239</sup> Vitoria further developed Aquinas' doctrines that nations had authority to use force as a just punishment against other nations.<sup>240</sup> His writings were an effort to give a normative

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229. *Id.* at 326-27.

230. *Id.*

231. *Id.*

232. *Id.* at 327.

233. *Id.*

234. *Id.*

235. *Id.* at 305.

236. *Id.* at 300.

237. *Id.* at 301.

238. *Id.* at 305.

239. *Id.* at 297.

240. *Id.* at 300.

justification for the Spanish presence in the New World, as well as undermine arguments which were based only on power-politics.<sup>241</sup>

In the 16th century Spanish historical context, it was not unreasonable to recognize the norms of communication, travel, and trade as foundations for the international relations between Spain and the indigenous nations of the New World. However, if that meant that the Spanish could take over the territories of indigenous people, such as the Inca, and become its new sovereign, then that part of Vitoria's normative discourse could have served as a justification to conquer, colonize, and exploit the human and natural resources of indigenous nations. Regarding this, Antony Anghie opines: "Vitoria's scheme finally endorses and legitimizes endless Spanish incursions into Indian society. Vitoria's apparently innocuous enunciation of a right to 'travel' and 'sojourn' extends finally to the creation of a comprehensive, indeed inescapable system of norms which are inevitably violated by the Indians."<sup>242</sup>

However, for Vitoria, the normative principle of natural partnership and communication, which was the foundation for the norms of travel and trade, did not apply when the Spaniards injured indigenous people.<sup>243</sup> For example, Vitoria recognized that in the case of the conquest of the Inca Empire, there were extremely evil actions committed by Spanish conquerors against indigenous peoples.<sup>244</sup> He also believed that the Incas did not violate the natural law of nations' norms.<sup>245</sup> However, he believed that other indigenous nations, such as the Aztec, violated natural law.<sup>246</sup> Vitoria specifically mentioned the practice of human sacrifice in Yucatan, which he considered a grave violation of natural law which could have justified the Spanish use of force.<sup>247</sup>

Vitoria believed that some indigenous nations, such as the Aztec, were responsible for injuries against innocent people.<sup>248</sup> Although this could justify the Spanish use of force, there was a previous condition which required respecting the interests of indigenous people. Because of

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241. POLITICAL WRITINGS, *supra* note 25, at 284.

242. ANGHIE, *supra* note 154, at 21.

243. POLITICAL WRITINGS, *supra* note 25, at 278.

244. Vitoria resolved conflicts between diverse sovereign wills by applying natural law principles, such as respect for human dignity and human life. For a criticism of Vitoria's use of absolute standards to resolve conflicts between sovereign wills, see Kennedy, *supra* note 138, at 34-35.

245. POLITICAL WRITINGS, *supra* note 25, at 332.

246. FRANCISCO DE VITORIA, *On Dietary Laws, or Self-Restraint*, in POLITICAL WRITINGS 205, 225 (Jeremy Lawrence & Anthony Pagden eds., 12th prtg. 2010).

247. *Id.* at 214-17. This aspect of Vitoria's ideas is analyzed in another section of this article. See Felipe Solis et al., *Hernán Cortés y la Conquista de México*, in PASAJES DE LA HISTORIA 20, 21 (Felipe Solis ed., 2003).

248. POLITICAL WRITINGS, *supra* note 25, at 225.

this, Vitoria used the scholastic dialectic method to balance the application of the norms of the natural law of nations with exceptions for their implementation. Regarding this, James Muldoon writes:

[o]n the one hand the method provided a structured basis for analysing a problem in an orderly way, setting out pros and cons clearly and enabling the reader to see the consequences of a course of action. On the other hand, the method can lead to paralysis of the will, balancing each argument for action against a reason for not acting.<sup>249</sup>

Vitoria's conclusion on the illegality of the Spanish use of force against the Inca Empire was influenced by the scholastic dialectic method, as well as his doctrine on the conditionality of the implementation of the norms of the natural law of nations.<sup>250</sup> According to Vitoria, the Spaniards had the right to travel within indigenous territories so long as they did not hurt indigenous people.<sup>251</sup> On this, Vitoria said: "[a]mongst all nations it is considered inhuman to treat strangers and travellers badly without some special cause, humane and dutiful to behave hospitably to strangers. This would not be the case if travellers were doing something evil by visiting foreign nations."<sup>252</sup>

Vitoria believed indigenous nations could not have prohibited the presence of Spanish immigrants in their territories if those immigrants did not behave in a wrongful manner.<sup>253</sup> Regarding this, he said, "[s]ince these travels of the Spaniards are (as we may for the moment assume) neither harmful nor detrimental to the barbarians, they are lawful."<sup>254</sup> Vitoria also believed that free trade was just when the Spaniards did not damage the interests of indigenous nations. Regarding this, he said, ". . . the Spaniards may lawfully trade among the barbarians, so long as they do no harm to their homeland."<sup>255</sup> Vitoria also conditioned the Spanish right to acquire citizenship in the New World to respect for the requirements of indigenous communities. Regarding this, he said, "[c]onsequently, it seems he would enjoy the same privileges as the rest, at least as long as he accepted the same burdens as they."<sup>256</sup>

249. James Muldoon, *Francisco de Vitoria and Humanitarian Intervention*, 5 J. OF MIL. ETHICS 140 (2006).

250. RAMOS ET AL., *supra* note 180, at 292, 345, 348.

251. CIENCIA TOMISTA, *supra* note 145, at 27.

252. POLITICAL WRITINGS, *supra* note 25, at 278.

253. See CIENCIA TOMISTA, *supra* note 145, at 28.

254. POLITICAL WRITINGS, *supra* note 25, at 278.

255. *Id.* at 279.

256. *Id.* at 281.

Vitoria believed that the Spaniards should have demonstrated to indigenous people that they did not have the intention to harm them. Regarding this, he said, “the Spaniards ought first to remove any cause of provocation by reasoning and persuasion, and demonstrate with every argument at their disposal that they have not come to do harm, but wish to dwell in peace . . . .”<sup>257</sup> Despite Vitoria’s doctrines on the conditionality of the Spanish presence in the New World, the application of the natural law of nations’ norms to the unequal relations of power between Spain and the indigenous nations could have led to colonial and unjust results. Consistent with Onuma Yasuaki’s view, Vitoria’s norms could unjustly apply to indigenous political communities because they did not have the power and economic development to fairly trade with Spain or travel to Europe.<sup>258</sup>

There are two elements in Vitoria’s views that seem to be contradictory. On the one hand, Vitoria believed that Spanish conquerors should not hurt indigenous people’s interests. On the other hand, he indicated that indigenous nations could not prohibit Spanish people from trading and immigrating into their lands. Therefore, according to Vitoria, indigenous nations did not have the final authority in their own territories. Vitoria did not consider that even the peaceful presence of Spanish people in indigenous territories could have been hurtful to the preservation of indigenous nations and their cultures.

Contrary to Vitoria’s views, Bartolomé de las Casas believed that none of the indigenous nations injured Spanish people in the New World.<sup>259</sup> Therefore, there was no legal justification to use force against any indigenous nation. On the contrary, since the beginning of the Spanish conquest, indigenous nations had just causes for war against the Spaniards.<sup>260</sup> For De las Casas, the Spanish encounters with indigenous people should not have had the objective of conquering and colonizing the New World.<sup>261</sup> He believed that the only reason for the Spanish presence in indigenous territories should have been the peaceful evangelization of its inhabitants.<sup>262</sup>

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257. *Id.*

258. A NORMATIVE APPROACH TO WAR, PEACE, AND JUSTICE IN HUGO GROTIUS, *supra* note 169, at 372-86.

259. RAMOS ET AL., *supra* note 180, at 149.

260. *Id.* at 112.

261. *Id.* at 149.

