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Submitted Abstract: Society and the Recognition of First Nations Peoples

Society is a foundational concept in international law, defining both state sovereignty and membership of the family of nations (Angie 2004). The concept of society was historically used to exclude First Nations from recognition within international legal regimes, and arguably continues to do so. This chapter will map the notion of society as a defining concept in international law and its current usage in relation to first peoples. The application of the concept of society in Australian domestic law will be explored as a case study of how society continues to influence the recognition (and non-recognition) of first peoples' rights within international and domestic legal frameworks, which differ significantly from First Nations peoples' perspectives of law.

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Introduction

'Society' has been identified as a foundational concept in the development of international law, defining both state sovereignty and membership of the family of nations.[1] Antony Anghie argues that as international law shifted from its foundations in natural law based on transcendental and universal values, towards a scientific, positivist framework, society became a central concept that helped to shape the Eurocentric system of international law. (p.48). Anghie argues that the nineteenth century positivist international law, devised a number of strategies for excluding non-Europeans from the emerging international legal

[1] Antony Anghie, Imperialism, Sovereignty and the Making of International Law, (2004, Cambridge University Press, New York), 59.

order: firstly by creating a distinction between so-called civilised and uncivilised peoples, and secondly by only admitting peoples who met European standards of civilisation as members of 'international society', and thereby linking international legal status to a 'cultural distinction.' (57-58). So for Anghie colonialism was not simply the application of sovereignty, but rather international law (and sovereignty) was constituted through colonialism.(p.38).

One of the problems with Anghie's analysis however is that it does not identify precisely *how* the concept of society is put to such use, nor does he examine the crucial link between the nineteenth century positivists' pre-occupation with society and the work of their natural law predecessors, Francisco de Vitoria (1483-1546) and Hugo Grotius (1583-1645). Anghie's work has also been criticised by Yasuaki Onuma for over-emphasising Vitoria's role in formulating the modern concept of sovereignty,[2] which also appears to be inconsistent with his view that nineteenth century positivists were its main architects. This chapter argues that the natural law origins of international law, and in particular the work of Vitoria and Grotius also grounded their conception of a 'law of nations' upon the idea of society, and developed a theory of sovereignty, which also constructed First Nations peoples, as 'special subjects' within the emerging Eurocentric international legal order. (Ref Watson)

Although a number of scholars have critiqued Vitoria and Grotius theory of 'just wars' for the support it provided to colonialism,[3] very little attention has been directed to how society functions within their works to develop a particular vision of sovereignty and sovereign power. And while Robert Williams and James (Sakej) Youngblood Henderson have shed light on how the 'state of nature', as attributed to Indigenous peoples, was posited as the hypothetical antithesis of Western 'civilised society', providing rationalisations for the

[2] Yasuaki Onuma, 'Multi-civilizational international law in the multi-centric 21st century world: transformation of West-centric to global international law as seen from a trans-civilizational perspective', in Peter Haggenmacher, Pierre-Marie Dupay and Vincent Chetail (eds), *The Roots of International law* (2014, Martinus Nijhoff Publishers, Leiden), 629.

[3] Robert A. Williams Jr, The American Indian in Western Legal Thought: The Discourses of Conquest, (1990, Oxford University Press, New York), 93-108; S James Anaya, *Indigenous Peoples in International Law* (2004, 2nd ed, Oxford University Press, Oxford), 19; Anghie, above n1, 19-30.

colonisation of first nations peoples and their lands,[4] the concept of society and its role in constructing a discourse of international law which operated to negate Indigenous sovereignty is not explored.

Grotius is also noted for his theory of property which is constructed in contrast to a mythical 'primitive hunter-gather state'[5] and also for articulating the first comprehensive theory of international law, influenced by Aristotelian notions of human sociability and reason, however his work on society and 'commonwealth' and the legitimate ends of sovereign power are overlooked (and incorrectly in my view attributed to Thomas Hobbes 1651).[6]. Youngblood Henderson urges Indigenous scholars to confront the assumptions of the state of nature and how they underlie 'modern theory' in order to transform existing power relations.[7] This work takes up this challenge however it approaches the problem from a different perspective: by focussing on the positive production of a discourse of society, which informed international legal norms and the implications for First Nations peoples.

This chapter aims to show how the concept of society was also central to early natural law theories of international law, influencing who was deemed to hold sovereign power, the rights flowing from sovereignty, and the way the Indigenous subject was constructed within the emerging Eurocentric international legal order. In doing so it will draw upon Michele Foucault's theories on power and knowledge to show how the concept of society was fundamental to producing a discourse of international law, which manufactured Indigenous subjects in certain ways and with specific power effects.[8] Foucault argues that power is not limited to juridicial sovereignty but is exercised through various means – including through discourses and disciplinary knowledge - which are both constraining *and* productive. Power may constitute a 'relationship of force' which 'represses': it can also be productive in that it 'manufactures subjects', as a result of power effects.[9] For Foucault the production of of disciplinary knowledges coincided with the emergence of modern nation states and the

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[4] Williams, ibid, 197-203; James (Sakej) Youngblood Henderson, 'The Context of the State of Nature' in Marie Battiste (ed), *Reclaiming Indigenous Voice and Vision* (2000, University of British Colombia Press, Vancouver), 27-28.
[5] Robert A Williams Jr, Savage Anxieties: The invention of western civilization (2012, Palgrave Macmillan, New York).
[6] Youngblood Henderson, above n4, 15-23.
[7] Ibid, 33.
[8] Michael Foucault, *Society must be defended* (1997, Picador), 45.
[9] Ibid, 18.

