the law of nations and the new world

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with an introduction by
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Introduction

TIMOTHY J. CHRISTIAN

Canada's new Constitution "recognizes and affirms" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada."[1] Constitutional force has thus been given to rights which are difficult to define and have been of doubtful legality.[2] One of the issues that the courts may have to address is whether the aboriginal rights enshrined in the Constitution preserve the sovereignty and right of self-government possessed by Amerindians before the age of European discovery and colonial expansion. *The Law of Nations and the New World* will help to place any such argument in historical context.

When one reflects upon the rights set out in our Constitution, fundamental questions arise about the European occupation of the New World. What were the philosophical and legal justifications of colonial expansion? What were the arguments advanced to defend the subjection of the Amerindians and the creation of European hegemony? Were any voices raised in opposition and, if so, what was the basis for such opposition? Were the actions of the colonizers lawful when viewed from the perspective of developing international law? What was the method of claiming title in the New World and was this method lawful? What is the basis for a claim that surviving aboriginal peoples possess the attributes of sovereignty? Did theologians defend the rights of the Amerindians or rationalize the claims of the colonists?

In answering these questions *The Law of Nations and the New World* explores the ideology of European colonial expansion into the New World, describing and evaluating the legal, theological and philosophical justifications of the colonizers and their sponsors. Consistent with their academic interests, Professor Green deals with the legal,

and Professor Dickason with the theological and philosophical arguments from a historical perspective. The result is an interdisciplinary analysis of these three components of the ideology of colonialism.

In "Claims to Territory in Colonial America," Professor Green begins with the fundamental assumption that the lawfulness of an action must be determined according to the law in force at the time of the act, as opposed to the law in force when a subsequent dispute arises.[3] Therefore, he asks whether the discovery of the New World and the subjection of its peoples to European control was lawful according to the rules of international law in force during the age of discovery. This inquiry leads to an examination of state practice, a consideration of the views of the classical writers, and a review of the leading cases. Having treated these sources of law, Professor Green then assesses the legal validity of the claim that Canada's native people have a sovereign status that has survived the period of colonial expansion.

To document state practice a review is made of the commissions which authorized the earliest voyages of discovery, and of the contemporary accounts of various expeditions. This study discloses that the accepted methods of asserting sovereignty over newly discovered lands varied from the French practice of planting crosses bearing royal coats of arms to the Russian custom of burying coins or kettles or beads. It is clear from the survey that the explorers and their patrons considered that these rather simple devices were effective to convey territorial title—to the exclusion, not only of other European rulers, but of the original inhabitants as well. The indigenous people were not consulted and the Europeans made no attempts to conclude treaties or other formal arrangements with them, assuming them to be incapable of ownership. As a contemporary writer stated, the native population did not enjoy property rights but only had a general residence ". . .as wild beasts in a forest."[4]

The later colonizing efforts of the sixteenth and seventeenth centuries also proceeded on the premise that there was no need to consult or obtain the consent of the native inhabitants. While letters of commission sometimes spoke of the missionary motives of expeditions, the documents indicate that the primary purposes were the acquisition of territory. Further, contemporary treaties evidence a general agreement as to the proper method of asserting title and a general recognition of the legal effects of title so acquired. This leads Professor Green to conclude that at the time of discovery ". . .it was a well es-

tablished practice, amounting to law. . ."[5] that rule over the newly discovered lands passed to the sovereign in whose name a territory was claimed, regardless of any proprietary claims of the original inhabitants. Did contemporary legal theory support this approach?

Perhaps not surprisingly, the classical writers, Spanish, German, and English, agreed that European dominion over the New World and its peoples was legally justified. This conclusion was reached by different writers in different ways but the three main arguments can be framed as claims in the alternative. Where one argument failed, another arose in its stead. First, some contended that the New World was unoccupied and that Europeans had a right to claim the lands. This involved diminishing the status of the original inhabitants by characterising them as barbarians who, since they did not live in civilized society, were incapable of enjoying legal rights of ownership. A second, related argument was that Europeans, as Christians, had a duty to spread the word of the gospel and a right to engage in trade and to cultivate unoccupied land without interference. Conversely, the peoples of the New World had an obligation to receive the ambassadors of the pope, the trade expeditions and the colonists, and any resistance or hostility to the European presence could be met with force of arms. This right of self-defence authorized the establishment of fortifications and taking such pre-emptive military actions as were necessary to ensure the safety of the Europeans. Alternatively, it was argued that the Christian rulers of Europe had a moral and legal obligation to end the cannibalism and human sacrifice practiced by some tribes. There was a legal right to wage war to protect afflicted persons and to vanquish those New World rulers who condoned barbaric practices and prevented their subjects from converting to Christianity. Third, even if it were conceded that the campaigns which the Europeans had undertaken to establish themselves in the New World were unjust wars, the victors could not be deprived of their spoils because the doctrines of usucaption or prescription by long usage served to legitimize the reality of effective occupation. Professor Green traces the reasoning of the leading scholars who, while often mounting different arguments, arrived at the same conclusion—that European occupation was lawful according to the law of nations.