262. *Id.*

## VII. VITORIA'S JUST WAR DOCTRINES AND THE BATTLE OF CAJAMARCA

Consistent with his theological ideas, Francisco de Vitoria believed that indigenous people's violations of the norms of the natural law of nations were evil actions against the normative natural order which justified their punishment.<sup>263</sup> From a legal perspective, these actions were considered violations of the law of nations and injuries against Spanish immigrants and visitors to the New World. Because of this, the use of force against indigenous nations was justified. Based on Thomas Aquinas' and St. Augustine's ideas, Vitoria applied just war doctrines to the conquest of the New World.<sup>264</sup> Vitoria's view on the beginning of the Spanish conquest of the Inca Empire in the Battle of Cajamarca is particularly important. This was one of the most significant historical facts Francisco de Vitoria mentioned. His doubts about the legality of the conquest of the New World emerged because of the atrocities committed by Francisco Pizarro in the Spanish war against the Inca Empire.<sup>265</sup>

How did Vitoria apply his general just war doctrines to the Spanish conquest of the Inca Empire? Among the few historical facts that Vitoria mentioned about the Spanish conquest of the New World, the most important was the Spanish conquest of the Inca Empire in the Battle of Cajamarca. The Battle of Cajamarca was a crucial moment in the conquest of the Inca Empire, and is a key event in understanding Vitoria's international normative ideas. For Francisco de Vitoria, the Spanish actions in the city of Cajamarca (1532) violated the norms of just war.<sup>266</sup> In that city, Francisco Pizarro and other Spanish conquerors met the Inca King Atahualpa, who had just defeated his brother, Huascar, in a civil war. Describing this meeting, the Spanish historian, Pedro de Cieza de León, wrote:

[t]hey began to enter the plaza. When the squadrons reached the center of it, they formed a very large circle. Atahualpa entered after many of his captains and their people had done so. He passed all of them before his litter was set down. Because he was in the middle of the people, he stood up on top of the platform. He spoke loudly that they should be brave . . . that they should know that [the Christians] were hiding in fear. He

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263. Cavallar, *supra* note 13, at 188.

264. MIRALLES, *supra* note 215, at XIV-XV.

265. DE BELLO CONTRA INSULANOS INTERVENCIÓN DE ESPAÑA EN AMERICA, *supra* note 69, at 23.

266. Cavallar, *supra* note 13, at 191.



reminded them how they had always vanquished many people and nations, serving under his and his father's banners.<sup>267</sup>

As part of the Spanish strategy, Fray Vicente de Valverde explained, through his interpreter, Martinillo de Poechos, the medieval colonial law of the *Requerimiento* to the Inca King Atahualpa. Valverde explained to him that he had to accept Christianity, as well as the universal jurisdiction of the pope and the European emperor. According to the norms of the *Requerimiento*, if Atahualpa rejected the *Requerimiento*, the Spaniards could use force against him.<sup>268</sup> Fray Valverde gave a Bible to King Atahualpa, but he did not understand what was given to him and threw it away. This action was considered a rejection of the pope, emperor, and Spain's jurisdiction in the Inca realm.<sup>269</sup> This gave the Spaniards the normative justification they needed to use force against the Inca king and his people. Juan de Betanzos described the massacre of Cajamarca, as follows:

When the marquis had heard out Fray Vicente about that turn of events, he made his signal to the artillerymen. When they saw it, they fired their cannon and the arquebuses. Then everybody came out at once and fell upon the Inca's men. The horsemen lanced them and the foot soldiers cut with their swords without the Inca's men putting up any resistance . . . So many men tried to leave by the plaza's gate and the Spanish were so persistent in killing them that a large mass of Indians, as they saw the great massacre they were suffering, pressed against a stretch of the wall that circled the plaza and toppled it under their onslaught.<sup>270</sup>

In the massacre of Cajamarca, the Inca King Atahualpa was kidnapped, and high-level Inca leaders and many other indigenous people were killed. The Spanish invasion and use of force had the objective of taking over the natural resources of the Incas, especially gold and silver. After the massacre of Cajamarca, the Spaniards kidnapped and executed the king of the Inca Empire. Despite fulfilling a ransom of a room full of gold and silver, Atahualpa was condemned to death.<sup>271</sup>

Vitoria knew what happened in Cajamarca and believed that the Spanish actions were unjust and against the natural law of nations.<sup>272</sup> In a

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267. PEDRO DE CIEZA DE LEÓN, THE DISCOVERY AND CONQUEST OF PERU 211 (Alexandra Parma Cook & Noble David Cook eds., trans., 1998).

268. See PIMENTEL, *supra* note 58, at 89.

269. See DE CIEZA DE LEÓN, *supra* note 267, at 211.

270. JUAN DE BETANZOS, NARRATIVES OF THE INCAS 263-65 (Roland Hamilton & Dana Buchanan eds., trans., 1996).

271. *Id.* at 265.

272. See, e.g., RAMOS ET AL., *supra* note 180, at 292.

letter to his friend, Miguel de Arcos, on November 8, 1534, Vitoria expressed his opposition to Francisco Pizarro in Cajamarca.<sup>273</sup> This was the beginning of Vitoria's intellectual task to develop doctrines and a language on the laws applicable to the international relations of Spain with the indigenous nations of the New World. It was also the beginning of a quest to apply scholastic norms and principles to relations between nations. The letter was based on Vitoria's knowledge of the Spanish actions in the Andean region, which he obtained from testimonies of former missionaries and soldiers who returned to Spain from the Inca realm.<sup>274</sup>

Francisco de Vitoria, as a theologian, sought to find principles which reflected the 16th century Spanish scholastic view of truth and justice. He tried to influence the conscience of Spanish sovereigns and people. Regarding the Spanish conquest of the Inca Empire, in his letter to Miguel Arcos, Vitoria wrote:

As for the case of Peru, I must tell you, after a lifetime of studies and long experience, that no business shocks me or embarrasses me more than the corrupt profits and affairs of the Indies. Their very mention freezes the blood in my veins . . . I do not understand the justice of the war. I do not dispute the emperor's right to conquer the Indies, which I presuppose he may, most strictly; but as far as I understand from eyewitnesses who were personally present during the recent battle with Atahualpa, neither he nor any of his people had ever done the slightest injury to the Christians, nor given them the least grounds for making war on them . . . But even supposing the justice in the war is all on the side of the Spaniards, hostilities may not proceed beyond subduing them and compelling them to accept the emperor as prince with the infliction on them of as little damage and loss as possible. This does not mean robbing them and leaving them destitute of everything regarding their temporal goods . . . In truth, if the Indians are not men but monkeys, they are incapable of injury. But if they are men, and our neighbours, and as they claim vassals of the emperor, I cannot see how to excuse these conquistadors of utter impiety and tyranny; nor can I see what great service they do to His Majesty by ruining his vassals.<sup>275</sup>

Vitoria believed that one of the main reasons for the conquest of the Inca Empire was the Spanish conquerors' ambition to become wealthy.<sup>276</sup> Consistent with his view of just causes for war, Vitoria

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273. ESCUELA DE SALAMANCA, *supra* note 42, at 36-40.

274. *Id.* at 37-39.

275. POLITICAL WRITINGS, *supra* note 25, at 331-33.

276. *Id.* at 332.

believed that the only way the Spanish actions in the Andean region could be justified was if indigenous people injured the Spaniards. Vitoria rejected the legality of the Spanish conquest of the Inca Empire. However, if it was just, Vitoria indicated that the Spanish conquerors should have followed legal norms during war (*ius in bello*). Regarding this, he said:

[b]ut even supposing the justice in the war is all on the side of the Spaniards, hostilities may not proceed beyond subduing them and compelling them to accept the emperor as prince with the infliction on them of as little damage and loss as possible. This does not mean robbing them and leaving them destitute of everything regarding their temporal goods.<sup>277</sup>

Vitoria believed that Spain's military actions should have been proportionate to specific objectives. He believed that the actions of Francisco Pizarro and other Spanish conquerors in the Andean region were violations of fundamental scholastic norms of natural law and the law of nations, including proportionality in the use of force.<sup>278</sup>

One of the greatest weaknesses of Anghie's, Williams', and other authors' criticisms of Vitoria's international law doctrines, generally, and the law of war particularly, is their complete disregard of the Spanish conquest of the Inca Empire in the city of Cajamarca, a concrete historical event. Considering that Vitoria specifically mentioned the event and rejected the legality of the Spanish war against the Incas, the lack of consideration of that fact does not allow one to see the possible universal and just consequences of Vitoria's international legal ideas in the 16th century historical context. This does not mean that there were no other aspects of Vitoria's just war ideas which were ethnocentric and colonial. Ideas such as the application of different standards for wars between European nations and between Spain and "infidel" nations.