exercise of state power over citizens: to control the 'internal enemy'.[10] Disciplines therefore 'create apparatuses of knowledge' which are used coercively to achieve political ends.[11] In the Foucaudian matrix of power and knowledge disciplines produce: 'a discourse about a natural rule' or in other words a norm. Disciplines will define not a code of law, but a code of normalisation…'[12]

Although Foucault's critique is directed towards the use of disciplinary knowledge as a technology of power *within* the nation state, his theoretical framework has obvious relevance to the development of a Eurocentric international law as a form of disciplinary knowledge, and the construction of norms which operated to manufacture Indigenous subjects in certain ways, as 'special objects' of international law,(REF IW) and ensuring their subjugated position within the emerging international legal order. It seeks to provide 'a more elaborate, refined theory of the relation between law and power manifested as a will to empire',[13] by examining how society functions within the emergent disciplinary knowledge of international law, in ways that positions Indigenous peoples as objects rather than subjects of international law. My focus here is to examine how within natural law theories the concept of society was central to constructing an international legal order which supported European colonial expansion and the domination of Indigenous people, which informed the positivist traditional of international law that was to follow.

Society and the Construction of Sovereignty

Francisco de Vitoria and Hugo Grotius, are widely acknowledge as two of the founding scholars of 'international law', as it is understood within the European context. While this attribution and the extent of their influence on the doctrine of state sovereignty has been questioned, it is not within the scope of this chapter to debate these issues.[14] These two scholars are highlighted because they both shared concerns about the morality and legality of

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[10] Ibid, xviii.
[11] Ibid, 38.
[12] Ibid, 38. Although Foucault argues that the disciplines are 'alien to law' in this context (making specific reference to the 'human sciences'), the thesis that Foucault saw law as a secondary phenomenon, that was simply colonized by disciplinary knowledges, has recently been challenged by Ben Golder and Peter Fitzpatrick, see Golder and Fitzpatrick, *Foucault's Law,* (2009, Routledge), Chapter 1. Indeed the 'expulsion' thesis perhaps masks a more fundamental problem, as it diverts attention from how 'legal' disciplinary knowledge also operates as a form of power.
[13] Williams, above n3, 8.
[14] See generally Onuma, above NX, (2000), 5 – and references therein.

the conduct of Christian European nations with respect to non-Christian peoples, and also because they sought to articulate a principled approach to some disturbing questions arising from the European imperial project, although for very different reasons.

Vitoria, a Spanish Dominican theologian, wrote his major reflections on these questions, *On the Americans Indians* (1539) and *On the Law of War* (1539) some forty years after Christopher Columbus' voyage of 'discovery' to the Americas, and in response to reports of 'bloody massacres and innocent individuals pillaged of their possessions and dominions' which he argued raised 'grounds for doubting the justice of what had been done'.[15] *On the American Indians* questions the lawfulness of various claims to titles by the Spanish (including the Christian doctrine of discovery)[16] and also sets out what Vitoria regards as 'just claims' to title over Indian lands. *On the Law of War* elaborates upon these claims in Vitoria's theory of 'just war' in which he argues the 'possession and occupation of these lands is *most* defensible in terms of the laws of war'.[17] However it is Vitoria's essay *On Civil Power* (1528),[18] which establishes his vision of the scope and nature of sovereign power (that underpins the assumptions inherent in his works on colonialism), and of particular relevance to this work, defines sovereign power by invoking the concept of society. This essay has been described by Anthony Pagden as 'a defence of the Castilian monarchy, and of monarchies in general, as the most perform form of political community.'[19]

In contrast Grotius, a Dutch lawyers and jurist, started the initial work on his treatise *On the Law of War and Peace* (1625) as part of a defence of the actions of the Great United Company of the East Indies (Dutch East India Company), which captured a Portuguese vessel in the waters off the East Indies, and in doing so challenged Portugal's claim to exclusive trading rights in the area based on the authority of the papal bulls.[20] Grotius stated that his work was animated by a concern that:

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[15] Francisco de Vitoria, 'On the American Indians', in Anthony Pagden (ed), *Francisco de Vitoria: Political Writings,* (1991, Cambridge University Press, Cambridge), 238.
[16] Ibid, 231-292.
[17] Francisco de Vitoria, 'On the Law of War', in Anthony Pagden (ed), *Francisco de Vitoria: Political Writings,* (1991, Cambridge University Press, Cambridge), 293-327, at 295 (emphasis added).
[18] Francisco de Vitoria, 'On Civil Power', in Anthony Pagden (ed), *Francisco de Vitoria: Political Writings,* (1991, Cambridge University Press, Cambridge), 1-44.
[19] Anthony Pagden (ed), *Francisco de Vitoria: Political Writings,* (1991, Cambridge University Press, Cambridge), xvii.
[20] Hugo Grotius, *The Law of War and Peace*, (translation by Francis W Kelsey), (1925, Bobbs-Merrill Co Inc, New York), xiv-xv.

