The law of nations and the doctrine of terra nullius

Link to publication record in USC Research Bank:
http://research.usc.edu.au/vital/access/manager/Repository/usc:13866

Document Version:
Published version

Citation for published version:
Boucher, D (2010) The law of nations and the doctrine of terra nullius. in Asbach, O, Schroder, P (ed), War, the State and International Law in Seventeenth-Century Europe, Ashgate Publishing Company, United Kingdom, pp.63-82.

Copyright Statement:
Copyright © 2010 Ashgate Publishing Company. Reproduced here with permission.

General Rights:
Copyright for the publications made accessible via the USC Research Bank is retained by the author(s) and / or the copyright owners and it is a condition of accessing these publications that users recognize and abide by the legal requirements associated with these rights.

Take down policy
The University of the Sunshine Coast has made every reasonable effort to ensure that USC Research Bank content complies with copyright legislation. If you believe that the public display of this file breaches copyright please contact research-repository@usc.edu.au providing details, and we will remove the work immediately and investigate your claim.
Chapter 4
The Law of Nations and the Doctrine of *Terra Nullius*

David Boucher

Pope Benedict XVI, responsible under Pope John Paul II for countering the dangerous tendencies in Liberation Theology, addressed the Bishops of Latin America in Brazil on 13 May 2007. Pope Benedict thanked God for bestowing the great gift of the Christian faith upon the indigenous peoples, which had served for five centuries to animate the continent. Its significance, he argued, consisted in the coming of that God whom their ancestors had been in search of, unknowingly, in their own religious quests. To compound the insult, Pope Benedict XVI added that at no point had the introduction of Christianity alienated the pre-Columbian cultures. Nor had it been the imposition of a foreign culture. Authentic cultures, he argued, are open and receptive to other cultures, “hoping to reach universality through encounter and dialogue with other ways of life”.¹ Pope Paul III had been of a similar mind almost five centuries earlier. In 1537, he announced that “the Indians are truly men and ... they are not only capable of understanding the Catholic faith, but, according to our information, ... desire exceedingly to receive it”.²

The seventeenth century in Europe was a time of an immense opening of horizons, in which the new continent of America was firmly embedded in considerations of the territorial expansion of the state related to what was permissible under natural law and the law of nations. At the heart of conceptualising the relationship between Europe and the Americas was the issue of property, an issue absolutely essential to defining one’s political *persona* from wherever one might hail. The capacity to own and cultivate land, the obligation to conform to natural law, violation of which provided grounds for waging just war, and the opportunity for Europeans to enslave American Indians and to appropriate their lands with or without their consent, afforded numerous criteria that the Indians could rarely, or barely, meet.

In this chapter I should like to explore the practical implications of European ideas of natural law, natural rights and the law of nations with specific reference to the idea of *terra nullius*. The cases of the European encounters with the American Indians and Australian Aborigines provide an excellent illustration of how such abstract doctrines, with their universal standards and applicability, led to widely differing conclusions when translated into concrete social and political contexts requiring practical prescriptions and imperative injunctions, and ultimately could provide justifications for occupation and ownership even among apologists for the Indians. I want to suggest that while the idea *terra nullius* was closely allied with the right to husbandry, it was more fundamentally the duty to cultivate the land to its utmost capacity that provided the moral justification for appropriating “wasteland” and under-cultivated land. Of ultimate importance, however, was the fact that despite appearances even the concession of land rights to indigenous peoples did not at the same time concede sovereignty. Even more humanitarian Europeans from the seventeenth to the twentieth century believed that Indians were primitive, but that with proper training in the Christian religion, European agricultural methods and literacy they could become civilized.

