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THE CONCEPT OF RES COMMUNIS IN INTERNATIONAL LAW

CHARLOTTE KU*

INTERNATIONAL LAW AND ECOLOGY

As the means by which man defines relations, creates expectations and assigns obligations, law provides a chronicle of the progress of man himself. The most fundamental laws address issues of survival: to insure that individual actions will contribute to and not jeopardise the welfare of the group.[1] With survival needs met, the law moves on to address individual rights in matters of property and other private relations. What the law seeks to do is not only to provide guidance, where the balance between group and individual rights appears uncertain, but also to help the parties to a dispute come to agreement on a course of action or decide that there is need for change in existing practices. To be effective, and to be observed, law must be dynamic.

The same applies to the law which governs the basic unit of international life, the state. States submit themselves to restrictions on their freedom and independence to insure their survival, and to see that their citizens are able to pursue life within the framework of a distinctive cultural heritage molded by language, religion and history. The law seeks to deal with elements both of commonality and divisiveness. But if the function of law is to structure and organise the impact of human relations, then the record of international law on questions of ecology is virtually non-existent until the present century. As a reflection of the values and concerns of the law-makers, this vacuum accurately mirrors the lack of thought given to man's relationship to his natural surroundings. The word 'ecology' did not even appear in the English language until 1873.[2]

At that time, few people realised that the industry and technology which had begun to make possible a better life for millions of individuals around the world would also create unprecedented problems. A survey of newspaper and magazine headlines during the summer of 1988 in the United States suggests some of them: ocean contamination, drought and soil erosion, ozone and the greenhouse effect were daily topics. More than a decade ago, in an essay entitled, 'The Historical Roots of our Ecological Crisis', Lynn White, Jr, had already described the conditions which nurtured great technological and scientific advancements, but which also made it difficult to cope with their negative byproducts:

> Science was traditionally aristocratic, speculative, intellectual in intent; technology was lower-class, empirical, action-oriented. The quite sudden fusion of these two,

*Research Associate, Committee on Asian Studies, University of Virginia, Charlottesville, VA 22903, U.S.A.

> towards the middle of the nineteenth century is surely related to the slightly prior and contemporary democratic revolutions which, by reducing social barriers, tended to assert a functional unity of brain and hand. Our ecologic crisis is the product of an emerging, entirely novel, democratic culture. The issue is whether a democratized world can survive its own implications.[3]

The scientific and industrial revolution created wideranging and complex ecological problems, but the failure and even reluctance to recognise them until they reached crisis levels stemmed from the deeper roots of western Christianity. Man, 'created in the image and likeness of God', transcended nature. Man named the animals—thereby, by implication, 'establishing his dominance over them'.[4] As White concluded, 'Christianity . . . not only established a dualism of man and nature but also insisted that it is God's will that man exploit nature for his proper ends'.[5] Reflecting this, both domestic and international law developed a focus on 'successful sharing rather than conservation' of natural resources.[6] Historically, international law addressed issues of sharing for the purpose of equitable exploitation, considering conservation a secondary issue, of concern only when depletion of the resource could jeopardise such exploitation.

Despite its late start, however, law—both international and domestic—has proven sufficiently robust to begin to address the needs of environmental protection. Yet, lack of both scientific and political agreement on how to stop and reverse environmental degradation has limited the ability of law to undo the damage of technology and ignorance. Part of this ignorance is conceptual, stemming from fundamental assumptions about man and his natural surroundings. Western law and the international legal system derived from it certainly reflect the anthropocentric perspective identified by White, but that perspective itself is multi-faceted. To explore some of these facets, this essay takes as its point of departure Francesco de Vitoria's discourse, *De Indis*, written between 1539 and 1541, which addressed proper relations between the Old World of Europe and the New World of the Americas. A consideration of Vitoria's ideas may help us better understand the implications of the anthropocentric approach for our own attempts to relate to our natural environment.

SPAIN AND THE NEW WORLD

Vitoria the 'Expounder'

When Ambassador Arvid Pardo of Malta exhorted those assembled at the 1967 United Nations General Assembly to declare the seabed a common heritage of mankind, he was participating in a struggle to define appropriate uses of natural resources which reaches back to the beginning of recorded history. The sea was the greatest non-land natural resource of antiquity; and the ancient Greek view, as expressed by Aristotle, was that 'water is not bounded by a boundary of its own substance'.[7] Roman practice was to regard the sea as *res communis omnium* or common and free to all;[8] and Roman practice was effectively international law. With the collapse of the Roman empire, however, international practice changed, as coastal states began to lay claims to outlying waters during the Middle Ages. The Venetian Republic, for example, claimed

sovereignty over the entire Adriatic and effectively enforced the claim by levying tribute from foreign ships using that sea.[9] Neighboring states, other European powers and even the Pope bolstered Venice's claim by recognising it through treaties and custom. In the same way, the Republic of Genoa claimed the Ligurian Sea, and Denmark and Sweden struggled for mastery over the Baltic.