> Throughout the Christian world I have observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.[21]

While Vitoria and Grotius had very different motivations: they both emphatically rejected the Christian doctrine of discovery as legitimate grounds for colonial expansion.[22] Grotius makes the point (with reference to Vitoria) that: saying:

> [It is] Equally shameless … to claim for oneself by right of discovery what is held by another, even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one.[23]

Both Vitoria and Grotius also viewed as unjust wars or titles claimed on the grounds of refusing to accept Christianity,[24] because 'unbelief' was not sufficient grounds to wage war. (Ibid). As a consequence they endeavoured to articulate a secularised 'law of nations', based on natural law (as determined from the precepts of divine or Christian law, and dictated by 'right reason'), which they perceived as 'manifest and self evident', and therefore immutable and universal.[25] Both also attempted to synthesise Christian principles and Aristotelian philosophy to give expression to the ideal or natural form – the telos – of its subject matter – being the law of nations and the sovereign bodies who constituted this emergent international legal order.

Vitoria also argued that the 'barbarians' were rational beings, evidenced by the fact that 'they have some order in their affairs: they have properly organized cities, proper marriages,

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[21] Ibid, 20.
[22] Vitoria, above n15, 260; Grotius, above n20, Book 2, XXII.IX.
[23] Ibid.
[24] Vitoria, above, n15, 265-7.
[25] Hugo Grotius, *The rights of war and peace*, Richard Tuck (ed) from the translation of Jean Barbeyec 2005 (Liberty Fund, Indianopolis), xl-xli.

magistrates and overlords, laws, industries, and commerce, all of which require the use of reason'[26] As rational beings they also possessed 'true dominion, both public and private',[27] and also could be regarded as 'legitimate' sovereigns.[28] However Vitoria also regarded the barbarians as 'foolish and slow-witted' which he argued may be provide grounds for 'subjecting the Indians' in other ways.[29] Indeed Vitoria's characterisation of Indigenous peoples as rational beings has been noted as one of his most significant contributions to international legal discourse.[30] The natural law foundations and purported universality of this emerging law of nations, together with the attribute of reason to Indigenous peoples arguably made it binding upon all peoples who were seen to constitute a 'human society'.[31]

This naturalist law of nations developed by Vitoria and Grotius was also problematic because it privileged European forms of social, legal and political organisation, and presented them as universal. The consequence for Indigenous peoples was that failure to conform to a universalised standard based on European (Christian) norms, was attributed to a lack of reason, providing grounds for denying Indigenous peoples 'rights' to property and sovereignty. As an emerging body of legal disciplinary knowledge, the law of nations, was clearly intended to have specific power effects, in that it defined the peoples possessing sovereignty, the scope and nature of sovereign power, and as a consequence, constructed a subjugated position for Indigenous peoples within the international legal framework. The concept of society was central to this construction, being fundamental to how sovereignty was defined, and the scope and nature of sovereign power.

What is society??

> For Man is indeed an Animal, but one of a very high Order, and that excels all the other Species of Animals much more than they differ from one another; as the many Actions proper only to Mankind sufficiently demonstrate. Now amongst the Things peculiar to Man, is his Desire of Society, that is, a certain Inclination to

[26] Grotius, above n15, 250.
[27] Ibid, 251.
[28] Grotius, above n18, 17-18.
[29] Grotius, above n15, 251.
[30] Williams, above n3, 99.
[31] Ibid, 100; Anghie, above n1, 23.

> live with those of his own kind, not in any manner whatever, but peaceably, and in a community regulated to the best of his understanding.[32]

Societates, meaning a partnership, is according to Vitoria the natural form of human association, arising from the distinct human characteristics of speech and reason, and the need for humans to live together to fulfil their need for food and shelter, and to ensure their safety and security[33] For Grotius the natural desire of society arises from the particular characteristics of men, being speech, and the 'faculty of knowing and acting, according to some general principles'.[34] According to Grotius man's natural inclination is to live in society, not merely out of self-interest, but because man is 'more perfect' when his actions are 'designed for the service of another'.[35] Vitoria also argues (with reference to Aristotle), that men are 'impelled by nature to *seek* society', and that men who do not 'should be counted as beasts'.[36]

According to Vitoria men enter partnerships due to the necessity of helping to bear each other's burdens, and therefore 'a civil partnership (*ciuillis societas*) is the one which most aptly fulfils men's needs.'[37] Being spawned by necessity means that society is not a human invention, but is founded in natural law, with the consequence that the very 'purpose and utility of public power are identical to those of *human society* itself.'[38]. Grotius also posits the natural law origins of municipal law as stemming from the need for men to form agreements and create obligations, which is the reason why 'bodies of municipal law have arisen.'[39] Grotius notes that this 'care of maintaining society, in a manner conformable to the light of human understanding, *is the fountain of right, properly so called,*' and includes respecting private property; fulfilling obligations and promises; paying restitution for harm done; and an expectation of punishment if rights are transgressed.[40] Therefore according to Grotius 'rights' are constituted both in and through society, because *the mutual recognition of rights is the very essence of society itself.* Rights are determined by the use of 'reason', and

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[32] Grotius, above n25, vi.
[33] Vitoria, above n18, 6-9.
[34] Grotius, above n25, vii.
[35] Ibid, vi.
[36] Vitoria, above n18, 8.
[37] Ibid, 8-9.
[38] Ibid, 9-10.
[39] Grotius, above n20, 15.
[40] Grotius, above n25, viii.

anything contrary to reason is inconsistent with natural law.[41]. For Vitoria and Grotius society, is synonomous with public or civil power, and is the vehicle through which rights are asserted and defended, according to 'reason'. Under this construction of natural law, society is equated to civil society, reflecting specifically European legal, political and social practices, which are presented as universal.