**The Idea of Terra Nullius**

The Latin *terra* means land, earth, or ground, and *nullius* means no one’s; hence vacant or empty land, or at least unoccupied by anyone who qualifies as capable of ownership. The idea of *terra nullius* has become increasingly prevalent in recent discussions of the legitimacy of European expansionism, but especially so in the context of the “history wars” in Australia. I want to suggest that while ideas that constitute the “doctrine” of *terra nullius* were important, and while most natural law jurists acknowledged a right to take possession of vacant lands, there were other much more fundamental arguments that justified European expansionism in America, Australia and Africa, namely that the indigenous peoples were in dereliction of their duty to God to cultivate the land and make it as productive as possible.

This contention rests upon a number of propositions:

1. That universal principles were used as instruments of oppression, and instead of conferring rights and duties upon all, were the preserve of only those who qualified. In other words, universal rights were almost invariably special rights.
2. That theories of property and just war were fundamental to the application of the principles of natural law, natural rights and the law of nations.
3. That, contrary to the widespread contention that the likes of Grotius, Pufendorf and Rachel secularised the natural law and natural rights traditions, these traditions rested on the obligation to obey the natural law principally as a duty to God.\(^3\) The Indians therefore had a duty to God to cultivate their land, which they singularly failed to fulfil.

The third proposition is probably most contentious because it denies current orthodoxy, as expressed, for example, by Arthur Nussbaum, A.S. McGrade and James Griffin. Arthur Nussbaum firmly believes that both Grotius and Pufendorf may justifiably have laid claim to secularising natural law.\(^4\) Griffin, for example, contends that the use of reason as the means of discovering natural law and as the ground of our obligation to obey it is the hallmark of modern natural rights theory. In my view, he is wrong to attribute these ideas to thinkers such as Grotius, Puffendorf and Locke.\(^5\) A.S. McGrade is representative of the prevailing view in suggesting that during the period encompassing John of Salisbury (c. 1115–76), Richard Hooker (1554–1600) and Francisco Suarez (1548–1617), the theory of natural rights arose out of the religious view of society. After this time, McGrade suggests, the politics of right more or less dispensed with religion.\(^6\)

It is my contention, however, that even natural rights theorists who are said to have secularised the tradition, such as Hugo Grotius (1583–1645), Samuel von Pufendorf (1632–94), John Locke (1632–1704) and Johann Wolfgang Textor (1638–1701), retain such a heavy residue of absolute theological presuppositions that their arguments would be unsustainable without the religious outlook upon which they depend. It is not my contention that all natural law and natural rights thinkers ultimately rely on God as the ground of obligation.\(^7\) My claim is more modest: those thinkers who have been most identified with secularising natural

\(^3\) This proved to be a particularly contentious issue at the conference and I therefore go to some pains to substantiate it. I would particularly like to thank Thomas Pink and Kees van der Pijl for their comments. I have elaborated some of the themes in this chapter in my book *The Limits of Ethics in International Relations: Natural Law, Natural Rights, Human Rights in Transition* (Oxford, 2008).


law and natural rights tended not to abandon God as the ultimate source of obligation. Why, indeed, would they want to, given the contemporary conditions of belief?

It is important to distinguish in the classic writers between the method or means by which we come to know natural law and the grounds for our obligation to obey it. My view is that in the earlier thinkers who are significant for the development of natural law and the law of nations, reason enables us to know the law and God ultimately obliges us to obey it. Emer Vattel (1714–67) saw this distinction very clearly and was aware of what was at stake. He differed from those who wished to posit God as the foundation of obedience to natural law, preferring instead a complicated combination of motive, interest and reason.8 He says that “In no way does it detract from the authority of God to say that everything he ordains for us in natural laws is so fine and useful in itself that we would be obliged to adopt it, even if God had not ordered it”.9 For revealed laws such as those we find in the Scriptures, Vattel does not deny that God is the source of obligation. For natural laws, however, we know them to be the will of God only “by the reasons for these laws”.10 This hardly constitutes a secularisation of the tradition. Indeed, it still inhabits the same universe of discourse as those who posit Him as the foundation of obligation.