The most ambitious claim, however, came in the sixteenth century, when Spain and Portugal petitioned Pope Alexander VI to divide the oceans and lands of the non-European world between them. Thus, on the basis of Papal Bulls and the 1494 Treaty of Tordesillas, 'Spain claimed the exclusive right of navigation in the western portion of the Atlantic, in the Gulf of Mexico and in the Pacific. Portugal assumed a similar right in the Atlantic south of Morocco and in the Indian Ocean'.[10] The dimension of the claim and the inherent difficulties of maintaining effective control over such a large area invited reactions, most particularly from those states not included in this division of the world. In addition to the exploits of English freebooters, the Spanish and Portuguese claims engendered a juridical debate between those advocating *mare clausum* (national claims) and *mare liberum* (open seas). The writings of John Selden (*Mare Clausum*, 1629) and Hugh Grotius (*Mare Liberum*, 1609) framed the debate. Grotius' arguments—and British and Dutch sea power—prevailed, and Oppenheim's *International Law* states:

> [A]lthough the open sea is not the territory of any State, it is nevertheless an object of the Law of Nations. The mere fact that there is a rule exempting the open sea from the sovereignty of any State whatever shows this.[11]

Grotius had not written in an intellectual vacuum; as James Brown Scott pointed out in *The Catholic Conception of International Law*: 'The modern law of nations of which Vitoria was the expounder, Suarez the philosopher, and Grotius the systematizer, is the contribution of what we may call . . . the Spanish School of International Law'.[12] Vitoria's work had been inspired by the Spanish crown's need to define its relations with the population of Spain's discoveries in the New World. His lectures *De Indis* provide an elegant insight into sixteenth century assumptions about relations between men, between man and God, and between man and nature. While modern life has severely challenged the teaching authority of the Catholic Church, it has not wholly escaped the influences of Christian values as Vitoria described them. These values, which influenced Grotius fifty years later, have a continuing impact today.

De Indis

Francisco de Vitoria was born in Segovia in 1494.[13] His studies took him to Alcala and eventually to Paris for eighteen years. At the age of thirty, Vitoria entered the preaching Order of St Dominic, following in the footsteps of his great intellectual forebear, Thomas Aquinas. In 1532, he assumed the prima professorship of theology at the University of Salamanca, a post he held until his death in 1546. Recognised over time as one of the great scholars of Spain, Vitoria was much respected during his lifetime. Charles V shared this general esteem, and consulted Vitoria on numerous occasions. Two particularly historic discourses came out of these royal commissions—*De matrimonio* and *De Indis*. The first

addressed the arguments advanced by Henry VIII of England as grounds to annul his marriage to Catherine of Aragon, the Spanish king's aunt. The second answered questions submitted by Charles V about the Indies between 1539 and 1541.

Collected and compiled by his pupils after his death, Vitoria's lectures filled several volumes and carried the general title, *Relectiones Theologicae. De Indis*, in three sections, is part of this larger work, the first edition of which appeared in 1557. In the course of his discussion *de Indis*, Vitoria identified three general principles which he felt should govern relations between the Old and New Worlds. Although he used a different vocabulary, twentieth century readers of Vitoria's work can readily recognise these principles as: (1) the equality of states; (2) the independence of states from outside interference; and (3) state responsibility for the treatment of aliens within its territory.

When Vitoria undertook to examine the issues raised by Spanish voyages to the New World, he could draw on the direct experience of his pupils who had worked as missionaries in the Indies and on the pronouncements of royal commissions which had preceded him. Two such pronouncements resulted from inquiries from the Spanish monarchs who had sponsored the first voyages of exploration, Ferdinand and Isabella. In 1494, they addressed the question 'of the aborigines' to a commission of theologians and canon lawyers. The commission's reply was predicated on a defense of the inhabitants of Columbus' New World by Juan Lopez de Palacios Rubios:

> The king had added to his power the isles of the ocean commonly called the Indies and he has summoned into the truth of the Gospel the men and the uncultured peoples there resident. The question thus arises, what rights does the sovereign possess? The author has learned from a reliable source that the aborigines of the countries just discovered by Christopher Columbus are men endowed with reason—mild, pacific, and capable of rising to the level of our religion. They have no private property, but cultivate certain land in common. They are addicted to polygamy, which results in the disorganization of their families. Are they free? Yes, for God has given liberty to all men; nevertheless they ought to hearken to the teachings of Christian priests.[14]

Vitoria began with Lopez' argument that the native inhabitants of the Americas should be treated with the dignity and respect befitting human beings. He then tackled the problem in three parts:

> In the first part we shall inquire by what right these Indian natives came under Spanish sway. In the second part, what rights the Spanish sovereigns obtained over them in temporal and civil matters. In the third part, what rights these sovereigns or the Church obtained over them in matters spiritual and touching religion....[15]

Throughout the discussion, Vitoria displayed a pragmatic and analytical intellect, which, although bound by the detailed constraints of the formal scholastic proof, never lost sight of the larger questions and implications of his inquiry. Before proceeding to the substantive discussion, however, Vitoria clarified the nature of his undertaking:

> [N]either the sovereigns of Spain nor those at the head of their councils are bound to make completely fresh and exhaustive examination of rights and titles which have already been elsewhere discussed and settled, especially as regards things of which the sovereigns are in *bona fide* occupation and peaceful possession....[16]

Vitoria cited Aristotle's *Ethics* as authority for this position; the alternative would preclude ever taking possession of any discovery: 'if any one were to be continually inquiring, settlement would be indefinitely postponed'.[17]

Vitoria explained that, despite earlier pronouncements on the subject of relations between Spaniards and aborigines, there continued to be enslavement and plundering of the native population. A new and more thorough consideration of legal rights and obligations was called for because:

> Even if the thing in question were in itself lawful, it would be sinful for any one to do it before deliberating and assuring himself of its lawfulness; and he would not be excused on the ground of ignorance, for the ignorance would manifestly not be invincible, since he does not do what in him lies to inquire into the lawfulness or unlawfulness of the matter.[18]

This premise was a logical outgrowth of Christian responsibility as manifested by an individual's conscience: '[A] man is bound to base his judgment, not on his own sentiments, but on demonstrable reason or on the authority of the wise'.[19] Vitoria mirrored his times by putting the highest premium on authority. He put forward three propositions:

> FIRST. In doubtful matters a man is *bound* to seek the advice of those whose business is to give it, otherwise he is not safe in conscience, whether the doubt be about a thing *in itself* lawful or unlawful.
>
> SECOND. If after a consultation in a doubtful matter it be settled by the wise that the thing is unlawful, a man is bound to follow their opinion, and if he act contrary thereto he is without excuse, *even if the thing be otherwise lawful.*
>
> THIRD. On the other hand, if after such consultation it be settled by the wise that the thing is lawful, he who follows their opinion is safe, *even if it be otherwise unlawful.*[20]

The Equality of States

Vitoria opened his substantive discussion by planting the seeds for the concept of sovereign equality. He asserted that 'it is not for jurists to settle this question [of the rights and duties towards the Indians] or at any rate for jurists only, for since the barbarians in question... were not in subjection by human law, it is not by human, but by divine law that questions concerning them are to be determined'.[21] With this in mind, Vitoria tackled the question of 'whether the aborigines in question were true owners in both private and public law before the arrival of the Spaniards; that is, whether they were true owners of private property and possessions and also whether there were among them any who were true princes and overlords of others'.[22]

The answer hinged on whether those occupying the land were capable of

ownership. If they were not, then the Spaniards could claim possession of a *res nullius*—an area not in anyone's possession. If they were, however, then the Spaniards were not exercising original sovereignty over the land and its inhabitants. For Vitoria, the key was to determine the status of the Indians, a status which would then determine their property rights, if any.

If the inhabitants of the New World were found to be slaves, the *Institutes* of Justinian declared that 'a slave can have nothing of his own'.[23] But how to determine whether the Indians were slaves or not? Vitoria turned to Aristotle for one criterion when he argued that they might be slaves:

> But, of a surety, if there be any such, the aborigines in question are preeminently such, for they really seem little different from brute animals and are utterly incapable of governing, and it is unquestionably better for them to be ruled by others than to rule themselves. Aristotle says it is just and natural for such to be slaves. Therefore they and their like can not be owners.[24]

Aristotle's argument was only one factor, however, and not the decisive one. Vitoria dismissed the argument that one must be Christian in order to have 'title to dominion'. He stated that 'unbelief does not prevent anyone from being a true owner',[25] and explained:

> Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural or on human law; therefore they are not destroyed by want of faith.[26]

He underscored his point by noting that taking the possessions of Saracens or Jews because they were unbelievers 'would be theft or robbery no less than if it were done to Christians'.[27]

Vitoria noted that the Indians were in peaceful possession of the territory they occupied. 'Therefore, unless the contrary is shown, they must be treated as owners and not be disturbed in their possessions unless cause be shown'.[28] Addressing the issue of whether the Indians *could* possess territory whatever the appearance of facts, Vitoria answered in the affirmative based on an assessment that they possessed reason:'... they are not of unsound mind, but have, *according to their kind*, the use of reason'.[29] Its outward expression might differ from ways familiar to Christians, but:

> [T]here is a certain method in their affairs, for they have policies which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion. Further, they make no error in matters which are self-evident to others; this is witness to their use of reason. Also, God and nature are not wanting in the supply of what is necessary in great measure for the race.[30]

The blessings of nature as evidence of God's favor and approval of a nation or a people reflected the belief that God and man had a special relationship, and that God had put man in overlordship over a natural environment which existed for man's use. Bounty was a sign of God's favor. Thus, man was responsible to

man and certainly to God, as Vitoria saw it, but responsible to nature only in making sure that it was well and equitably exploited and that all men, as God's chosen creation, should benefit from it. Vitoria's answer, then, to the question of Indian title to the land they inhabited was that they 'were the true owners, before the Spaniards came among them, both from the public and private point of view'.[31] This conclusion placed limits on Spanish claims to title by discovery and imposed upon Spanish settlers and explorers certain responsibilities and duties in their relations with the native population. It also made clear that the Indians were not, at the time of discovery, a population subject to Spanish authority on the basis of occupation.