Society and the Nature of Sovereignty

Vitoria and Grotius also express a distinct preference for certain forms of society as suitable for exercising sovereign power. For Vitoria it logically follows from the necessity of civil socieities that 'the city (ciutias) is … the *most natural community,* the one which is more conformable to nature.'[42] And for Vitoria – the *perfecta communitas* – is both self-sufficient (perfecta) and not subject to the will of another: 'a perfect community or *commonwealth* [state] is therefore one which is complete in itself; that is one that is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrates.'[43][44] According to Vitoria no society is self-sufficient without 'magistrates and authorities possessing executive power.'[45] In keeping with his role as advisor to the Castilian monarchs, Vitoria argues that 'with all the most honoured and wise peoples of earth, that monarchy is not merely equitable and just, but also of all forms of government the most excellent and convenient to the commonwealth.'[46] Here Vitoria links society, community and commonwealth (and state) as being the most perfect forms of human partnership, and the monarchy is the most suitable form of government to exercise sovereign power.

Vitoria also maintains that non-Christian peoples may be legitimate sovereigns because 'there can be no doubt at all that the heathen have legitimate rulers and masters' (based on an analogy with pre-Christian secular forms of governance which did not rely on divine law for their legitimacy). [47] And although Vitoria affirms that non-Christian sovereigns shall not be deprived of their kingship or power on the grounds of 'unbelief', they may be deprived of

[41] Ibid, ix.
[42] Vitoria, above n18, 8.
[43] Vitoria, above n17, 301.
[44] NB Williams, cites the Nys translation of Vitoria, in which – 'state' is substituted for 'commonwealth'. PAGE REF.
[45] Pagden, above n19, xxii.
[46] Vitoria, above n18, 20.
[47] Ibid, 17-18.

their power, where they have 'committed *some other injustice*.'[48] Implicit in this recognition is an adherence to Christian values which if transgressed provide the justification for depriving non-Christians of sovereign power. So native American sovereignty is not perceived as independent and self-sufficient in the same way that European sovereignty is: it is constructed as something lesser, and vulnerable to non-Christian interference. Vitoria's theory of 'just war' also provides ample justifications for depriving non-Christians of their sovereignty, and will be discussed below.

For Grotius 'the common subject of supreme power is the State' which he regards as 'a perfect society of men.'[49] The state constitutes: "An association in which many fathers of families unite into a single person and state gives the greatest right to the corporate body over its members. This in fact is the most perfect society.'[50] The nature of sovereign power is that is indivisible, being 'not subject to the legal control of another'.[51] According to Grotius sovereignty is also evidenced by the existence of certain types of legal institutions and processes, for example having its 'own laws, courts, and public officials.'[52] Another pre-requisite for statehood include 'tribunals and the other agencies' through which citizens and foreigners alike may obtain their rights.[53]. While Grotius affirms that the common subject of sovereignty is the state, sovereignty may be exercised in different ways: by a government of the peoples; a constitutional government; or by men with supreme power.[54]

Vitoria's qualified acceptance of Indigenous sovereignty is radically subverted by Grotius whose vision of sovereignty explicitly privileges and sanctions imperial power. It excludes from sovereignty 'peoples who have *passed under the sway of another people*, such as the peoples of the Roman provinces.'[55] Grotius regards colonised peoples as lesser subjects of the law of nations, stating that: 'For such peoples are not in themselves a state, in the sense in which we are now using the term, but the inferior members of a great state, *just as slaves are members of a household*.'[56] While Grotius recognises that sovereignty may be held by

[48] Ibid, 18.
[49] Grotius, above n25, Book 1, III.VII, 259.
[50] Grotius, above n20, Book 2, V.XXII.
[51] Ibid, Book 1, III.VII.
[52] Ibid, Book 1, III.VI.
[53] Ibid, Book 3, II.II.
[54] Ibid, Book 2, III.VIII.
[55] Ibid, Book 1, III.VII.
[56] Ibid – emphasis added.

peoples under an 'unequal alliance' or treaty (for example, conquered peoples subject to treaties), he acknowledges that in the majority of cases the strongest party (with respect to power) '*gradually usurps the sovereignty properly so called*.'[57]

Under the norms established by Vitoria and Grotius only 'civil' societies constitute sovereign societies, and are exemplified by European legal and political institutions such as courts and public officials exercising executive power. While Vitoria affords some recognition of First Nations as sovereign peoples, it is vulnerable to colonial power, thus setting up an unequal relationship between Europeans and non-European peoples. Grotius further entrenches this division, denying sovereign status to peoples lacking European norms of political and legal organisation. Even worse however, Grotius's law of nations legitimises colonial incursions onto the lands of first nations peoples and condones the gradual usurpation of sovereign power from peoples overawed by their conquerors, and endorses it as a form of prescription. For European nations sovereignty is marked by independence and indivisibility, however Indigenous sovereignty is vulnerable to usurpation by European interests, with Indigenous peoples constructed as objects to be governed. The pattern of colonial entrapment thus established had the effect of positioning Indigenous peoples within the framework of domestic law, and nullifying any international legal personality or status.

Society and the 'Law of Nations'

The natural sociability of man is also used to support the existence of a 'law of nations'. Grotius argues the nature of man inevitably leads to 'mutual relations of society' which underpins natural law, whereas municipal law is based on mutual consent.[58] The law of nature, however is also shaped by 'expediency', so for men to obtain the things necessary to 'live properly', they must also 'cultivate the social life.'[59] Consistent with this logic is that municipal laws should also cater for expediency and those prescribing laws for others must have some 'advantage in view'.[60] The common advantages of its members is also advanced as the rationale for a *consensual* law of nations:

[57] Ibid, Book 1, II.XXI – emphasis added.
[58] Ibid, 15.
[59] Ibid.
[60] Ibid.