Besides his focus on the Spanish conquest of the New World, Vitoria also wrote about the laws of war to address European wars with Muslim nations. However, it is not clear if all his doctrines applicable to Muslim nations were also applicable to the indigenous nations of the New World. Even if this was the case, Vitoria did not believe that the Incas violated the norms applicable to nations or the norms applicable only to "pagan" nations.<sup>279</sup> Therefore, for Vitoria, they did not commit injuries which could have justified the Spanish use of force in the Incan realm.<sup>280</sup>

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277. *Id.*

278. *Id.* at 331-33.

279. See PEREÑA, *supra* note 40, at 22.

280. *Id.*

Besides his ethnocentric doctrines on just war, Vitoria had ideas of general universal application which respected indigenous interests, such as the obligation of the winner of a war to administer his victory as an impartial judge. Despite his biased doctrines on the *ius in bello*, Vitoria believed that the actions of the Spanish conquerors in the Andean region went beyond what was allowed in a just war.<sup>281</sup>

Despite the general consistency of Vitoria's doctrines, there were contradictions and inconsistencies which could be explained by his desire to defend the interests of his country. These interests were often contrary to his view of the universality of norms and the equality of human beings created in God's image (*imago Dei*). A biased just war doctrine, which considered indigenous nations only as violators of the law, would not have highlighted the Spanish violations of the law of war in the conquest of the New World.

#### VIII. THE APPLICATION OF NATURAL LAW IN THE INTERNAL JURISDICTIONS OF INDIGENOUS POLITICAL COMMUNITIES

Previously it was held that Vitoria believed that the norms of travel, trade, and evangelism were part of the natural law of nations which indigenous nations and Spain should have respected in their mutual relations. In this part of the article, the right to life, as a fundamental norm of natural law, will be analyzed. Violations of that norm, such as human sacrifice practiced by indigenous nations, was one of Vitoria's most compelling justifications for the Spanish presence in the New World. Unlike violations of the norms of the natural law of nations in the relations between nations, in this case the violations were against natural law in the internal jurisdictions of indigenous political communities. Francisco de Vitoria believed that indigenous people could not have been unaware of fundamental norms of natural law, including respect for innocent human life.<sup>282</sup> Therefore, human sacrifice, even if justified by cultural reasons, was a grave violation of natural law.<sup>283</sup>

Vitoria did not mention the customs of human sacrifice and cannibalism in the Inca Empire. However, he mentioned those practices in the Aztec realm.<sup>284</sup> For Vitoria, this was a just reason to use force and conquer indigenous territories.<sup>285</sup> He justified the Spanish conquest of the Aztec

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281. See POLITICAL WRITINGS, *supra* note 25, at 331-33.

282. Cavallar, *supra* note 13, at 188-89.

283. *Id.* at 188.

284. See ESCUELA DE SALAMANCA, *supra* note 42, at 36.

285. Muldoon, *supra* note 249, at 133.

Empire because of grave violations of the right to life.<sup>286</sup> He also mentioned alliances between minority indigenous groups and Spanish conquerors, in the Mesoamerican region, as a just reason to use force.<sup>287</sup>

One of Antony Anghie's and Brett Bowden's main arguments against the justice of Vitoria's ideas indicates that his objective was the imposition of Spanish norms and cultural identity on the indigenous nations of the New World.<sup>288</sup> Anghie believes that Vitoria's normative ideas were an imposition of Spanish norms not only for the regulation of relations between Spain and the indigenous nations of the New World, but also for the regulation of the relations between indigenous sovereigns and their citizens.<sup>289</sup> Therefore, Vitoria tried to impose his European view of natural law into the internal jurisdictions of indigenous political communities. For Anghie and other authors, Vitoria believed that indigenous customs were against the Spanish version of the law of nations. Therefore, the Spanish cultural identity was the standard which indigenous nations had to embrace to become civilised.<sup>290</sup>

Antony Anghie indicates that in Vitoria's writings there is a contradiction between the ontological indigenous person who could obey the norms of natural law because of his rational capacity, and the concrete cultural-historical indigenous person who constantly violated Spanish norms.<sup>291</sup> For him, Vitoria justified the Spanish use of force against indigenous nations because of the differences between Spanish and indigenous cultural practices.<sup>292</sup> Anghie's analysis can lead to the conclusion that respect for indigenous customs and the sovereign will of the rulers of indigenous nations were more important than stopping unjust violent indigenous nations' customs, such as human sacrifice and cannibalism.

Regarding the Spanish norms of natural law which applied not only to the relations between nations, but also to the relations between indigenous people inside their political communities, Anghie writes:

. . . the Spanish acquire an extraordinarily powerful right of intervention and may act on behalf of the people seen as victims of Indian rituals: 'it is immaterial that all the Indians assent to rules and sacrifices of this kind and do not wish the Spaniards to champion them.' Thus Spanish identity or, more broadly, an

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286. ESCUELA DE SALAMANCA, *supra* note 42, at 36.

287. Muldoon, *supra* note 249, at 137.

288. Anghie, *supra* note 5, at 326-27.

289. *Id.* at 327.

290. See Brett Bowden, *The Colonial Origins of International Law - European Expansion and the Classical Standard of Civilization*, 7 J. HIST. INT'L. 1, 12 (2005).

291. Anghie, *supra* note 5, at 22.

292. *Id.*

idealized Western identity, is projected as universal in two different but connected dimensions of Vitoria's system: Spanish identity is both externalized, in that it acts as the basis for the norms of *jus gentium*, and internalized in that it represents the authentic identity of the Indian.<sup>293</sup>

The cultural practices and religious rituals, mentioned by Anghie, were human sacrifice and cannibalism, which were part of the religious customs of the Aztecs, Mayas, Incas, and other indigenous political communities. Robert Williams, Antony Anghie, and other authors do not pay enough attention to Vitoria's proposed norms that justify the use of force to end violations of the right to life of innocent indigenous persons in human sacrifice.<sup>294</sup> It seems that for the 16th century Spanish historical context, one of Vitoria's most compelling and universal reasons to use force against indigenous political communities was to save the lives of innocent indigenous people.

For Vitoria, Spanish military actions which helped indigenous allies, who stood up against unjust laws and oppressive sovereigns, were lawful. They were just because those actions were in defense of innocent persons and against a tyrannical power. This was based on Vitoria's view of the unity of humankind and the authority of the entire world (*autoritas totius orbis*) to prevent and punish grave violations of natural law.<sup>295</sup>

Vitoria believed, in a just war, injured indigenous people could have asked Spain to help them fight against dominant oppressive indigenous sovereigns.<sup>296</sup> Regarding this, he wrote, "[t]here can be no doubt that fighting on behalf of allies and friends is a just cause of war . . . [a] commonwealth may call upon foreigners to punish its enemies and fight external malefactors."<sup>297</sup> Francisco de Vitoria specifically mentioned the Spanish conquerors' alliances with the Tlaxcala people.<sup>298</sup> For a long time, the Tlaxcaltecs fought against the Aztecs and tried to keep their independence.<sup>299</sup> The Aztecs continuously attacked them, and they resisted those actions. Often, the Aztecs used Tlaxcala prisoners of war in human sacrifice.<sup>300</sup> When Hernán Cortés arrived in their territory, they resisted the Spanish conquerors.<sup>301</sup> However, after several battles, the

293. *Id.* at 22-23.

294. For example, see WILLIAMS, JR., *supra* note 50, at 99. He does not consider Vitoria's view of the indigenous custom of human sacrifice.