As Charles Taylor has argued, belief in God was almost unchallenged because the “conditions of belief” made it axiomatic that alternative views were inconceivable for most people. Owing to a transformation in those conditions of belief, it is no longer axiomatic to believe in God because there are evident alternatives that make it more difficult to sustain faith.11 In the seventeenth century, if a philosopher did not rely at some stage in his argument on God as the ultimate foundation of obligation, sometimes alongside other compelling reasons, we would need to seek an explanation for the omission; in contemporary society, it is the inclusion of such grounds that demands an explanation.

From the time of the early Christians to the seventeenth century and beyond, the dominant view was that all authority ultimately derives from God. It is difficult to see what would give moral and intellectual force not only to the arguments but also to the obligations and rights that individuals and nations have under the natural law had God not willed it so. St. Paul, for example, contends that “No authority exists save by God’s sanction; such as do exist have been appointed

by God”.12 It is common during the later medieval period explicitly to invoke God as the ground for obedience to the natural law. Gratian, for example, in *The Decretum Gratiani* (c. 1140), contends that any principle that can be determined as a pre-conventional natural right must be regarded to be a reflection of divine wisdom and will. He declares that “nothing is commanded by natural right except that which God wishes to be done, and nothing forbidden except that which God forbids to be done”.13

Grotius, Pufendorf, Textor and Rachel suggest that the law of nature pertains only to humans, and is obligatory in its force. An indubitable and immutable human nature provides the foundation for natural law. Starting from the basis of our natural sociableness, Grotius, for instance, suggests that proofs of the natural law are almost as self-evident as the data we receive through the senses.14 Natural law is so inextricably tied to human nature that even if God did not exist, and He had no interest in the welfare of humanity, the law would remain valid.15 This has often been taken to be Grotius’s secularisation of the natural law. Such a view is anachronistic.

When one examines Grotius’s argument closely, it is evident that his statement is partially rhetorical, and what lies at the heart of our obligations is God: as Jean Barbeyrac comments in his notes to Grotius’s text, “the Duty and Obligation, or the indispensable Necessity of conforming to these Ideas, and Maxims, necessarily supposes a superior Power, a supreme Master of Mankind, who can be no other than the Creator, or supreme Divinity”.16 Jean Jacques Burlamaqui, the author of *The Principles of Natural Law* writes in a similar vein. He argues that it is obvious from Grotius’s mode of expression that Grotius did not wish to exclude the divine will from natural law. While reason is a source of obligation, “it could never produce of itself so effectual an obligation, as when it is joined with the divine will”.17

Grotius, in fact, explicitly contends that there are compelling reasons for ascribing the principles of the natural law to God. God has made them so evident and clear even to those “less capable of strict Reasoning” that He forbids us to give in to impetuous passions which are contrary to our own and others’ interests and

16 Grotius, *Rights of War and Peace*, Preliminary Discourse, ns 1 to § XI.
which divert us from conforming to the rules of reason.\textsuperscript{18} In the \textit{Mare Liberum} (\textit{The Free Sea}) Grotius goes further and suggests that God directly insinuates certain precepts into men's minds, which are "sufficient to induce obligation even if no reason is apparent".\textsuperscript{19}

It is true that Pufendorf did not believe that God had inscribed the natural law in men's hearts. He believed himself to be in conformity with orthodoxy when he said, "Most are agreed, that the Law of Nature is to be drawn from Man's Reason; flowing from the true Current of that Faculty, when unperverted".\textsuperscript{20} Yet not only does God endow us with the reason we use for coming to know the natural law; the reason that we are obliged to follow natural law is because it is God's "Will and Command we should act according to that Law".\textsuperscript{21}