> … just as the law of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate *as between all states*, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the *great society of states*. And this is what is called the law of nations, whenever we distinguish that term from the law of nature. [61]

So for Grotius, the law of nations, although based on natural law, is created by consensus for the 'advantage' of the 'great society of states'.[62]

For Vitoria it is the binding nature of civil law upon the legislator in his ideal society which cements the authority of the law of nations. He argues that civil law should be binding on the legislator, who should 'share the burdens of the commonwealth.'[63] From this principle he infers by corollary that, there is a consensual law of nations, which has the validity of 'positive enactment (lex)' because:

> The whole world, which is in a sense a commonwealth, has the power to enact laws which are *just and convenient to all men*; and these make up the law of nations. From this it follows thot those who break the law of nations, whether in peace or in war, are committing mortal crimes…No kingdom may chose to ignore this law of nations, *because it has the sanction of the whole world*.[64]

Here Vitoria takes the notion of society as a civil partnership, to a law of nations, binding upon an international society which may enact laws for the common good of all men. However as will be argued below, what is viewed as 'just and convenient; or for the 'advantage' of the great society of states, constructs specifically European cultural practices as universal. (CHECK ANGHIE).

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[61] Ibid.
[62] Ibid.
[63] Vitoria, above n18, 40.
[64] Ibid. NB A different translation of this passage also appears in Williams, above n3 at 116, with state being substituted for commonwealth.

For Grotius the international context can also be distinguished from municipal law because each state is free to judge its own actions, because there are no 'higher authorities'.[65]. And according to Vitoria, any prince who wages just war becomes *ipso jure* – 'judge of the enemy and may punish them judicially.'[66] Therefore the possession of international rights takes on a special significance because they implicitly include the right to defend them through the waging of 'just war'.[67] Within the international context of a mutually constituted system of society and rights where to 'violate another's right' is the very nature of injustice, the preservation of 'human society' itself is equated with 'proper business of justice'.[68].

Summary

Society is a foundational concept of the emergent international legal order based on natural law. It has a dual aspect in that society is used to define both the individual entity that holds sovereign power, and the sum of its individual parts, which constitute 'human society'. It functions as a basic element of international law with society becoming synonomous with the notions of state, statehood, and sovereign power. In the domestic context society is entangled with the notion of rights, which are constituted in and through society. In the international context society is constructed to serve the mutual advantage of its member states, who are also the arbiters of what is just and right. However as we have seen not all peoples were deemed sovereign societies within the emerging international legal order, with only limited recognition afforded to non-Christian peoples, and a privileging of societies with specifically European style political and legal arrangements. This particular construction of society also provided tacit approval to colonialism, and positioned Indigenous peoples as 'slaves', as objects to be governed rather than sovereign peoples in their own right. The concept of society was central this construction and the emerging disciplinary knowledge of international law created norms that had specific power effects, and operated to exclude Indigenous peoples as sovereign subjects of international law. However the subjugated position of Indigenous peoples in the emerging discipline of international law rights was most clearly articulated in the theory of just wars, which provided a 'rationale' basis upon which European colonial powers could impose their will on First nations peoples, and making them special objects of international law.

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[65] Grotius, above n20, Book 2, I.XI.
[66] Vitoria, above n15, 283.
[67] Grotius, above n25, xxvi.
[68] Ibid, xlv.

Rights of sovereign society to wage 'just wars'.

'If you take away justice, what are empires if not vast robberies?' (St Augustine).(Kelsey. Book 2, I.I.3).

Both Grotius and Vitoria articulated a vision of sovereignty, which although posited as universal, was constructed to reflect both Christian and European forms of social, political and legal organisation. The power attributed to European Christian sovereign states however was most clearly pronounced in their theories of 'just war' which provided a number of rationalisations for European colonial powers to assert their dominance over Indigenous peoples. Indeed the power to wage war was almost exclusively attributed to sovereign states, or those exercising sovereign power on behalf of the state,[69] with the clear implication being that non-state actors and those viewed as lacking sovereign power, could not by definition wage a 'just war'.[70] This limitation had the effect of rendering Indigenous resistance to colonial power as unjust, and contrary to the interests of international society. And although Vitoria and Grotius also set out a number of 'unjust' titles or grounds for war,[71] and both emphatically rejected claims based on of papal authority (such as the doctrine of discovery), their elaboration of the grounds for just war provided a secularised rationale for colonial expansion in the interests of European sovereign powers, and the emerging international 'society'.

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[69] For Grotius, the right to wage public war can only be exercised by 'one who holds the sovereign power in the state', above n 20, Book I, III.IV. According to Vitoria the authority to declare war rests with the commonwealth, or a prince exercising commonwealth authority, above n 17, 300-1).

[70] Grotius also distinguishes between wars waged between different peoples being declared in the name of the state, as opposed to wars conducted by 'brigands and robbers'. He notes however that the latter may assume of a form of statehood ''[i]f by the accessions of desperate men this evil grows to such proportions that it holds lands, established fixed settlements, seizes upon states and subjugates peoples, it assumes the name of a kingdom." See above n20, Book 3, II.II. Therefore somewhat ironically the law of nations also sanctions the creation of states by non-peaceful means.