This analysis places in context the decisions of various international tribunals and courts of the United States and Canada to the effect that aboriginal peoples do not possess the attributes of sovereignty in in-

ternational law. Indeed, it would be odd if international law did not authorize the expansionist activities of the leading, colonial powers, for the law of nations was little more than a self-serving, crystallization of state practice. One might be forgiven for concluding that a legal analysis of questions of this magnitude is predictably circular, for if it was done it was lawful. After being conquered and subjected to the rule of the colonizing powers, it is difficult to see, from a legal point of view, how anything resembling sovereignty could have endured in the Amerindians.

Professor Dickason in "Concepts of Sovereignty at the Time of First Contacts" examines the theological and philosophical perspectives on colonialism in the New World. While her contention is that colonial expansion could not be justified according to natural or divine law, it is clear from her analysis that the majority of contemporary, influential scholars had little difficulty defending European hegemony.

While there was some theological controversy over the status of the Amerindians, the prevailing view was that they were savages living in an infant culture who ought not to be accorded the same status as Christians or even infidels who at least were civilized enough to have developed a religion—albeit non-Christian and inferior. The status accorded infidels and that bestowed upon Amerindians is usefully compared by Professor Dickason. While it was generally conceded that infidels were capable of *dominium*—the lawful possession of property and political power—leading scholars regarded the Amerindians as subhumans who were incapable of it.

In the thirteenth century Pope Innocent IV held that all rational creatures, Christian or pagan, had the right under natural law to own property and to govern themselves. Accordingly, not even the pope could seize the possessions or displace the jurisdiction of heathen without just cause. This view was contested by Hostiensis who asserted that the rights of infidels were subject to those of Christians. Only those infidels who recognized the lordship of the church were to be tolerated by it—being permitted to own possessions and exercise jurisdiction over Christians. Any ill-treatment of Christian subjects could lead to a revocation of authority by the pope and a justifiable expropriation of the land, possessions and jurisdiction or lordship of the infidel. Hostiensis held that Christ had assumed all power on His coming and that those who failed to recognize Him had

forfeited their rights. The views of Hostiensis prevailed and applying his reasoning, the possessions of the Amerindians could be seized with impunity.

Further support for the subjugation of the Amerindians was found by adopting Aristotle's doctrine of natural servitude. It was argued that the Amerindians were naturally inferior and could not qualify for the same rights as Europeans. Thus, European domination was consistent with the natural order of things and the slave trade and exploitation of native labour could be justified.

The ascendancy of these views coincided with the loss of influence of a universal Catholic church and the creation of national monarchies. Concerns about pervasive standards of justice, as disclosed in natural law, were replaced by the need to justify and regulate the activities of particular monarchs in the New World. The law of nations displaced natural law as the critical standard. While the overriding importance of the principles of justice were theoretically affirmed, on a practical level, short-term, expansionist considerations prevailed.

The predominant view, and that which justified colonial expansion, was that Amerindians were beyond the reach of natural law. However, not all theologians, especially those who had actually spent time in the New World, agreed with this disposition of the Amerindian's interests, even on a theoretical basis. Chief among those who championed the cause of the Amerindian was the Spanish Dominican, Las Casas. Professor Dickason examines his writings, pointing out that his arguments "did not deflect the course of empire, but restated basic principles effectively enough that they are still being heard today."[6]

Las Casas contested each of the propositions relied upon by conventional theologians to justify the dehumanization and exploitation of the Amerindians. First, he argued that natural law did apply to the Amerindians as it did to all human beings. Thus, he attacked the Aristotelian notion of natural servitude, pointing out that Aristotle was himself not a Christian and that his doctrine which allowed for the subjection of some to servitude was inconsistent with the Christian object of uniting mankind. Further, he contended that the views of Hostiensis were heretical. Second, he argued that true conversion could only take place among free people. Infidels could not be forced to accept Christianity—rather, the power of rational argument, which he was confident would ultimately succeed, had to be trusted.