295. See, e.g., MIRALLES, *supra* note 215, at 109.

296. POLITICAL WRITINGS, *supra* note 25, at 289.

297. *Id.* at 289-90.

298. *Id.* at 289.

299. See HOWARD J. ERLICHMAN, CONQUEST, TRIBUTE AND TRADE 100 (2010).

300. *Id.*

301. *Id.*

Spaniards won the war.<sup>302</sup> The leader of the Tlaxcala people, Xicontenatl, offered peace to Cortés and asked him to become allies against the Aztecs.<sup>303</sup>

After the Spanish conquerors were temporally defeated by the Aztecs, under the leadership of Cuitlahuac, and after the death of King Montezuma, they escaped to the territory of the Tlaxcala, where they reorganized and went back to Tenochtitlan, the Aztec capital.<sup>304</sup> Finally, Cortés captured Cuauhtemoc, the new Aztec king, and defeated the Aztec resistance.<sup>305</sup>

One of the few, Vitoria's knowledge of concrete events in the relations between Spain and indigenous nations, was the Spanish alliances with minority indigenous groups such as the Tlaxcaltecs. He considered it a just reason to use force on behalf of indigenous minority groups who were injured by other indigenous nations who ruled their territories.<sup>306</sup> Regarding the Spanish protection of the Tlaxcaltecs against the Aztecs in New Spain, Francisco de Vitoria wrote:

. . . whenever the barbarians themselves are engaged in legitimate war with one another, in which case the injured party has the right to wage war, and may call upon the Spaniards to help them, and then share the prizes of victory with them. This is what is said to have happened when the Tlaxcaltecs were fighting the Mexicans; they made a treaty with the Spaniards that they should help them to defeat the Mexicans, and promised them in return whatever they might win by the laws of war. There can be no doubt that fighting on behalf of allies and friends is a just cause of war . . . .<sup>307</sup>

A similar situation happened in the Spanish conquest of the Andean region. Indigenous nations, who were enemies of the Incas, were the main Spanish allies in the wars of conquest.<sup>308</sup> Spain would not have been able to conquer the Inca Empire if they did not establish strategic alliances with indigenous nations that opposed the Incan rule in the Andean region. Furthermore, the Incas were divided, which made it easier for the Spaniards to conquer them. At the end, the Spanish agreements with their

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302. *Id.*

303. GLORIA M. DELGADO DE CANTU, 1 HISTORIA DE MÉXICO 263-64 (5th ed. 2006).

304. See ERLICHMAN, *supra* note 299, at 100.

305. *Id.* at 98.

306. POLITICAL WRITINGS, *supra* note 25, at 288.

307. *Id.* at 289.

308. *Id.*

Andean allies (Chancas, Cañaris, and other indigenous groups) were unfulfilled.<sup>309</sup>

The norm of ‘defense of allies’ could have served as a justification for the Spanish actions against the Incas. However, Vitoria did not mention this scenario regarding the Andean region. It seems that Vitoria believed that the doctrine of alliances, as a justification for the use of force, was not applicable to the case of Francisco Pizarro’s actions in the Incan realm.<sup>310</sup>

From the perspective of minority indigenous groups, such as the Tlaxcaltecs or Chancas, it could have been considered just for the Spanish conquerors to intervene on their behalf. In the 16th century historical context, it is difficult to know Vitoria’s motives to justify the Spanish use of force to help minority indigenous nations. Did Vitoria propose this doctrine with the only objective of justifying the Spanish conquest, or was he mainly concerned with the welfare of indigenous minority groups? He may have had both objectives.

On one hand, it seems that he used ethical and legal norms to justify Spain’s imperial expansion. On the other hand, it seems that he applied what he considered to be just and universal norms to help indigenous people who suffered oppression and persecution. Vitoria indicated that the Romans used force for just motives, and at the same time, increased their empire.<sup>311</sup> This shows that Vitoria considered the use of force for just motives to be consistent with Spain’s objective of conquering the New World.

The norms of friendship and fellowship, as part of the social nature of human beings, were one of Vitoria’s foundations to justify the use of force in order to protect indigenous converts to Christianity and defend indigenous allies.<sup>312</sup> In the first case, converts to Christianity became “brothers” and “sisters” of Spanish Christians because of their common faith. In the second case, there was a political friendship.<sup>313</sup> For Vitoria, indigenous Christian converts should not have been persecuted because of their religious beliefs.<sup>314</sup> If they were persecuted, Spain could have

309. See, e.g., WALDEMAR ESPINOZA SORIANO, *LA DESTRUCCIÓN DEL IMPERIO DE LOS INCAS* 171-88 (4th ed. 1986).

310. Vitoria does not justify the Spanish conquest of the Inca realm. See ESCUELA DE SALAMANCA, *supra* note 42, at 37-40.

311. *POLITICAL WRITINGS*, *supra* note 25, at 289.

312. *Id.*

313. Ramón Hernández makes a distinction between natural and spiritual friendships in Vitoria’s international legal doctrines. See RAMÓN HERNÁNDEZ MARTÍN, *FRANCISCO DE VITORIA Y SU ‘RELECIÓN SOBRE LOS INDIOS:’ LOS DERECHOS DE LOS HOMBRES Y DE LOS PUEBLOS* 112-15 (1998).

314. *POLITICAL WRITINGS*, *supra* note 25, at 13-14.



used force to protect their lives. For Vitoria, this was one of the main reasons to use force against indigenous political communities. Regarding this, he said:

. . . if any barbarians are converted to Christ and their princes try to call them back to their idolatry by force or fear, the Spaniards may on these grounds, if no other means are possible, wage war on them and compel the barbarians to stop committing this wrong. If they persist, they may exercise all the rights of war, sometimes including the deposition of their masters, as in other just wars. This third title may be advanced not only on grounds of religion, but on grounds of human amity (*amicitia*) and partnership (*societas*) since the barbarians' conversion to Christianity makes them friends and partners of us Christians . . .<sup>315</sup>

Vitoria believed that one of the main reasons why Spain could use force against tyrannical indigenous rulers was the ethical norm of loving and respecting others.<sup>316</sup> Also, he believed that because indigenous people, who were oppressed by their sovereigns, were part of the international community, they should be protected by Spain.<sup>317</sup>

#### IX. THE APPLICATION OF NATURAL LAW IN THE INTERNAL JURISDICTIONS OF INDIGENOUS POLITICAL COMMUNITIES: THE RIGHT TO LIFE AND HUMAN SACRIFICES

Francisco de Vitoria specifically mentioned the practice of human sacrifice in Yucatan. This was the first place where the Spanish *conquistador*, Hernán Cortés arrived in the New World to begin the conquest of the Aztec Empire.<sup>318</sup> The practice of human sacrifice was widespread in Mesoamerica and the Andean region.

It was not only the Mayas in Yucatan who practiced human sacrifice. The Aztecs, Incas, and other indigenous nations of the New World also had religious beliefs which allowed these rituals. Aztec state ideology encouraged the human sacrifice of prisoners of war as offerings to their gods.<sup>319</sup> The Spanish ethno-historian, Bernardino de Sahagún, who lived in New Spain from 1529 to 1590, described the human sacrifice

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315. *Id.* at 286.

316. *Id.* at 287-88.

317. *Id.* at 288.

318. *See, e.g.,* Solis et al., *supra* note 247, at 21.