[71] Vitoria outlined what he regarded as a number of unjust claims to titles which included: assertions by the Emperor as master of the whole world; assertions by pope as supreme pontiff; and claims based on the Christian doctrine of discovery. Further unjust grounds for war included refusing to accept Christianity; or on the basis of the sins of the barbarians. Claims to title based on the voluntary consent of Indigenous peoples were also considered unjust because of the likelihood that consent could be obtained by coercion, and the possibility that the barbarians would not understand the nature of the dealings, and already had their own princes who they could not depose without good cause. A final unjust title was a claim based on a 'special gift of god' because this would be contrary to the rules of the scripture and the common law – above n15, 252-277. Grotius also outlines what he regards as unjust causes of war which include waging war to gain an 'unjust advantage', because of a desire to acquire richer land, to rule others against their will on the pretext that is for their own good - above n20, Book 2, XXII.VI-XII).

Grounds for 'Just Wars'

For both Grotius and Vitoria, the ultimate cause of just war is an injury received.[72] For Vitoria a just war is one: 'which avenge injustices (iniurias)' with the purpose of war being to ensure the 'peace and security of the commonwealth', 'for the good of the whole world', because there can be no security unless enemies are prevented from injustice, through fear of war and punishment.[73] To this end Vitoria argued that both defensive and offensive wars may be waged because there would be no deterrence to wrongdoing if there was no fear of punishment or war.[74]

According to Grotius war is also permitted to promote the 'mutual tie of kingship among men', or where there is an 'obvious wrong' a state may exercise the right vested in 'human society' to protect others.[75] According to Grotius there are three justifiable causes of war: defence, recovery of property and punishment[76], grounds which are consistent with the natural right of self defence, and also extends to the right to punish, and use pre-emptive violence, because in the law of nations there is no 'higher authority'. [77] The use of punishment was also defended in terms of society, because in 'nature' it was perceived that there was 'much less regard for society than concern for the preservation of the individual'.[78] The rights of those entitled to wage war are extensive and generally permit all things which are necessary towards that end, which from a moral perspective justified the means.[79] The right to wage war, is also constituted in and through international society, and includes the right to do everything necessary to secure a right, and as Grotius makes clear in his statement: 'By right I mean that which is strictly so called, denoting the power of acting in respect to society only.'[80]

Things belonging to men in common

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[72] Grotius, above n20, Book 2, II.I; Vitoria, above n17, 298.
[73] Vitoria, ibid.
[74] Ibid.
[75] Grotius, above n20, Book 2, XXV.VI-VIII.
[76] Ibid, Book 2, I.II.2.
[77] Ibid, Book 2, I.XI.
[78] Ibid, Book 2, I.IV.
[79] Ibid, Book 3. I.II.
[80] Ibid, Book 3, I.II.

For both Vitoria and Grotius a fundamental cause of injury may arise from the right of all men to enjoy 'of things which belong to men in common'.[81] For Grotius this right derived from the original state of man where *all things were held in common,* and each man was permitted to take what he needed, giving rise to private property,[82] which could not be taken without an unjust act. While Grotius concedes that this 'primitive state' of common ownership may have continued if men were able to live in 'mutual affection' as had 'certain tribes in America', it was abandoned because:

> men were not content to feed on the spontaneous products of the earth, to dwell in caves, to have the body either naked or clothed with the bark of trees or skins of wild animals, but chose a more refined mode of life.[83]

This 'primitive' communal ownership also ceased due to the lack of justice and fairness in the division of goods[84] So for Grotius private ownership arises not from an act of free will, but through tacit agreement, as in occupation.[85] For Grotius this common ownership also explained how property could be acquired over unoccupied or 'hitherto uncultivated' lands.[86] Grotius also asserts that since primitive times occupation is the 'natural and primary mode of acquisition' of property or by taking possession of land which belongs to no-one.[87]

Rights derived from common ownership also extends, in the case of necessity, to taking things belonging to others, *but not unless the possessor had equal need*; and the right of 'innocent use' of the property of another, where there is no detriment to the owners.[88] Most significantly 'innocent use' includes a right of passage over lands where people were forced to leave their own territories, or to engage in commerce, and a right of 'temporary sojourn'.[89] Indeed the right of passage for the purpose of trade was so highly regarded that:

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[81] Ibid, Book 2, II.I.
[82] Ibid, Book 2, II.II.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid, Book 2, II.IV.
[87] Ibid, Book 2. III.I-IV.
[88] Ibid, Book 2, II.VIII-XI.
[89] Ibid, Book 2, II.XIII-XV.

> No one, in fact, has the right to hinder any nation from carrying on commerce with any other nation at a distance. That such permission be accorded is in the interests of *human society* and does not involve loss to any one; if one fails to realise an anticipated gain, to which he is not entitled, that ought not to be accounted a real loss.[90]

Vitoria also argues a claim to title derived from the common ownership of all things 'since the beginning of the world', which although subject to the 'division of property (*diuisio rerum*)', was not intended to interfere with 'men's free mutual intercourse', and the natural law requirement to treat all travellers hospitably.[91] Vitoria thus argues that there is a right to on the basis of 'natural society and fellowship'[92] or 'natural partnership and communication' which includes the right to:

> … lawfully trade amongst the barbarians, as long as they [the Spanish] do no harm to their homeland…. 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.[93]

And because this right is derived from natural and divine law, any human enactment purporting to prohibit it would be 'unreasonable'.[94]

Vitoria concludes that even if these rights were not supported by natural law, they are binding under the law of nations because 'the consent of the greater part of the world is enough to make it binding, especially when it is for the *common good of all men*.'[95] So for Vitoria and Grotius these rights are defendable as being in the interests of 'human society', and the common good of all men. While the exercise of these rights is qualified in terms of not being used to the detriment of the owners, any judgements of benefit or otherwise is made through

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[90] Ibid, Book 2, II.XIII.
[91] Vitoria, above n15, 278.
[92] RAW, American Indian, p.101 citing Nys translation of Vitoria.
[93] Ibid, 279.
[94] Ibid, 278-9.
[95] Ibid, 281.

a Eurocentric perspective. To deny such a right was not only unreasonable, but breached the law of nations which the greatest part of the (European) world had consented to.