Thus the obligation to spread the gospel did not create a right to force unbelievers to listen. Third, based on his personal observation, he disputed the contention that the Amerindians were barbarians, arguing that merely because some had not adopted a government on European lines did not mean that they lacked the reason to be brought into an orderly domestic and political society. Indeed, he was of the view that the cultural attainments of some of the New World peoples were on a level with those of the Greeks and Romans. Fourth, Las Casas accepted that European monarchs were obliged to protect the innocent living in those cultures where human sacrifice was practiced. However, he was of the view that this duty could not justify the conquest and enslavement of the New World peoples nor the appropriation of their lands and possessions. It was the prerogative of God to impose punishment for the sins of an infidel committed "within the borders of the territory of his own masters and his own unbelief."[7] Finally, and as a logical result of his argument that the Amerindians were under natural law, Las Casas argued that the Amerindians were entitled to make war against, and kill, the Spaniards, in self-defence.

Professor Dickason traces the influence of these arguments on contemporary theologians and on the development of legislation purporting to restrict oppressive colonial practices in the New World. This analysis provides a refreshing indication that not all scholars were swept up in rationalizing expansion, but it also is a depressing reminder that, ultimately, the views of Las Casas were superseded by arguments supportive of the material interests of the colonial regimes.

In her account of French expeditions of discovery and colonization, Professor Dickason emphasizes the alliances formed between the Europeans and their Amerindian allies. She argues that while the historical evidence indicates that the Amerindians believed the alliances were a *de facto* recognition of their sovereign rights, the French never wavered in their view of the Amerindians as "hommes sauvages" living out of society and incapable of enjoying legal rights. The English, likewise, were preoccupied with the prospects of New World wealth and little concerned about the rights of the inhabitants. By the time of Elizabeth I the natural right to engage in trade was routinely claimed in commissions authorizing expeditions—just as the possible rights of the Amerindians were routinely ignored.

Whether regarded from the legal, theological, or philosophical per-

spective, the prevailing ideology of the age of European discovery and colonization gave no credence to the humanity of the Amerindians. As subhumans they were incapable of possessing rights—legal, natural or divine. It will be interesting to see what effect this historical reality has on the definition of aboriginal rights in the new Constitutional guarantee—particularly if it is regarded as an attempt to ameliorate ancient and longstanding injustices. *The Law of Nations and the New World* provides a fascinating insight into the thinking of those who were responsible for and who opposed the subjugation of the Amerindians. It will be of special interest to those who want to examine the assumptions which permitted it to be done.

Notes

1. S. 35(1), *The Constitution Act*, 1982.
2. Some recent consideration of these questions from a legal perspective can be found in: Gagne, "The Content of Aboriginal Title at Common Law" (1982-83) 47 *Sask. L. Rev.* 309; L.C. Green, "Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms" (1983) 61 *Can. Bar. Rev.* 339; N. Lyon "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to do with Vague but Meaningful Generalities" (1982) 4 *Sup. Ct. L. Rev.* 57; Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms* (1982); McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 *Sup. Ct. L. Rev.* 255; Shaun Nakatsuru, "A Constitutional Right of Indian Self-Government" (1985) 43 *U. T. Fac. L. Rev.* 72-99; Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 *Can. Bar Rev.* 314; B. Slattery, "The Constitutional Guarantee of Aboriginal Rights and Freedoms" (1983) 8 *Queen's L. J.* 232; B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 *Am. J. Comp. L.* 361-91.
3. In adopting this approach, Professor Green used the same method of analysis as was employed by Judge Huber, a sole arbitrator dealing with competing claims by the United States and the Netherlands over the sovereignty of an East Indian Island, in *The Island of Palmas* (1928) 2 *U.N., Reports of Int'l Arb. Awards*, 831. He held that the effect of the discovery of the Island by Spain was ". . .to be determined by the rules of international law in force in the first half of the 16th century."
4. Green at p. 18.
5. Green at p. 38.
6. Dickason at p. 199.
7. Dickason at p. 210.

Contents

Claims to Territory in Colonial America

L. C. GREEN

Detail from Clouet's *Carte d'Amerique,* 1782. Reprinted with permission from the Public Archives Canada, National Map Collection, NMC 11879.