319. *See* MIGUEL LEON-PORTILLA, *AZTECAS-MEXICAS, DESARROLLO DE UNA CIVILIZACIÓN ORIGINARIA 175-78* (2005) (describing the history of the Aztec civilization, including the practice of human sacrifice).

practiced by the Aztecs as part of their worship to their gods “Xipe Totec” and “Huitzilopochtli.”<sup>320</sup> Regarding this, Charles Phillips writes:

Another important central element of Mesoamerican civilization—at least as far back as the Olmecs in c. 1200BC— was the use of human blood sacrifice to honour and propitiate the gods. Among the Aztecs, vast lines of prisoners of war were paraded up steep temple pyramids to be sacrificed by having their hearts ripped from their chests.<sup>321</sup>

One of the characteristics of the Inca religious worldview was the offering of children in human sacrifice to the mountains which were considered gods. Unlike the Aztecs, the Incas believed in giving complete human bodies in sacrifice without taking out any parts.<sup>322</sup> For the Incas, human sacrifice was a ritual to appease and obtain blessings from their gods and show their power over other nations of the Andean civilization. Regarding the Spanish accounts of the practice of human sacrifice in the Andean region, Constanza Ceruti writes:

. . . [a]ccording to these accounts, sacrifices were made for different reasons, such as the important events in the life of the Inca emperor, including his illness and death and the succession of a new emperor to the throne. . . In regional contexts, they were noted as often having been made to stop natural calamities, such as droughts, epidemics and volcanic eruptions . . . .<sup>323</sup>

In the Andean region, ethnic groups such as the Mochica and the Paracas also practiced human sacrifice. Regarding the custom of Inca practice of human sacrifice, Nigel Davis writes:

[a] seemingly conservative figure comes from Fray Joseph de Acosta, who states that when the Inca Huayna Capac died, only a very few years before the Conquest, a thousand human offerings followed him to the next world. Acosta writes that when an Inca ruler died, they killed his favourites and concubines, together with servants and court officials; children were also slain.<sup>324</sup>

Although the indigenous nations’ practice of human sacrifice was done inside their own jurisdictions, for Vitoria, foreign sovereigns, such

320. BERNARDINO DE SAHAGÚN, *HISTORIA GENERAL DE LAS COSAS DE NUEVA ESPAÑA* 97-100 (Angel Maria Garibay ed., Editorial Porrúa 11th ed. 2006).

321. CHARLES PHILLIPS, *THE COMPLETE ILLUSTRATED HISTORY OF THE AZTEC & MAYA* 12-13 (Joy Wotton ed. 2009).

322. See Constanza Ceruti, *Human Bodies as Objects of Dedication at the Inca Mountain Shrines, (North-Western Argentina)*, 36 *WORLD ARCHAEOLOGY* 103, 113 (2004).

323. *Id.*

324. NIGEL DAVIES, *HUMAN SACRIFICE IN HISTORY AND TODAY* 261 (1981).

as Spain, had authority to punish “evil” actions inside the jurisdictions of other political communities when their own sovereigns did not do it.

For Vitoria, Christian and indigenous nations’ general violations of natural law did not justify the use of force. Only the gravest violations of natural law, such as the killing of innocent persons, justified the use of force. Vitoria condemned the killing of innocent human beings by Spanish conquerors and indigenous people. Consistent with 16th century Spanish Christian views of rationality, the norm of respect for the sanctity of human life was considered of universal validity. Vitoria’s doctrine on the protection of innocent human life was based on one of the norms of the ten commandments of the Bible: “[y]ou should not kill.”<sup>325</sup> Further, Vitoria said: “. . . this command was always the same before the law, during the time of the law, and in Gospel time. This is clear, because the natural law is never changed; it is not abrogated, limited, or extended.”<sup>326</sup>

For Vitoria, there were some cases when the killing of human beings was justified. Vitoria justified the killing of human beings in self-defense against unjust attacks.<sup>327</sup> However, he believed that violations of the right to life of innocent human beings were never justified. For Vitoria, if Aztec rulers exercised their political authority consistent with natural law, they should have stopped and punished the practice of human sacrifice.<sup>328</sup> Because they did not do it, the nations who had the power to stop extreme violent actions could justly use force to protect innocent human lives. When innocent persons, such as children, were victims of human sacrifice, Spain could legitimately use force on behalf of the authority of the international community.<sup>329</sup>

Regarding the norms of natural law which indigenous people were supposed to obey, Professor Anghie said: “. . . an idealised version of the particular cultural practices of the Spanish assume the guise of universality as a result of appearing to derive from the sphere of natural law.”<sup>330</sup> However, in the case of the defence of innocent human life, Vitoria’s arguments had a universal perspective. For the 16th century Spanish scholastic mindset, it was irrational to believe that a society, anywhere in the world, could survive without respecting the right to life of innocent human beings.

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325. VITORIA, *supra* note 130, at 83.

326. *Id.*

327. *Id.* at 143.

328. See POLITICAL WRITINGS, *supra* note 25, at 214.

329. *Id.* at 288.

330. ANGHIE, *supra* note 5, at 21.

Vitoria believed that the killing of human beings in religious rituals and cannibalism was against natural law and divine law.<sup>331</sup> For Vitoria, consistent with Felipe Castañeda's analysis, people who practised cannibalism were murderers who constantly sought new victims to sustain their habits.<sup>332</sup> This created the conditions for constant wars between people who practiced cannibalism. Therefore, they were constant violators of the right to life.<sup>333</sup> Vitoria also believed that cannibalism was against the right to a burial because it destroyed the human body.<sup>334</sup>

Vitoria believed the killing of innocent human beings was against divine law because it violated the Ten Commandments of the Bible.<sup>335</sup> According to Vitoria, neither an innocent person nor a criminal could be acceptable sacrifices to God.<sup>336</sup> He believed all human life belonged to God, who was the creator of life.<sup>337</sup> Therefore, human beings could not take away the life of innocent persons. He believed human sacrifice was the result of indigenous nations' idolatrous worldviews.<sup>338</sup>

For 16th century Spanish scholastic thinkers, indigenous nations which committed evil actions, such as human sacrifice, violated fundamental doctrines of the Catholic Christian worldview regarding human nature. Therefore, as Castañeda explains, for Vitoria, the person who killed human beings for religious sacrifice and ate human flesh was the ontological opposite of what a human being should be.<sup>339</sup> However, for Antony Anghie, Spanish Christian norms could not have served to distinguish right from wrong. According to Anghie:

[t]he gap between the Indian and the Spaniard, a gap that Vitoria describes primarily in cultural terms by detailed references to the different social practices of the Spanish and the Indians, is now internalized; the ideal, universal Indian possesses the

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331. Vitoria addresses the issue of human sacrifice in his work *De temperatia*. For an excellent analysis of *De temperatia*, see VICENTE BELTRÁN DE HEREDIA, 2 ANUARIO DE LA ASOCIACIÓN FRANCISCO DE VITORIA 23, 41 (1931).

332. See FRANCISCO DE VITORIA, RELECCIÓN SOBRE LA TEMPLANZA O DEL USO DE LAS COMIDAS & FRAGMENTO SOBRE SI ES LÍCITO GUERREAR A LOS PUEBLOS QUE COMEN CARNES HUMANAS O QUE UTILIZAN VÍCTIMAS HUMANAS EN LOS SACRIFICIOS 177, 178 (Felipe Castañeda et al. ed., 2007).

333. *Id.*

334. POLITICAL WRITINGS, *supra* note 25, at 210.

335. *Id.* at 214.

336. *Id.* at 215.

337. *Id.*

338. *Id.* at 216.