According to Vitoria if the barbarians resist the exercise of these rights, the Spanish may defend themselves with the use of force.[96] And although Vitoria opines that the barbarians are 'by nature, cowardly, foolish and ignorant', and may understandably fear these men with 'strange customs, who are armed and much stronger, and even attack them out of fear, if this was to occur the Spanish are entitled to defend themselves.[97] However if all efforts to secure peace and safety fail the Spanish may:

'treat them no longer as innocent enemies, but as treacherous foes against whom all rights of war can be exercised, including plunder, enslavement, deposition of their formers masters, and the institution of new ones.'[98]

For Grotius the common right of ownership includes the right of foreigners to take possession of places with 'deserted and unproductive soil,[99] and a general right to acts 'indispensable for the obtaining of the things without which life cannot be comfortably lived.'[100] Indeed to hinder such acts 'is at variance with the nature of society' and serves to 'separate men from relation with their common parent, to refuse fruits freely produced for all, and to do away with the community of life.'[101] Here the right of common ownership is posited as the basis of wide ranging rights to take property as deemed necessary, in the interests of human society, with such interests constructed through a European, materialistic perspective.

Offending against the 'laws of nature'

Although Vitoria viewed as unjust any claims to title based on 'sins against nature', non-belief or failure to accept the teaching of Christianity, he advanced a just claim to title on the grounds of defending the innocent against tyranny, which included preventing unjust death

[96] Ibid, 281-2.
[97] Ibid, 282.
[98] Ibid, 283.
[99] Grotius, above n20, Book 2, II.XVII. The first method of taking property – which Romans ascribed to the law of nations – is taking possession of that which 'belongs to no one' – at Book 2, VIII.I.
[100] Ibid, Book 2, II.XVIII.
[101] Ibid.

(even without the pope's authority), and prohibiting the barbarians for 'practicing any nefarious custom or rite', *even if consensual.*[102] In effect, this ground enabled the Spanish to claim just title based on a Christian worldview of what was natural and right, against the voluntary will of Indigenous peoples.

Grotius however extended this notion to argue that it was permissible to wage a just war against those who offend against the law of nature, as Kings have the right to punish those who injure not only their subjects but also those who 'excessively violate the law of nature or nation in regard to any persons whatsoever.'[103] This right is considered consistent with the 'liberty to serve the interests of human society, through punishments' which lies in the hands of those who rule over others, and are 'themselves subject to no one.'[104] Indeed Grotius regards war against those who practice barbaric acts as being sanctioned by nature: 'The most just war is against savage beasts, the next against men who are like beasts'.[105] Here Grotius suggests act which offend against the law of nature, generally are those which are contrary to the interests of human society, and presumably include the rights of trade and free passage which are in the interest of human society in general. As Anghie notes this is an 'extraordinary powerful right of intervention', which has the effect of universalising Spanish norms.[106]

Just claims to title

For Vitoria further claims for just title could also be argued to enable the spread of the Christian religion; protect converts to Christianity, and even to remove an 'infidel ruler' where a good proportion of the natives had been converted to Christianity.[107] Title could also be acquired by true and voluntary election, and for the sake of allies and friends (noted in this way that the Romans expanded their territory).[108] Grotius did not recognise any right to wage war against those unwilling to accept the Christian religion, however war could be

[102] Vitoria, above n15, 287-8.
[103] Grotius, above n20, Book 2, XX.XL.
[104] Ibid. Some examples of breaches of natural law cited by Grotius include those who 'act with impiety towards their parents','feed on human flesh', and 'those who practice piracy'.
[105] Ibid.
[106] Anghie, above n1, 23.
[107] Vitoria, above n15, 284-7.
[108] Ibid, 288-290.

waged against those who treat Christians cruelly because of their religion, or are irreverent to their own gods.[109]

Vitoria suggests a further possible ground of just title, which he argues some may view as legitimate: the mental incapacity of the barbarians:

> '… these barbarians, though not totally mad … are nevertheless so close to being mad, that they are unsuited for setting up or administering a commonwealth both legitimate and ordered in human and civil terms. Hence they have neither appropriate laws nor magistrates fitted to the task. Indeed they are unsuited to government their own households (*res familiaris*); and their lack of letters, of arts and crafts (not merely liberal, but even mechanical), or systematic agriculture, of manufacture, and of many other things useful, or rather indispensable, for human use. I might be therefore argued that for their own benefit the princes of Spain might take over their administration, and set up urban officers and governors on their behalf, or even given them new masters, *as long as this could be proved to be in their interest.*'[110]

Indeed Vitoria claims there are 'scant differences between the barbarians and madmen; they are little or no more capable of governing themselves than madman, or *indeed wild beasts.*'[111] Grotius also observes (again with reference to Vitoria) that 'the view seems defensible that, *if there exist any peoples wholly deprived of the use of reason, these cannot have ownership*, but merely for charity's sake there is due to them what is necessary to maintain life.'[112] Here ownership is constructed through a European prism of 'reason' and 'rationality' with ownership restricted to those who are perceived as possessing reason. Therefore any peoples seen to be lacking mental capacity or reason, which may be evidenced by resisting what the Europeans regarded as reasonable requests to enter Indigenous lands, to conduct trade, or even having forms of government suitable to regulating 'human and civil needs' may provide sufficient grounds to establish a claim to title over Indigenous lands.