It has become increasingly common since the end of the Second World War for aboriginal peoples in a variety of countries, including Canada, to assert that they are the true and sovereign owners of the territories they occupy, regardless of the fact that they may constitute a minority of the population. Frequently they put forward claims for a return of the land, despite the presence of nonaboriginals who may have been there a century or more. On occasion these claims have been met by land grants by the local government or by compensation, but there have been instances when the aboriginal peoples have demanded self-government or independent statehood. Aboriginal groups and their sympathisers often suggest that the ruling majority are alien interlopers lacking any true title to the country they govern. These groups tend to ignore the fact that in the modern world title to statehood depends not on local custom or morality, but on international law. In assessing the claims of Canada's aboriginal peoples, especially the Indians, it is necessary to look at the history of Western settlement and the legal basis of claims to territory and sovereignty in international law.

In considering the validity of claims to titles to territory in international law, it must be remembered that international law is a vital and progressive rather than a sterile system. That is to say, what may have been sufficient to establish title in the sixteenth century might not necessarily be sufficient today. Equally, claims of an indigenous people which might be recognised today, might well have been unknown then. It is necessary, therefore, to examine the validity of the acquisition of current titles in accordance with the principles and customs that were valid at the time when the title was claimed to have been established, and not now when its validity may be challenged.[1]

Further, it must be borne in mind that international law as we know it today is the development of the practice of the European Christian states and it is important to examine that practice in order to ascertain what the law was in that developmental period before it became the universal system it now is. This is necessary when examining any alleged rule of law, and even more so in the case of title to territory as may be seen if one looks at the manner in which the Latin American states in the nineteenth century, and equally the new states of Africa today have insisted on maintaining the old colonial boundaries which were established either to delimit the jurisdictional limits of local administrators or to define the extent of competing imperialist expansionist policies.

The Pope and the Papal Bulls

At the time of the era of discovery, from the early part of the fourteenth century, it was generally accepted that the entire globe was the property of God and, as such, distributable by the Pope as His delegate on earth. At the same time, it was the practice of the European states to seize for themselves territories which had not yet been claimed by other Christian states, regardless of the attitude or presence of aboriginal inhabitants, who, for the main part, were described as "savages" or "barbarians." Many of these seizures were based on a series of Papal Bulls, whereby the yet undiscovered world—that is to say, undiscovered by the European powers—was divided by the Pope primarily between Portugal and Spain. Insofar as the Western hemisphere is concerned, the Bull of 4th May 1493, issued after Columbus returned from his first voyage, is the most significant. By it, the Pope granted to Ferdinand and Isabella and their descendants all lands lying west of a line joining the North and the South Poles, 100 leagues west of the Azores, including regions discovered and unknown, so long as they had not already been seized by any other Christian Prince. The subjects of other states were not allowed to enter this domain without the consent of the Spanish King. Lands east of the line were awarded to Portugal:

> . . .on one of the chief of these aforesaid islands [discovered by Columbus] the said Christopher has caused to be put together and

built a fortress fairly equipped, whereon he has stationed as garrison certain Christians. . .who are to make search for other remote and unknown islands and mainlands. . . .Wherefore,. . .you have purposed. . .to bring under your sway the said mainlands and islands with their residents and inhabitants and to bring them to the Catholic faith. . . .And in order that you may enter upon so great an undertaking with greater readiness and heartiness endowed with the benefit of our apostolic favour, we, of our own accord, not at your instance nor the request of anyone else in your regard, but of our own sole largess and certain knowledge and out of the fullness of our apostolic power by the authority of Almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ, which we hold on earth, do by tenor of these presents, should any of said islands be found by your envoys and captains, give, grant, and assign to you and your heirs and successors,. . .forever, together with all their dominions, cities, camps, places and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and south, by drawing and establishing a line from the Arctic pole. . .to the Antarctic pole. . ., no matter whether the said mainlands and islands are found in the direction of India or towards any other quarter, the said line to be distant one hundred leagues from any of the islands commonly known as the Azores and Cape Verde. With this proviso however that none of the islands and mainlands, found and to be found, discovered and to be discovered, beyond the said line, towards the west and south, be in the actual possession of any Christian king or prince up to the birthday of our Lord Jesus Christ just past from which the present year one thousand four hundred and ninety-three begins. And we make, appoint and depute you and your said heirs and successors lords of them with full and free power, authority, and jurisdiction of every kind: with this proviso however, that by this our gift, grant, and assignment no right required by any Christian prince, who may be in actual possession of said islands and mainlands prior to the said birthday of our Lord Jesus Christ, is hereby to be understood to be withdrawn or taken away. . . .Furthermore, under penalty of excommunication *late sententie* to be incurred *ipso facto,* should anyone thus contravene, we strictly forbid all persons of whatsoever rank, even imperial or