Vitoria identified other possible bases for Spanish jurisdiction over the newly discovered lands: conversion of the native population to Christianity, thereby giving both the spiritual and temporal leaders of a Christian nation authority based on the religious hierarchy; voluntary acceptance of Spanish rule by the Indians; overthrow of native tyrant and non-Christian rulers; and formation of alliances with Spain. Finally, Vitoria asserted that, 'in their own [the aborigines'] interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly *for their benefit*'.[32]

The notion of responsibility and trusteeship as an aspect of foreign rule was clearly set out by Vitoria's requirement that 'any such interposition be for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards'.[33] Nevertheless, Vitoria was ambivalent as to the extent of this responsibility, and returned to Aristotle's criterion when he argued that 'some are by nature slaves, for all barbarians in question are of that type and so they may in part be governed as slaves are'.[34]

Non-Interference and the Use of Force

Having concluded that the aborigines possessed title to the lands 'lately discovered' by Columbus, Vitoria proceeded in Section II of *De Indis* to examine the nature of Spanish claims and authority in order to determine *both* Spanish and Indian rights and duties. Vitoria asked:

> It being premised, then, that the Indian aborigines are or were true owners, it remains to inquire by what title the Spaniards could have come into possession of them and their country.[35]

To the greatest displeasure of the Spanish monarch who had commissioned Vitoria's inquiry, he rejected the notion that the King of Spain might claim title based on some hierarchy which placed him above the Indian owners of the Land—not even in the monarch's simultaneous capacity as Holy Roman Emperor. Vitoria declared, quite simply, that the Emperor was not lord of the world: 'Imperator non est dominus totius orbis'.[36] Vitoria supported his assertion:

> The patrimony of the Church is not subject to the Emperor; the kingdom of Spain and the kingdom of France are no more under his domination, although the gloss says that this independence is matter of fact and not matter of law; doctors even

concede that some cities formerly subject to the Empire have succeeded in withdrawing from its rule by force of custom, a thing which would not be possible, if their subjection were by divine right.[37]

Citing Aristotle and Thomas Aquinas to lend further support to his position, he asserted:

And Aristotle says, Power is of two kinds, the one originates in the family, like that of the father over his sons and that of the husband over the wife, and this is a natural power; the other is civil, for, although it may take its rise in nature and so may be said to be of natural law, as St. Thomas says, yet, man being a political animal, it is founded not on nature, but on law.[38]

In a similar vein, Vitoria rejected the notion of a universal temporal authority for the Pope, noting that even Pope Innocent III admitted his lack of power over a kingdom like France.[39] For Vitoria, where the Pope's temporal powers existed, they flowed from his spiritual ones; he concluded then that the Pope could not exercise temporal power over those like the Indians who did not accept his spiritual authority.[40] With no authority over Indian lands, the Pope could not seize their property. Vitoria again rejected the argument that because the Indians were 'unbelievers', it was justified to take what lawfully belonged to them.

Vitoria found that 'at the time of the Spaniards' first voyages to America they took with them no right to *occupy* the lands of the indigenous population'.[41] This conclusion, however, was to be narrowly construed. It limited the scope of Spain's claim to occupy the territories based on discovery alone, but it did not altogether curb Spanish privileges in the New World. Vitoria elaborated Spain's rights and privileges and Indian responsibilities and obligations in seven propositions: a framework for international intercourse among separate and independent units, as Vitoria had concluded the Spaniards and Indians were. His propositions foreshadowed much of the law which still guides international conduct today.

Vitoria's first proposition was that '[t]he Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them'.[42] Vitoria explained the basis for his *first proposition*:

[I]t was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common use which prevailed among men, and indeed in the days of Noah it would have been inhumane to do so.[43]

This conclusion led him to describe what we have come to know as most favored nation status and other standards of equal treatment accorded by one foreign sovereign to another. According to Vitoria's:

Second proposition: The Spaniards may lawfully carry on trade among the native Indians, so long as they do no harm to their country. . . .Neither may the native

> princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives.
>
> *Third proposition*: If there are among the Indians any things which are treated as common both to citizens and to strangers, the Indians may not prevent the Spaniards from a communication and participation in them.
>
> *Fourth proposition*: If children of any Spaniard be born there and they wish to acquire citizenship, it seems they cannot be barred either from citizenship or from the advantages enjoyed by other citizens.[44]

Vitoria did not rule out the use of force in order to win and maintain these rights; his last three propositions outlined the conditions by which the Spaniards could lawfully wage war against the Indians:

> *Fifth proposition*: If the Indian natives wish to prevent the Spaniards from enjoying any of their above-named rights under the law of nations, for instance, trade or other above-mentioned matters, the Spaniards might in the first place use reason and persuasion in order to remove scandal and ought to show in all possible methods that they do not come to the hurt of the natives, but wish to sojourn as peaceful guests and to travel without doing the natives any harm; and they ought to show this not only by word, but also by reason.... But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force.
>
> *Sixth proposition*: If after recourse to all other measures, the Spaniards are unable to obtain safety as regards the native Indians, save by seizing their cities and reducing them to subjection, they may lawfully proceed to these extremities.
>
> *Seventh proposition*: If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, then they can make war on the Indians, no longer as innocent folk, but as against forsworn enemies, and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withal with observance of proportion as regards the nature of the circumstances and of the wrongs done to them. ... Also, it is a universal rule of the law of nations that whatever is captured in war becomes the property of the conqueror.[45]