Despite the fact that Pufendorf is acknowledged to derive the natural law from God, and explicitly rejected the tentative Grotian suggestion that the natural law would retain its force even if God did not exist, Nussbaum argues that in practical terms Pufendorf is so little influenced by theological and religious sentiments that he has come to be "considered the true founder of a secular law of nature".\textsuperscript{22} This flies completely in the face of the evidence. Pufendorf explicitly states that the dictates of reason do not alone achieve the power and dignity of laws. A higher principle must be invoked in order to instil an immutable obligation. There can be no law without a sovereign and, as sovereign of the universe, God is the creator and enforcer of natural law. Natural law, from which our natural rights derive, is the creation of God, who, should we transgress against it, punishes our actions. Pufendorf argues that "the obligation of Natural Law proceeds from God himself, the great Creator and supreme Governor of Mankind; who by Virtue of his Sovereignty hath bound Men to the observation of it".\textsuperscript{23}

The same can be said for Rachel, Textor and Burlamaqui. For Rachel, it is not reason that gives natural law its obligatory force. The source of natural law is divine providence, and its obligatory force derives from the same source: "For if the obligation of every law derives its authority in paramount fashion from God, Natural Law receives its authority in the highest possible degree from that same source".\textsuperscript{24} Johann Wolfgang Textor perhaps has a stronger claim to having secularised

\textsuperscript{18} Grotius, \textit{Rights of War and Peace}, Preliminary Discourse, § 13.
\textsuperscript{20} Pufendorf, \textit{The Law of Nature and Nations}, Book II, chap. iii, § XIII.
\textsuperscript{21} Pufendorf, \textit{The Law of Nature and Nations}, Book II, chap. iii, § XIII.
\textsuperscript{22} Nussbaum, A Concise History of the Law of Nations, p. 148.
the natural law. He follows and modifies the theories of Grotius and Hobbes. The law of nature for him issues directly from natural reason. God, however, implants this reason in men and one of the self-evident laws of nature is that we must fulfil our obligations to God. Without God, whose existence Textor goes to some pains to prove, there is no basis for obligation and civil society would collapse.25

Even in the mid-eighteenth century, natural law was still being inextricably linked to God’s authority. Jean Jacques Burlamaqui (1694–1748), an influential Swiss jurist whose chief works are *Principles of Natural Law* (1747) and *Principles of Political Law* (1751), set out to demonstrate the efficacy of natural law by relating it to its original source in God’s rule, and to human reason and moral instinct. International and domestic law were, for him, based on natural law. Burlamaqui contends that the law of nature consists in certain principles of right reason that teach us what is right and wrong according to the extent to which this law agrees or disagrees with man’s rational and sociable nature. Hence God, the author of nature, commands or forbids those actions. The obligation to obey the natural law, then, is ultimately a duty to God.

As soon as we have acknowledged a creator, it is evident that he has a supreme right to lay his commands on man, to prescribe rules of conduct to him, and to subject him to laws; and it is no less evident that man for his part finds himself, by his natural constitution, under an obligation of subjecting his actions to the will of this supreme being. 26

In essence the rationalist who believes that the natural law is right because it is rational, and the voluntarist who believes it is right because God wills it so, on the whole maintain that obligations to obey it rest on God.

The Implications for *Terra Nullius*

I want now to look at the idea of *terra nullius* and how what I have just argued has a bearing on it. The doctrine of vacant or unoccupied lands, available for others to acquire and appropriate was a central pillar in conceptualising relations between European and non-European nations, that is, between civilized and barbarous and savage societies. It was an important issue because “unoccupied” did not literally merely mean “uninhabited”, it also came to mean under-used, uncultivated or


under-cultivated land available for appropriation, and in this respect it was an important consideration in the partition of Africa.

The term *terra nullius* itself has come to be emblematic of some of the more pernicious acts of Europeans perpetrated upon Australian Aboriginals after they took possession of the continent. The idea that vacant land may be occupied through necessity, for example, was well established among the Greeks and Romans. In order to alleviate overpopulation in the polis or city, establishing a colony elsewhere provided a practical solution to a pressing problem.