339. Felipe Castañeda, *Antropofagia y Guerra Justa en el de Temperatia de Francisco de Vitoria*, in RELECCIÓN SOBRE LA TEMPLANZA O DEL USO DE LAS COMIDAS & FRAGMENTO SOBRE SI ES LÍCITO GUERREAR A LOS PUEBLOS QUE COMEN CARNES HUMANAS O QUE UTILIZAN VÍCTIMAS HUMANAS EN LOS SACRIFICIOS 159, 177 (Felipe Castañeda et al. ed., 2007).

capacity of reason and therefore the potential to achieve perfection. This potential can only be realized, however, by the adoption or the imposition of the universally applicable practices of the Spanish.<sup>340</sup>

For Vitoria, to end the custom of human sacrifice, it was necessary to change indigenous nations' worldviews on human nature and human life. This means that the transformation of indigenous worldviews was part of the process of implementation of the norms of natural law. If this transformation meant the change of extreme violent practices of indigenous nations, which were contrary to their own interests, it could have been consistent with 16th century views of universal justice. However, if the change meant the destruction of fundamental aspects of indigenous cultures and the imposition of Spanish interests, then this was a colonial and ethnocentric excuse to conquer indigenous nations. For Vitoria, the efforts to evangelise indigenous people were also efforts to end the ideological foundations of human sacrifice.<sup>341</sup>

Vitoria believed that indigenous nations' worldviews justified the killing of innocent human beings in human sacrifice.<sup>342</sup> But this was not the only characteristic of their norms and behaviour; he also recognized that indigenous people had well-established political communities. Contrary to Vitoria's perspective, Juan Ginés de Sepúlveda labelled indigenous nations as savages and constant violators of natural law and rejected the existence of political communities in indigenous territories.<sup>343</sup> For him, human sacrifice and cannibalism were evil actions which proved the inherent ethnic inferiority of indigenous people and justified the Spanish invasion and colonization of the New World.<sup>344</sup>

Francisco de Vitoria and Bartolomé de las Casas had different views about the justification for the use of force because of the human sacrifice practised by indigenous nations.<sup>345</sup> Bartolomé de las Casas justified human sacrifice done by indigenous nations because it was a "lesser evil."<sup>346</sup> For him, the Spanish wars against indigenous nations produced more evil than the killing of innocent people in human sacrifice.<sup>347</sup> He justified human sacrifice because for some indigenous nations it was a way of

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340. ANGHIE, *supra* note 5, at 327.

341. See VITORIA, *supra* note 332, at 178.

342. *Id.* at 160.

343. See GINÉS DE SEPÚLVEDA, *supra* note 14, at 109, 111-13.

344. *Id.* at 111-13.

345. See Teófilo Urdanoz, *Las Casas y Francisco de Vitoria*, 198 REVISTA DE ESTUDIOS POLÍTICOS, Nov.-Dec. 1974, at 115 (Spain).

346. LEWIS HANKE, ALL MANKIND IS ONE 92 (Stafford Poole trans., 1994).

347. *Id.*

demonstrating their love to God. The Aztec, Inca, Maya, and other indigenous nations gave their most precious persons, such as children, to their gods in human sacrifice.<sup>348</sup> De las Casas argued that it was very difficult to change the religious worldviews of indigenous nations and their beliefs in human sacrifice. Regarding this, he wrote:

[n]or is human sacrifice—even of the innocent, when it is done for the welfare of the entire state—so contrary to natural reason that it must be immediately detested as something contrary to the dictates of nature . . . If they offend God by these sacrifices, he alone will punish this sin of human sacrifice.<sup>349</sup>

De Las Casas' commitment to a universal perspective, which respected the interests and cultures of indigenous people, included the forgiveness of human sacrifice and the rejection of the use of force to stop them. Contrary to that view, Vitoria believed that, like all human beings, indigenous people could violate fundamental norms of natural law. In the case of human sacrifice, there was a clear violation of the right to life of their own citizens. For him, this was not a violation of Spanish subjective cultural standards, but a violation of a universal normative standard of natural law.<sup>350</sup>

Consistent with his view on the importance of consistency between positive law and natural law, Vitoria indicated that positive domestic laws should punish human sacrifice. Regarding this, he said: “. . . as St Thomas so elegantly explains, the intention of law and legislators is to make the subjects good . . . But they cannot be good if they live with bad customs; therefore it is the prince's duty to abolish these evil rituals.”<sup>351</sup> For Vitoria, non-Christian sovereigns had authority to promulgate laws against human sacrifice and punish its violations.<sup>352</sup> Therefore, if an indigenous sovereign became a Christian, he had a higher obligation to enact laws against human sacrifice and ensure the end of this practice. Vitoria believed that Christian sovereigns could enact laws consistent not only with natural law, but also with divine law and that their subjects, Christians and non-Christians, were obliged to obey those laws.<sup>353</sup>

348. *Id.* at 93-95.

349. *Id.* at 94-95.

350. Authors critical of Vitoria's views, such as David Kennedy and Antony Anghie, believe that the international norms proposed by Francisco de Vitoria were culturally subjective opinions imposed on indigenous nations. See, for instance, Anghie, *supra* note 5, at 321-22, and Kennedy, *supra* note 138, at 23-35.

351. POLITICAL WRITINGS, *supra* note 25, at 219.

352. *Id.*

353. *Id.* at 222.

Christian princes could use force to stop human sacrifice practised by foreign nations because it was a grave injury against innocent human beings.<sup>354</sup>

Vitoria believed that Christians could become rulers of indigenous nations and had authority to force them to end unnatural rituals such as human sacrifice.<sup>355</sup> Vitoria believed that Christian rulers who governed indigenous nations had to make good laws for the temporal wellbeing of their subjects and consider the interests of indigenous nations.<sup>356</sup> The implementation of good laws in the Spanish colonies was essential to preserve the good conscience of Spanish sovereigns.<sup>357</sup> Regarding Vitoria's view of the place of justice in punishing human sacrifice, Scott Davis writes ". . . the perception of injustice formed by education in the virtues makes it unthinkable to stand by while others are taken to be sacrificed. This alone entitles the Spaniards to put an end to human sacrifice as an institution."<sup>358</sup>

#### X. THE USE OF FORCE: HUMAN SACRIFICES AND PROPORTIONALITY

Vitoria often quotes Saint Augustine, who justified the use of force when a nation did not punish the "wrongdoings of its own citizens."<sup>359</sup> Because indigenous norms allowed human sacrifice, and indigenous sovereigns did not issue punishment for human sacrifice, Vitoria believed that the use of force, based on the concept of the "good of the whole world," could have been properly applied to Spain's wars against indigenous nations.<sup>360</sup> Regarding this, he said:

I assert that in lawful defence of the innocent from unjust death, even without the pope's authority, the Spaniards may prohibit the barbarians from practicing any nefarious custom or rite . . . This applies not only to the actual moment when they are being dragged to death; they may also force the barbarians to give up such rites altogether.<sup>361</sup>

For Vitoria, grave violations of the right to life justified the conquest of the Aztec Empire, as well as the actions of Spain in the Andean

354. *Id.* at 225.

355. *Id.* at 227.

356. *Id.*

357. *Id.* at 228.

358. G. Scott Davis, *Conscience and Conquest: Francisco de Vitoria on Justice in the New World*, 13 MOD. THEOLOGY 4, at 475, 490 (1997).

359. POLITICAL WRITINGS, *supra* note 25, at 298.

360. *Id.* at 225, 298.

361. *Id.* at 288.

region.<sup>362</sup> However, Vitoria did not mention the Inca practices of human sacrifice.<sup>363</sup> For Vitoria, the objective of Francisco Pizarro and other Spanish conquerors in the Andean region was to exploit the natural resources of indigenous people, not to save innocent human lives.<sup>364</sup>

Francisco Suarez, like Vitoria, believed that wars should be waged to defend innocent human beings only in extreme circumstances.<sup>365</sup> According to him, “[T]his ground for war should rarely or never be approved, except in circumstances in which the slaughter of innocent people, and similar wrongs take place.”<sup>366</sup> Consistent with the Spanish scholastic understanding of natural law, human sacrifices practiced by indigenous people were actions contrary to fundamental norms, such as “love your neighbour as yourself” and “you should not kill innocent persons.”<sup>367</sup> Regarding Francisco Suarez’s perspective on human sacrifice and the use of force, Doyle writes: “Suarez added that this may be done not only to liberate children, but also adults—even if they themselves consented and wished to be sacrificed to idols. For in this, he thought, these adults were worse than madmen.”<sup>368</sup>

There were other Spanish scholastic thinkers besides Suarez who agreed with and clarified Vitoria’s justification for the use of force against indigenous nations to end human sacrifice. For Diego de Covarrubias, human sacrifice of innocent indigenous persons was a just reason for war.<sup>369</sup> According to him, the innocent people who could be killed in human sacrifice were fellow human beings, and there was an assumption that they were asking for help.<sup>370</sup> Even if they did not ask for help directly, there was still the Christian duty to save the lives of the innocent.<sup>371</sup> For Melchor Cano, indigenous nations and Spain could use force to protect the lives of innocent human beings against homicidal policies.<sup>372</sup>

Juan de Solórzano indicated that the Incas practiced human sacrifice to celebrate the appointment of a new king or when their king died.<sup>373</sup>

362. *Id.* at 225, 288, 298.