'Dominion Over Palm and Pine'

Vitoria's treatment of the Indian question featured man—European and American—as the centerpiece of God's creation. For Vitoria, justification of this anthropocentrism was self-evident: man possessed reason, which meant he also possessed conscience and a soul. His generosity in extending this to the Indians reflected the depth of his belief that man was special as long as there was evidence of reason, no matter what the color of the individual's skin or the nature of his religious beliefs. To deny men, even 'unbelievers', recognition of this special status would offend God. By admitting in his discourses the possibility of peaceful

relations and mutual responsibility between Christians and non-Christians, Vitoria opened the door to the later secularisation of law. Western legal systems were removed from the theological realm and, with the Reformation, detached from the accepted teachings of the Catholic Church.

Vitoria's other arguments also strike a familiar chord. The concept that alien rule must be for the benefit of the governed distinguished Vitoria's discourses from other justifications for colonial rule based on conquest—400 years before the League of Nations' mandate system was conceived in 1919. His description of the lawful use of force, observing proportionality, also has a good deal in common with the peaceful settlement/cooling off requirements contained in the League Covenant.

As technology made possible increasing travel and exploration to 'new worlds', the issues Vitoria addressed, and others posed by the meeting of alien cultures, would recur again and again. Access to formerly closed societies became an issue which on more than one occasion would lead to war. Territorial concessions, customs jurisdiction, extraterritoriality, and most-favoured nation status were issues which culminated intellectually and politically in the wars of independence in Latin America in the nineteenth century and in the decolonisation movements of Africa and Asia a century later, with a profound impact on the international system.

Most importantly for our purposes, Vitoria had reiterated the Christian concept that the blessings of nature were to be shared by all men who could claim a portion of the bounty provided by God to meet man's needs. The objective, however, as Ian Brownlie noted, was the exploitation and sharing of resources and not conservation.[46] Vitoria skirted the problems of equitable sharing and a definition of exploitation 'without doing the natives any harm'.

Finally, while he set standards of conduct, the breach of which would invite sanction, Vitoria gave little guidance on how to apply those standards in a non-European context. Was the failure to send an emissary to discuss trade a move to 'prevent commerce with the natives', even if the Indians had no concept of such embassies? The question of legal interpretation in an intercultural context has no definitive answer five centuries later.

AVERTING THE 'TRAGEDY OF THE COMMONS'

Rudimentary Methods, Colossal Achievements

The inherent differences between the Europeans' perspective on man and nature and the attitude toward nature's plenty characteristic of the New World was perhaps most manifest in the undertaking of the great sea voyages which brought the two into contact. Far-ranging sea journeys were not unknown to the non-European world. Chinese junks, Arab dhows, Viking boats and Polynesian rafts like the Kon Tiki logged impressive travel records. Yet, it was the European voyages spearheaded by Portugal and Spain which began the irreversible process toward cultural and political interaction and economic interdependence characteristic of our world today. The imprint of the age of Renaissance exploration in the fifteenth and sixteenth centuries has been deep, partially

because of the speed with which Europeans surmounted obstacles thought to be insuperable for centuries. In less than a hundred years, European explorers managed to fill in the contours of the world map, with the exception of the poles and Australia.[47]

As historian J.R. Hale asked, 'How were [Europeans] able to get away with it, to come and go, to swagger across the globe, as if they possessed some mysterious immunity?'[48] He answered that they 'had the technical and psychological equipment, and the political and economic background, to carry out a sustained programme of exploration'. The people they encountered were ill-prepared for the European onslaught: 'too primitive or too ill-armed, too confused by local rivalries or too indifferent to the 'unreal' here and preoccupied with the 'real' hereafter, to oppose them'. The failures they met 'were the result of tempest or malnutrition, or of rivals from Europe itself. What Europeans decided to do they could do; only the forces of nature, it seemed, could stop them'.[49] In fact, as the industrial revolution took shape in the nineteenth century, even the forces of nature seemed unable to stop the conquests of western man.

Part of the Europeans' 'psychological equipment' was their religion. As Hale noted, the nations of Europe had in common a concept of exploitation which set them apart from the peoples they encountered in Asia, Africa, and the Americas:

> While the Moslem, and still more the Buddhist and the Hindu, took his environment for granted, believing the world and the business of making a living in it to be of secondary importance to the world of the spirit, the Christian believed that God had made the world for him to make the best of: he saw it as something to be enjoyed rather than endured.[50]

The failure of native Americans to exploit and 'enjoy' the bounty of the hemisphere, according to Europe's definition, came to be seen eventually as confirming the 'manifest destiny' of the United States to do so. Three centuries before, Vitoria had seen in the richness of the Americas God's favor toward its inhabitants; the heirs to the conquistadors did not disagree, but even more than the Spanish fathers, they believed they could 'improve' God's bounty, indeed, that God expected it of them.