Michael Connor and Merete Borch deny that there is evidence of any body of opinion that regarded indigenous lands as *terra nullius*. Connor simply rejects international juristic and philosophical opinion as having no legal substance and irrelevant to his claim that the term itself was not used by government officers and settlers in the eighteenth century or before. To say that it has no legal substance, however, is to overstate the case. Michael Connor accuses Henry Reynolds, a leading proponent of the *terra nullius* thesis, of fabricating the doctrine on the grounds that it had no basis in British nor European law, and that his use of Vattel to substantiate his case was illegitimate in that Vattel was “not making up rules of law for men to follow, he was a writer, a publicist, a theorist.” Merete Borch has suggested that “it is difficult to see that any of the frequently quoted international jurists provided argumentation for seeing indigenous land as *terra nullius* either during the eighteenth century nor before it”. This view, I think, is mistaken.

Connor’s criticism assumes an excessively positivistic conception of international law, and Borch’s is simply contrary to the evidence. The law of nations, or *ius gentium*, was not a law enacted by an international legislature nor was it enforced in international courts; it was legal in the sense that it was inferred from the accepted practice of “civilised” states as either directly derivative from the natural law or from international custom, but also from the opinions of learned theologians, philosophers and jurists. It was a law that comprised a curious amalgam of moral, political and legal arguments in the justification of state and individual practice.

There was no doubting its existence, as Suarez suggests, because it “is assumed by all authorities to be an established fact, or so we gather from their very frequent use of

---

the term”.32 One of its distinguishing features is that its precepts “are not established in written form” and “it consequently differs in this respect from all written civil law, even from that imperial law which is applicable to all”.33 Furthermore, the law of nations differs from natural law in that the latter is truly universal, common to all peoples and accepted by everyone. The law of nature can fail to be observed only by those in error. It may not, however, always be observed by all nations, and what is considered by some to be the law of nations may not be considered so by others, and therefore “without fault fail to be observed”.34 As Samuel Rachel maintains, “the law of nations is employed as a common bond of obligation; and peoples of different forms of government and of different size lie under the control of these rules, which depend for their efficacy upon mutual good faith”.35

It is incontrovertible that the authorities on the Law of Nations generally acknowledged a right, to the occupation of unoccupied lands, and in some instances even if the lands were under the eminent domain of a recognizable sovereign. The basic premise among jurists and philosophers in the early modern period regarding property rights was that God gave the whole world in common to mankind, and those portions that remained unoccupied or uncultivated, which did not necessarily mean upon which no people resided, were available for legitimate occupation.

Vitoria, Ayala, Suarez, Gentile, Locke, Wolff and Vattel, for example, contend that people have an obligation to cultivate the land, and if they do not they have no right to prevent those who would. Although Vitoria did not as such disagree with the doctrine, he denied that mere discovery, *ius inventionis*, was a legitimate claim to ownership. Occupation of land for him is a manner of appropriating territory that has no owner, that is, *illa quae sunt deserta, quod in nullius bonis est*.36 For him, under natural law, all men originally had a right to everything. Because of God’s premonition of Man’s sinfulness, He made provision for private property in permissive natural law in so far as men could come together and agree that “You take this and you this and I will have this”.37 Vitoria was in no doubt that the American Indians had ownership rights and that not all their land was *res nullius*. *Res nullius* is not an exact equivalent of *terra nullius*. The former refers

to items in general without an owner, such as buffalo roaming the range, which are common to everyone, or to things that cannot be owned, such as the air we breathe or the oceans we sail.

Balthazar Ayala contends that under natural law, in primitive times, all things were in common and no individual owned anything. Community of goods, however, did not suit man’s debased nature. Natural reason informed the law of nations that a system of private property was required to mitigate the sinfulness of mortals.38 Suarez, using Isidore’s Etymologies (Bk. V, chap. vi), contends that ius gentium, or the natural law, confers upon individuals the right to occupy places not previously occupied by others.39 Alberico Gentili (1552–1608), starting from the premise that humanity comprises a universal society, claiming Tacitus as an authority, and developing an idea from Thomas More’s Utopia, concluded that exiles from their own countries were entitled, out of necessity, to wage offensive wars in their quest for habitable territory, and that vacant lands may be colonised by people who need them for their own use. Unoccupied land belongs to no one and those who take it have a right to do so. Nature abhors a vacuum. Under the rule of Spain, he argues, almost all of the New World remains unoccupied. The implication was that the right to occupy it by means of possession was still valid.40