363. *Id.*

364. *Id.* at 331-32.

365. SUAREZ, *supra* note 108, at 826.

366. *Id.*

367. *See, e.g.,* VITORIA, *supra* note 332, at 187-88.

368. John P. Doyle, FRANCISCO SUAREZ: ON PREACHING THE GOSPEL TO PEOPLE LIKE THE AMERICAN INDIANS, 15 FORDHAM INT’L L. J. 938, 939 (1991).

369. Diego de Covarrubias, *Justicia de la Guerra Contra los Indios*, in MISION DE ESPAÑA EN AMÉRICA 1540-1560, at 221 (Luciano Pereña ed., 1954).

370. *Id.*

371. *Id.*

372. Melchor Cano, *Dominio Sobre los Indios*, in MISION DE ESPAÑA EN AMÉRICA 1540-1560, at 109-12 (Luciano Pereña ed., 1954).

373. PEREIRA, *supra* note 114, at 435-37.



According to him, around one thousand children, from four to ten years old, were sacrificed for those types of rituals.<sup>374</sup> He also stated that the wives of dead leaders were forced to be buried alive with their husbands.<sup>375</sup> Solórzano believed that human sacrifice was “. . . abominable not only for us, who by God’s favour profess the pious Christian religion, but also for the pagans and infidels . . . .”<sup>376</sup> Solórzano also described the Aztecs’ custom of human sacrifice.<sup>377</sup> Solórzano concluded that Spanish kings could wage wars against indigenous nations to force them to stop human sacrifice and obey natural law.<sup>378</sup> According to him, actions against divine and natural law were actions against all humanity.<sup>379</sup>

Juan de la Peña—another Spanish scholastic thinker who interpreted Vitoria’s doctrines—believed that even if it was consistent with their customs, it was still wrong for innocent indigenous persons to accept being killed in human sacrifices.<sup>380</sup> Peña focused on innocent persons because he accepted human sacrifice of persons found guilty of crimes which deserved the death penalty. Peña concluded that the war against the Aztecs was unjust because their human sacrifices were done against guilty human beings.<sup>381</sup> According to him, the Spanish conquerors did not require indigenous nations to stop the practice of human sacrifice before using force. Also, the Spaniards killed more human beings in a few days than the Aztecs did in many years of human sacrifice.<sup>382</sup>

For Vitoria, a just war to save the lives of innocent human beings should have been proportionate to that narrow objective. According to him, “if war is declared on the barbarians by this title, it is not lawful to continue once the cause ceases, nor to seize their goods or their lands on this pretext.”<sup>383</sup> Vitoria did not mention when the causes for the killing of innocent human beings by human sacrifice ended. If the main cause for human sacrifice was the indigenous nations’ worldviews, which led them to believe that it was good to kill innocent persons for religious reasons, then changing this aspect of indigenous nations’ beliefs required a very long time.<sup>384</sup> In the case of the Spanish conquest of the Inca Empire, the

374. *Id.* at 437.

375. *Id.*

376. *Id.* at 439.

377. *Id.* at 466-67.

378. *Id.* at 439.

379. *Id.* at 469.

380. DE BELLO CONTRA INSULANOS INTERVENCIÓN DE ESPAÑA EN AMERICA, *supra* note 69, at 219.

381. *Id.* at 225.

382. *Id.*

383. POLITICAL WRITINGS, *supra* note 25, at 226.

384. *See* VITORIA, *supra* note 332.

use of force against the Incas was completely disproportionate to that specific religious objective. Regarding this, Vitoria opined:

I assume that, even if the war is fought by just title, the belligerent does not thereby have the power to eject the enemy from their dominions (dominium) and despoil them of their property at whim; he can act only as far as is necessary to ward off injustices (iniuriae) and secure safety for the future.<sup>385</sup>

If the Spanish conquerors had just titles to wage wars against indigenous people, they did not have the right, consistent with Vitoria, to occupy their territories. This part of Vitoria's doctrine was not pro-colonial because it defended the interests of indigenous nations. Regarding proportionality in the use of force, Juan de la Peña, who interpreted Vitoria's doctrines at the University of Salamanca, wrote: "Even when a war is legal to defend innocent persons, the precept of prudence should be also respected . . . [t]he war that is waged in defence of fellow human beings should not result in more damage than the one as a result of [human] sacrifice."<sup>386</sup>

One of the leading thinkers in the Andean region in the 16th century was José de Acosta. He agreed with the use of force to defend the life of innocent persons in cases of human sacrifice if it was done in a proportional manner.<sup>387</sup> Regarding this, he said:

it is also absurd to want to defend those if the defence will produce more mortality. And it is established by infinity of testimonies that many more, by far, have died in wars against the Indians than with any tyranny of the barbarians. What amount of sacrifices and massacres of Indians did happen because of the devastation caused by the sword of the Spaniards? Therefore, morally speaking, it would be very difficult, or better to say that it can never be alleged that the defence of innocents is a just cause for war against the Indians.<sup>388</sup>

Vitoria's doctrine on the use of force to end human sacrifice had a great influence on the Spanish scholastic perspective of war. Vitoria's recognition of the principle of proportionality in the use of force to end human sacrifice is a remarkable effort for the 16th century Spanish historical context. At that time, Spain's main objective was to conquer and

385. POLITICAL WRITINGS, *supra* note 25, at 226.

386. DE BELLO CONTRA INSULANOS INTERVENCIÓN DE ESPAÑA EN AMERICA, *supra* note 69, at 221.

387. JOSÉ DE ACOSTA, DE PROCURANDA INDORUM SALUTE, PACIFICACION Y COLONIZACION 292 (1984).

388. *Id.* at 297.

colonize indigenous nations without considering the consequences of the use of force in the New World.

For Vitoria, Spain could use force against indigenous political communities to save innocent human lives or liberate indigenous nations who were oppressed by another indigenous political community. Spain could do this because oppressive indigenous commonwealths were not fulfilling the objectives for their existence, which included the protection of the wellbeing of their citizens. In this case, the *communitas orbis* had the authority to stop grave violations against innocent persons. Because of this, a country with enough power, such as Spain, could use force on behalf of the entire world.

Considering that all human beings were part of the *communitas orbis*, the actions of Spain to save innocent human lives against the tyranny of the Aztecs was based on the *auctoritate totius orbis*. The actions of political communities taken on behalf of the rest of the world were considered legal even if oppressed indigenous people did not ask for help.<sup>389</sup> The reason for this was that innocent human beings could not forsake their right to life, which was given by God, who is the only one who could take it away.

On the one hand, Vitoria's justifications could be considered universal and just, consistent with 16th century views, because their aim was to save innocent human beings who were oppressed and persecuted by more powerful indigenous nations. On the other hand, under the excuse of changing indigenous worldviews, which allowed the practice of human sacrifice, and protecting Spanish allies, Spain could have justified the conquest and colonization of indigenous nations.

Vitoria's justification to use force to protect the lives of innocent indigenous persons was consistent with 16th century Spanish views of universal justice which recognized the sanctity of human life as one of its main foundations. The objective of protecting innocent human lives could not be considered ethnocentric or colonial because its aim was to protect the wellbeing of innocent indigenous people, whose lives were at risk because of the indigenous custom of human sacrifice. However, the Spanish disproportionate use of force was a problem that Vitoria did not systematically address. Therefore, even a principle, which could have been considered universal and just, could also have had ethnocentric and unjust consequences in its implementation.

Authors who are critical of Francisco de Vitoria's ideas often do not consider the complexity of Vitoria's proposal of global normative

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389. MIRALLES, *supra* note 215, at 109.

standards that need to be understood in the intellectual Spanish 16th century context. In that context, ethical norms, such as respect for the sanctity of human life, were an essential part of the prevalent worldview.