Hale did not suppress his admiration for the Renaissance explorers, and his sentiments apply to all the European pioneers and settlers who came after them: 'With methods so rudimentary and achievements so colossal, we must regret the more how little we know the men who made them'.[51] But as with all conquests, the consequences of Europe's conquest of nature and of non-European civilisations only began to emerge over time. Vitoria's attempt to apply his conception of divine law and human reason to the trilateral relationship between European and non-European man and their natural environment has grown more complex as, whatever their attitudes toward 'westernization', nations around the world have embraced modernisation, and its inherent exploitation of natural resources, as their economic and political goal. Rational solutions to the problems of modernisation still depend, as they did four hundred years ago, on the validity of the assumptions made about the nature of a particular problem. Since European explorers conquered the globe, international law has begun to reflect changing assumptions about the need to apply the principle of *res communis omnium* to the global ecosystem.

Use and Responsibility

By suggesting limits to the authority of both the Pope and the Holy Roman Emperor, Vitoria joined the assault on the medieval hierarchy which culminated a century later with the 1648 Peace of Westphalia. To replace the hierarchy dominated by Pope and Emperor, the Peace of Westphalia instituted a system characterised by multiple, independent states equal to each other in their capacity to acquire rights and responsibilities. The immediate impact of the settlement was to increase the number of sovereign actors on the European stage; its eventual impact, to alter radically the nature of the international system. The proliferation of actors increased the potential for conflict, as competition for finite resources grew between sovereign states no longer subject to Papal or Imperial authority.

In an effort to minimise the number of these conflicts, states, through treaty and custom, took up Grotius' concept of a *mare liberum*. Eventually, the injunction against territorial sovereignty applied not only to the high seas, but to other areas where man's skill and ingenuity began to take him: the polar regions, beneath the sea, outer space and even celestial bodies. As John Kish explained the concept of 'international spaces', areas that were free and open to all, *res communis omnium*, fulfilled two criteria: the absence of territorial sovereignty *and* its prohibition.[52] Interstate debates on the equitable sharing of resources have demonstrated, however, that the existence, for centuries, of the concept of freedom of the commons has not eliminated state conflict over its interpretation and implementation.

One of the criteria, the absence of territorial sovereignty, has sanctioned a lack of responsibility in the use of the commons. Warning against the dangers of this unchecked freedom, Garrett Hardin described the 'tragedy of the commons' by analogy to a literal 'commons':

> [A] pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. ... Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination towards which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.[53]

Private ownership or, in the international system, state jurisdiction, is the obvious response to this problem, since with exclusivity comes 'the responsibility to use the political and legal power of ownership to preserve [one's] domain [and] to conserve the resources therein prudently'.[54] The response is short-sighted, however. Neither private nor public ownership ensures that conservation of natural resources will not give way to management schemes with exploitation and exclusion, rather than preservation and sharing, as their objective. U.S. opposition to Canadian claims of jurisdiction over the portion of the Arctic Sea known as the Northwest Passage is an example of the problem of balancing conservation and usage issues.

While the U.S. objects to Canadian claims that the Northwest Passage is part of Canada's internal waters, based on historic title as well as the application of straight baselines, Canada's right to exercise jurisdiction for purposes of

pollution control over this area and more—out to 100 nautical miles—was asserted in its Arctic Waters Pollution Prevention Act.[55] In examining Canada's attempt to regulate shipping in order to prevent pollution of the area, Albert Utton found the Canadian action justifiable (1) on the basis of necessity and (2) in the absence of any other multilateral or regional effort to address the problem. As he put it, Canada's failure to act would have condemned the Arctic to become 'a lifeless sea, dying because it is essentially *res nullius*, a thing belonging to no one'.[56] When seen in the context of possible efforts to restrict use of the Northwest Passage, however, Canada's efforts to protect these waters demonstrate the likely exacerbation of conflicts, when the international system is forced to rely on the unilateral action of individual states to protect the commons.

There is a critical element in Canada's assertion of jurisdiction in the Arctic for the purposes of pollution control, however: unilateral responsibility does not flow from ownership, but from usership. Law, whether international or domestic, presupposes the existence of responsibility for every privilege. As the principal user, Canada assumed primary responsibility for pollution control in the Northwest Passage. In the case of the commons, it seems reasonable—to return to Vitoria—that the use of land, water and air resources by many nations carries with it multilateral responsibility to insure their continued availability. Knowing as we do that even 'renewable' resources can be destroyed, we may say that responsibility applies not only to contemporaries, but to succeeding generations.