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[109] Grotius, above n20, Book 2, XX.XLVIII-XLI.
[110] Vitoria, above n15, 290. NB Williams, above n3, 104 and 114 refers to the Nys translation which uses the term 'non-intelligence' rather than 'mad'. This translation also refers to administering a 'state' rather than a commonwealth.
[111] Ibid, 290-1.
[112] Grotius, above n20, Book 2, XXII.X.

Usurping Indigenous Sovereignty

The consequences flowing for the conduct of just war differ considerably between Vitoria and Grotius. While both agree that the conqueror gains the right to plunder and take booty from the enemy,[113] there are differences in respect to the acquisition of property and jurisdiction over the conquered. For Vitoria the conqueror has the right to deprive the enemy of land as a form of punishment, to seek both revenge and restitution in manner proportionate to the loss suffered– and was how the Roman's expanded their empire. [114] Question of whether the conqueror may depose of enemy's princes and set up new ones – *only where legitimate reasons for doing so* – and especially where the 'security and peace cannot otherwise be secured, and failure to do so would cause a dangerous threat to the commonwealth.'[115]

Grotius on the other hand provides a more nuanced explanation for how territory and jurisdiction may be acquired. According to Grotius, the right to acquire property and act of occupation does not impair the sovereignty of the original owners.[116] Grotius also distinguishes between two types of possession: sovereignty and ownership. Sovereignty may however be acquired by 'long standing possession' which carries with it a 'presumption of ownership'[117] Further Grotius affirms that sovereignty acquired by force may 'receive lawful confirmation by tacit acceptance'.[118] And although he regards sovereignty as generally inalienable, Grotius argues there may be circumstances where it is better to 'yield to the conqueror, rather than face extermination.'[119]

The rights of a people may also be extinguished by abandonment where the people lose their 'spirit' or 'essential character', which he defines as the 'full and perfect unioin of civic life, the first product of which is sovereign power; that is the bond which binds that state together, that is the break of life which so many thousands breath.'.[120] Extinguishment can also occur

[113] Vitoria, above n17, 322-4; .Grotius, above n20, Book 3, VI.VI.
[114] Vitoria, ibid, 324.
[115] Ibid, 326.
[116] Grotius, above n20, Book 2, II.XVII.
[117] Ibid, Book 2, IV.XI.
[118] Ibid, Book 2, IV.XIV.
[119] Ibid, Book 2, VI.V.
[120] Ibid, Book 2, IX.III.

when the form of organisation under which the people exists is destroyed, or when the enjoyment of 'common rights' has been taken away.[121] A further grounds for extinguishment is where the body of the people are destroyed, for example where that are so few survivors that they no longer constitute a people[122] or where the people are 'so scattered by force that they cannot unite together again, as sometimes happens in wars.'[123]. Here Grotius' endorses genocide as a legitimate norm of international law, and an effective means of acquiring territory at the expense of Indigenous peoples, knowledges and cultures.

According to Grotius the conqueror also acquires the right to rule over the conquered, including all civil power and sovereignty over them: in effect assuming the 'right of a master'.[124] The victor has absolute discretion to decide the degree of autonomy afforded to the conquered, and jurisdiction may be partial where servitude is mixed with a degree of personal liberty. 'Thus we read that arms have been taken from peoples; that peoples have been forbidden to have any iron except for agricultural purposes; and that other peoples have been compelled to change their language and manner of life.'[125] While Grotius urges a response that is humane and just – and that even some degree of liberty be left to the conquered such as 'their own laws, customs and officials' and their religion, a right that is qualified by the need to 'prevent the oppression of the true faith', [126] and therefore is subservient to the promotion of Christianity. Grotius concludes that the conquered should be treated with mercy and 'in such a way that their advantage should be combined with that of the conquerors,' because it is better to gain friends than rule over slaves.[127]

Conclusions

Society is a central concept in the formulation of the discipline of international law, and critical to how both sovereignty and international society was constructed in ways that excluded Indigenous peoples as full subjects of international law. The concept of society enabled the promotion of an international human society styled according to European norms, and also provided the rationale for just wars to promote trade and commerce, assist the spread

[121] Ibid, Book 2, IX.VI.
[122] Ibid, Book 2, IX.IV.
[123] Ibid, Book 2, IX.V.
[124] Ibid, Book 2. VII.I-II.
[125] Ibid, Book 3, VII.III-IV.
[126] Ibid, Book 3, XV.X-XI..
[127] Ibid, Book 3, XV.XII.

of Christianity, acquire property and jurisdiction, and assert European dominance over Indigenous Peoples. As a consequence Indigenous peoples were constructed as lesser subjects of international law: as 'special objects' to be governed.

Indigenous peoples were not afforded equality or enforceable rights because European sovereign states assumed a monopoly over the right to wage 'just wars', and also a meta-legal status in judging their own actions, and to determine what is rational, reasonable and necessary for the promotion of human society for the common good of all mankind. The concept of society was crucial to this construction of a Eurocentric international legal order, and the emerging body of disciplinary knowledge that was to become known as international law.

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