For Francisco de Vitoria, extreme violent actions against the sanctity of human life, even if committed consistently with domestic positive indigenous laws, were against the natural normative order.<sup>390</sup> For Vitoria, indigenous nations, such as the Aztec, could not have rationally argued that the systematic killing of innocent children in religious sacrifice was part of their sovereign will. Sovereign wills could not have prevailed over fundamental precepts of natural law such as respect for the right to life of innocent human beings.

Although he does not specifically mention the indigenous practices of human sacrifice and cannibalism, Antony Anghie indicates that Vitoria not only tried to impose a Christian European understanding of norms for the relations between nations on indigenous people, but he also tried to force indigenous nations to follow those Spanish norms in their domestic affairs.<sup>391</sup> Following Anghie's reasoning, it can be said that Vitoria's justification to use force to stop human sacrifice and cannibalism was an effort to impose norms contrary to indigenous cultures and justify Spain's colonial expansion. However, it is doubtful that Vitoria's proposal to use force to cease the practice of human sacrifice had the objective of justifying the Spanish colonial expansion in the New World. Considering Vitoria's theological beliefs in the obligation to save innocent human lives, he likely believed that Spain had a legal and moral obligation to stop the practice of human sacrifice in the New World.

## XI. CONCLUSION

This article demonstrated that Francisco de Vitoria's international normative ideas were a 16th century effort to promote just global norms which had ethnocentric pro-colonial components. Most of Vitoria's proposed norms were a *bona fide* effort to transcend his cultural setting and defend not only Spanish interests, but also the interests of indigenous nations and the international community.

Francisco de Vitoria's international legal and political doctrines emerged because of his interpretation of historical facts about the Spanish conquest of indigenous nations. They also emerged because of his views on the nature of indigenous nations and their political communities. He

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390. Contrary to this view, David Kennedy wrote: "Vitoria organizes his doctrinal system in a way which renders unjust and illegitimate what today would be termed exercises of sovereignty which conflict with each other or the moral/legal order." Kennedy, *supra* note 138, at 14-15.

391. See ANGHIE, *supra* note 5, at 327.

interpreted those facts through the lenses of 16th century Spanish scholastic legal, theological, and philosophical concepts. In Vitoria's historical setting, the conquest of the New World was justified by medieval law doctrines of legal instruments such as the *Requerimiento*, *Capitulations*, and *Alexandrian Papal Bulls*. Francisco de Vitoria rejected the doctrinal foundations of these documents and proposed the application of natural law in the international relations between Spain and the indigenous nations of the New World.

Francisco de Vitoria's international normative ideas emerged in a specific historical-intellectual context and answered specific questions which were relevant for that time. Vitoria applied Thomas Aquinas' scholastic ideas and canon law doctrines to the historical context of the Spanish conquest of the New World. In that context, there were emerging views of universal justice such as the one of Bartolomé de las Casas, who considered the interests of indigenous people even above the interests of his own country. Juan Ginés de Sepúlveda represented another view of universal justice which identified Spanish national interests with the interests of humankind. Francisco de Vitoria's international normative doctrines were closer to De las Casas' universalism. However, it had some elements consistent with Sepúlveda's ethnocentric colonial views.

Vitoria recognized the source of civil power in the commonwealth and not in ecclesiastical authority. Consistent with that belief, "infidel" nations, such as the Inca, could have had legitimate political communities. Unlike medieval authors, who rejected the existence of political communities in "infidel" nations because of their sinfulness and unbelief in Christianity, Vitoria accepted the existence of dominion (*dominium*) and civil power (*potestate civili*) in non-Christian nations. In his commentaries on Aquinas' *Summa theologiae*, he recognized the internal sovereignty of indigenous nations by indicating that Christian sovereigns were not superior to indigenous ones, and that their territories could not be taken away.<sup>392</sup> In his letter to Miguel Arcos, Vitoria equated the Inca Empire with Castile and Aragon. Those political communities were part of Spain, but they had a limited external sovereignty.<sup>393</sup>

Vitoria believed that indigenous nations, like all nations, were obliged to obey the natural law of nations' norms. These included the norms of travel, trade, and evangelism. Violations of those norms by indigenous nations were considered injuries against the rights of Spanish

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392. See VITORIA, *supra* note 82, at XXXIV.

393. See POLITICAL WRITINGS, *supra* note 25, at 301 & n.15; see also ESCUELA DE SALAMANCA, *supra* note 42, at 36-39.

visitors and immigrants in the New World.<sup>394</sup> Those injuries were considered actions that justified the Spanish use of force as a just punishment. For Francisco de Vitoria, grave violations of natural law norms inside indigenous jurisdictions were considered offenses against God's design of the universe and contrary to God's design of human nature. Human sacrifice and cannibalism were grave violations of natural law norms.<sup>395</sup> Therefore, for Vitoria, the Spanish conquest and colonization of the New World could have been justified to stop and punish those practices.<sup>396</sup> Despite Vitoria's recognition of the importance of proportionality in the implementation of those norms, he did not properly address the use of those natural law norms as an instrument to justify the conquest and colonization of indigenous political communities.<sup>397</sup>

This article showed that a careful analysis of Vitoria's views on concrete facts regarding the Spanish conquest of the Inca and Aztec empires reveals that Vitoria had a limited knowledge of the history and cultures of indigenous nations. Because of this, he mentioned the practice of human sacrifice in the Aztec realm, but he did not acknowledge it in the Inca Empire, where that was also common practice. He did the same regarding Spanish alliances with indigenous minority groups. Vitoria justified the use of force against the Aztecs because of the Spanish conquerors' alliances with the Tlaxcaltecs. However, he did not mention the Spanish alliances with indigenous nations in the case of the conquest of the Inca Empire.

Among other reasons, Vitoria's rejection of the legality of the conquest of the Inca Empire was based on his rejection of the doctrinal foundations of the *Requerimiento*, which was the main legal instrument to justify the Spanish use of force in the Andean region. Contrary to this, he justified the use of force against the Aztecs to end their customs of human sacrifice and cannibalism. Those actions were not violations of the natural law of nations in the relations between Spain and indigenous nations. They were violations of natural law by indigenous sovereigns against their own people and in their internal jurisdictions. For Vitoria, Aztec sovereigns violated fundamental norms of natural law because their customs allowed grave violations against the sanctity of human life. For the Spanish 16th century mindset, the defense of innocent human life was one of the most universal norms applicable to nations from diverse civilizations.

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394. See POLITICAL WRITINGS, *supra* note 25, at 284.

395. *Id.* at 207-14.

396. *Id.* at 218.

397. *Id.* at 283.

Antony Anghie and other critical scholars disregard the fact that in his letter to Miguel Arcos, Vitoria recognized that the Spanish conquerors' actions in the Inca realm were illegal. He believed that the Inca people did not injure the Spaniards. Therefore, there was no justification to use force in the Andean region. For Vitoria, the Inca—like all other indigenous nations—had the obligation to respect the natural law of nations' norms of trade, travel, and evangelism. If they violated those norms, they injured the Spanish immigrants and visitors in the New World. However, Vitoria did not mention Inca violations of the natural law of nations. Therefore, Francisco Pizarro's war against the Inca Empire was illegal. For Vitoria, even if the Incas violated the natural law of nations, Pizarro's use of force was disproportionate, and he therefore violated the norms of the law of war in the battle of Cajamarca.<sup>398</sup> The conquest of the Inca Empire could also have been justified because of grave violations of natural law in the internal relations between the Inca sovereigns and their citizens. However, Vitoria did not mention the Inca practice of human sacrifice, either because he did not know about it or he did not want to mention it.

If Francisco de Vitoria's ideas are the starting point of international law, there is not a colonial ethnocentric origin of this discipline. Despite the contradictions and limitations of Vitoria's international legal doctrines, his international legal ideas were a *bona fide* effort to promote just international norms. This was done within the limits of Vitoria's 16th century Spanish intellectual-historical context and within his limited knowledge about the indigenous nations of the New World.

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398. *Id.* at 332.