Wolff confirms that uninhabited lands may be colonised and appropriated because they are the property of no one. The nation appropriating the vacant land acquires property rights to it and sovereignty over it. Unlike Locke, for example, he acknowledges ownership and sovereignty by nations over the lands they occupy, even if those lands are waste and barren. Nevertheless, since every nation should perfect its condition, such land that lays vacant should be given to foreigners.41

Vattel suggests that “Every nation is obliged by the law of nature to cultivate the land that has fallen to its share”, and that “The cultivation of the soil … is … an obligation imposed by nature upon man”.42 The land would simply not feed its inhabitants if it were allowed to lay vacant. It may have been all right in primitive

38 Balthazar Ayala, On the Law of War And on Duties Connected with War And on Military Discipline, [1582], trans. John Pawley Bate (Washington D.C., 1912), Book II, chap. v, [16], p. 41.
times to live the life of hunting and gathering, but now that the population has greatly increased each nation “is obliged by the law of nature to cultivate the land that has fallen to its share”.

There was a distinction to be made, then, between the use of the land by American Indians and ownership, between occupation and possession. Even though this was not the widespread practice in America, it nevertheless informed the famous *Johnson v. M’Intosh* decision, which was itself evidently supported with reference to the authorities on the law of nations. It is a widespread misperception that Europeans refused to acknowledge Indian land rights, a myth perpetuated by the classic *Johnson v. M’Intosh* (1823) ruling by Chief Justice John Marshall to the effect that, because the English had not recognised the Indians as property owners, neither should the United States. In fact, there was widespread acknowledgment of Indian property rights, often for the benefit of the settlers who ruthlessly exploited them, rather than from any altruistic motives or moral conscience. Even when land rights were granted to indigenous peoples, governments felt little compunction in seizing them if their value became reassessed.

Prior to this decision, however, perception had already deviated from the fact. It came to be a widespread belief that Indians were hunter-gathers, and for centuries the law of nations had not acknowledged that they owned the land on which they hunted. Indeed, if agriculturalists settled on the same land, it was they who were deemed its owners.

In Grotius's view, for example, God had given the world to man in common, but also made provision for the acquisition of property through individual labour and industry as long as this acquisition conformed to two primary conditions, or natural laws. These were, first, that everyone may use common things without causing harm to others, and second that everyone be content with his portion and abstain from coveting another’s. For Grotius there is a difference between “occupation” (occupation) and “ownership” (dominium). Occupation is a natural right that pertains to self-preservation. There is a rudimentary form of private property, in owning one’s body, for example, and that extends to the appropriation of things such as fruit and animals for preserving that body. “Ownership” (dominium) is an institution created by civil society and is the result of agreement.

---

Various legal cases, including *Johnson versus M’Intosh* (1823) in the United States, served to reinforce the distinction between occupation and ownership. They reaffirmed the belief that when John Cabbot discovered and symbolically occupied North America in 1497, he delivered full proprietary title to Henry VII and the natives either became trespassers or attained some other title. They, and other aboriginals, were deemed licensees of the Crown, allowed rights of occupancy on sufferance, but not of ownership unless explicitly given such title by the Crown.\(^47\) The implication is an affirmation of Grotius’s point. If the Crown or government conferred land rights, then those rights qualify them for protection by the legal system just as the rights of any other American, Canadian or Australian who derived his titles from the government or Crown. What the idea of vacant land effectively meant for Grotius was that proprietary or ownership rights were deemed to have validity only within the context of a system of law.