International law has made slow progress towards establishing agreed-upon areas of international—universal or regional—responsibility for preservation and conservation of the commons. The fixing of liability and compensation due injured parties has produced a number of international agreements addressing pollution on the high seas, in the air, on rivers and lakes, and from specific sources like oil spills or nuclear accidents. These instruments are based on the premise that an injury has occurred, and that the state exercising sovereignty over the perpetrator is responsible for that injury, based on Oppenheim's linkage of a prior wrong with the resulting duties of the responsible state:

> Every neglect of an international legal duty constitutes an international delinquency, and the injured State can, subject to its obligations of pacific settlement, through reprisals or even war compel the delinquent State to fulfill its international duties.[57]

Applying this to a problem of air pollution, the arbitrators found in the 1941 Trail Smelter Case between the United States and Canada that:

> [U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and *the injury is established* by clear and convincing evidence.[58]

The International Court of Justice in the 1949 Corfu Channel case lent further authority to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[59]

The prudent management of the commons was little served by these decisions, however, since both were based on an injury which had already occurred. Prevention requires a broader understanding of international responsibility to cope with issues of the environment. One of the landmark efforts to prevent international pollution problems through joint management and consultation was the 1909 Boundary Waters Treaty between Canada and the United States, a model because it not only acknowledged the joint responsibility of the two parties for the maintenance of their boundary waters, but also set up an ongoing institution to carry out the treaty's objectives.

The provision which has given rise to the most dynamic aspect of the treaty is in Article IV, which states that 'the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other'.[60] To supervise use of the complex of rivers, lakes and streams which the United States shares with Canada, the treaty set up an International Joint Commission (IJC), one of the earliest international institutions to address problems of pollution. The IJC was a pioneer in this area, and among its activities, contributed to the findings of the Trail Smelter arbitration referred to above. In 1918, it prepared a draft convention which, although it never entered into force, is noteworthy for having highlighted the problem of prevention:

> The Commission is firmly of the view that the best method to avoid the evils which the treaty is designed to correct is to take proper steps to prevent dangerous pollution crossing the boundary line rather than to wait until it is manifest that such pollution has already physically crossed, to the injury of health or property on the other side.[61]

While the U.S.-Canadian approach to environmental protection is one of the oldest and most advanced international cooperative efforts, other bilateral and regional efforts exist between the U.S. and Mexico, in Europe among the riparian states of the Rhine, the Danube, and the North Sea, and in Asia for joint use of the Indus River, to name a very few. Specialised agencies of the United Nations assumed an active role in the area almost from the beginning of that world organisation in 1945, with the International Maritime Organization (IMO) one of the more active agencies in dealing with issues of the commons. Other agencies which have addressed these issues include the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Meterological Organization (WMO), the World Health Organization (WHO), the Food and Agriculture Organization (FAO), the International Atomic Energy Agency (IAEA), the International Labour Organization (ILO), and the International Civil Aviation Organization (ICAO). Despite these efforts, however, it was not until the mid-1960s that the environment appeared as a political topic in the General Assembly, which in 1968 approved a Swedish proposal to convene a worldwide conference on the environment at Stockholm in 1972.

One result of the Stockholm Conference was the United Nations Declaration on the Human Environment, which declared that 'man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth'. It noted that

'through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale'. The Declaration affirmed that 'both aspects of man's environment, the natural and man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right of life itself'.[62]

The states represented at Stockholm established the United Nations Environment Program headquartered in Nairobi. They affirmed that 'a growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest'.[63] Putting these sentiments into practice, however, has proven difficult. States haggle over the sharing of expenses and struggle with the demands of their political systems and industries. They have honest disagreements over how best to cope with environmental problems. But since 1972, reinforced by the concern for regional environmental issues expressed in such instruments as the 1975 Final Act of the Conference on Security and Cooperation in Europe (CSCE), there has been formal international recognition that environmental protection, as well as exploitation, is a legitimate responsibility of all states.

The Expanding Scope of Law

In the past few decades, technology sometimes seems to have outpaced man's ability to comprehend and assess the implications of his own creations. Machines responding to split second commands can do his bidding with deadly accuracy, but ultimately it is man who must decide what his machines are to do. The same problem arises as man tries to reevaluate his place in the natural order. When the astronauts travelling to the moon beamed back to earth the image of the planet suspended in outer space, the half-millenium of expansion which began with the discovery of the New World had ended. The surface of the earth was mapped and distributed among members of the human family.

The advent of space travel marked a change in man's outlook toward his own planet, coinciding with and contributing to a recognition of the limited renewability of earth's resources. But if a self-image as God's preeminent creation was necessary for western man's conquests and achievements, was the perception of limits an inevitable precursor of stagnation or doom? On the other hand, if man refused to abandon the anthropocentrism described by Lynn White, could he address the environmental degradation he had created? Must the optimism of western man, his faith in his ability to conquer other civilisations and uncharted lands, now become the source of his pessimism? Not necessarily.

Fifty years ago, in his discussion of the 'phenomenon of man', the twentieth century Jesuit Father Pierre Teilhard de Chardin described one of the stages of evolution as the deepening and widening of man's understanding of both himself and the world around him. Since this took place, 'man is seen not as a static centre of the world—as he for long believed himself to be—but as the axis and leading shoot of evolution, which is something much finer'.[64] Writing in China in the late 1930s, Teilhard proved himself a worthy successor to Vitoria in his treatment of man's reason. He called the 'engendering and subsequent development of the mind' by the term *noogenesis*, and explained:

> To this grand process of sublimation it is fitting to apply with all its force the word *hominisation*. Hominisation can be accepted in the first place as the individual and instantaneous leap from instinct to thought, but it is also, in a wider sense, the progressive phyletic spiritualisation in human civilisation of all the forces contained in the animal world.[65]

In their understanding of man's relationship to his environment, this was an important difference between Vitoria, the Dominican writer of the sixteenth century, and the Jesuit of the twentieth. But Teilhard did not take away from man's special place in the natural order by seeing him as a part of it; he added another dimension to it. Julian Huxley captured this in his commentary on *The Phenomenon of Man*, when he wrote that the 'pre-eminent significance of man in nature and the organic nature of mankind' were the 'two assumptions [necessary] to give a full and coherent account of the phenomenon of man'.[66] Vitoria broadened our understanding of human relationships, Christian and non-Christian, European and non-European; Teilhard gave us a Christian perspective on man's place in nature.

The record of man's response, as shown by legal writings from Vitoria to Teilhard—a legal writer in the sense of the sixteenth century, to the changes set in motion by the age of expansion gives reason for optimism. Beginning with Vitoria's discourses, *De Indis*, the scope of law, both international and domestic, has been widening. It has widened as to the *subjects* of law—Vitoria allowed for non-Christians; the Peace of Westphalia expanded the system by ending the political dominance of the Catholic Church in Europe; the building of empires and then decolonisation further expanded the number of state actors. In domestic law, new subjects emerged with the enfranchisement of non-property owners, ethnic and religious minorities, and women.

The *content* of the law has also changed domestically and internationally to reflect changes in views about the role of government and the responsibilities of one individual to another. On the international plane in the twentieth century, this has led to the 'internationalization' of concern for individual human rights, previously within the territorial sovereignty of each state, and to new reflections on man and nature. The law of nations is changing to reflect new realities and assumptions about man's relationship to his natural surroundings.

Vitoria argued that man's reason together with his conscience and soul could lead him to an understanding of the natural order of things. The order he contemplated was the relationship of men to each other and to the creator of that order, Vitoria's Christian God. However, there is nothing in his scheme which precluded adding the natural environment and its resources to that order, as did Teilhard. To build on two millenia of Christian doctrine a concept linking resource use with renewal and conservation for the benefit of future generations is not a radical departure from Vitoria's anthropocentrism; it affirms instead man's penultimate responsibility for the future of the planet because of Teilhard's *hominisation*. Vitoria's *De Indis* stands as a paean to man's reason, and to Europe's ability to face new obstacles and change in response to them, as needed.

The western pioneers of exploration and technology have bequeathed to the next century the challenge of redefining the anthropocentrism of the last five

hundred years, as the world's nations began to redefine their ethnocentrism in the twentieth century. The task is to broaden our anthropocentrism to include respect for the natural environment which sustains us and,conceptually, to translate this understanding of man and his place in nature into something 'socially and politically operational'.[67] International law must begin to 'encompass interests other than those purely human'.[68] The ability of man's reason to do both will determine not only how we live, but indeed, perhaps whether we live at all.

As the Stockholm Declaration reminded us, man is both creature and molder of an environment both man-made and natural. The conceptual challenge is to face this reality, and to view it as a complementary rather than an adversarial relationship. Man's surmounting of natural obstacles over the past centuries introduced an element of conquest into his relations with nature, and his perseverance was one of the reasons for the dynamism of western technology. But the same Christian teaching whose anthropocentrism contributed to our ecological problems can also provide the solution, in its concepts of human responsibility and the lack of human omniscience. The advances of western man in the age of expansion led us to forget what ecological problems now force us to remember: the organic nature of mankind.

Charlotte Ku

Charlottesville, VA, U.S.A.

NOTES

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9. See *Ibid.*, p. 3.
10. *Ibid.*, p. 5.
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15. *Ibid.*, p. 116.
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*, p. 117.
19. *Ibid.*
20. *Ibid.*, p. 119; emphasis added.
21. *Ibid.*
22. *Ibid.*, p. 120.
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*, p. 123.
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*, p. 120.
29. *Ibid.*, p. 127; emphasis added.
30. *Ibid.*
31. *Ibid.*, p. 128.
32. *Ibid.*, p. 161.
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*, p. 129.
36. *Ibid.*, p. 235.
37. *Ibid.*, p. 77.
38. *Ibid.*, p. 131.
39. *Ibid.*, p. 135.
40. *Ibid.*, p. 137.
41. *Ibid.*, p. 138; emphasis added.
42. *Ibid.*, p. 151.
43. *Ibid.*
44. *Ibid.*, pp. 152–4.
45. *Ibid.*, pp. 154–5. In a separate discourse, *De Indis, Sive de Iure Belli Hispanorum in Barbaros*, Vitoria outlined the rights and duties between belligerents in the conduct of war should relations reach that stage.
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62. As reprinted in Barros and Johnston, *The International Law of Pollution*, pp. 299–300.
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