There was a distinction to be made, then, between the use of the land by American Indians and ownership, between occupation and possession. Thomas Hobbes (1588–1679), although less fulsome in his discussion, subscribed to the view of More, Gentili and Grotius that the lands of the Americas were plentiful enough to accommodate a people that was still increasing in population and needed to expand into new territories. This did not give settlers a right to massacre the natives, but they could constrain them to live closer together.\(^48\)

The idea of wasteland was to figure prominently in Locke’s justification of acquisition. The fact that the land was deemed empty was justification for occupancy, but occupancy in itself did not, in the eyes of many apologists, give sufficient grounds for title or ownership. As with Grotius, occupancy for Locke had to be equated with possession. The principle of appropriating waste territories therefore needed to be supplemented with a theory of property that established a moral title to the ownership of land. Vattel was also quite clear that occupancy was not enough: “The law of nations will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use.”\(^49\)

Various strategies were adopted to effect opportunities of appropriation and ownership. Charles Mills argues that white settlers joined in expropriation contracts, which created societies, with the clear implication that no society had previously existed.\(^50\) James Tully has argued that European theories of property

\(^{47}\) Geoffrey Lester, *Inuit Territorial Rights in the Canadian Northwest Territories* (Canada, Published by Tungavik Federation of Nunavut, 1984), p. 3.


after settlement served to misrecognise the systems of property and the political organizations of the aboriginal peoples they encountered. Carole Pateman extends these ideas to talk about a specific form of Charles Mill's expropriation contract. This she calls the “settler contract”, among whose principal components are the right to husbandry and the establishment of sovereignty where the natives were deemed insufficiently organized and civilized to conceive of, let alone exercise, it. On the strict logic of the settler contract natives were excluded, as in Australia, or on the modified logic were afforded certain concessionary rights and partially accommodated, as in America under English settlement.

Where there was a recognisable social structure and system of authority – and this, of course, never went uncontested, irrespective of religion – the peoples were deemed to have the same rights and duties under natural law as Europeans. From this point of view the universality of the natural law, and of natural rights, appears to work for the benefit of indigenous peoples who conformed to universal (that is, to European) standards of social and political relations. The application of natural law, and the law of nations, uniquely the product of the western political experience, were conceived as universal, local variations on which, at least in terms of fundamental beliefs, were regarded as violations.

Natural law and natural rights were the universal standards employed by Europeans to judge what they encountered and to arrive at answers to the most fundamental of questions. There could be no exceptions to these rational universal standards, but there might be mitigating circumstances, such as invincible ignorance, that made some initial judgments less severe. Few Europeans would have denied that there were natural rights, and that all humans had them by the mere fact of being human: what was at issue was whether the American Indians met the qualifications, or fell short in some way, of being fully human. If they qualified, then like every human they possessed natural rights and participated in the universal community of humankind. This, however, was a doubled-edged sword. Far from offering the American Indians unqualified protections against violations by Europeans, it presented a set of criteria from which deviation constituted a just cause for war, during which many of these rights were in abeyance. There were disputes as to the circumstances that gave rise to just cause, or about practices that invited what we would now call humanitarian intervention, but few would argue that there were no conditions that could not give rise to the justifiable acquisition of territories and dominion in the Americas on the principle of the natural right of terra nullius or on grounds of violations of natural rights by the Indians against their own peoples or against Europeans.

The appearance of the universalism of natural rights was undermined in practice by what amounted to an imposition of European Christian standards of conduct and rationality. Fundamentally, Francisco Vitoria’s arguments, for example, rest upon universal rights, which take priority over those of specific communities, the contravention of which justifiably legitimates intervention by a foreign state to restore rights and punish the perpetrators of the wrong. Indeed, Vitoria believed in a universal community that was not merely confined to Christians. Each state has a right and a legal obligation to compel rogue states to conform to international law and to the customary law of the *societa gentium*. Vitoria assumed that not only Christians, but also the American Indians, could discover natural law by the exercise of right reason, and that just as the Spanish were obliged to act in a corresponding manner, so too they had the right to expect the Indians to do likewise. The laudable intention to constrain heavily armed Spanish soldiers in their relations with native Indians by reference to the natural law broke down ultimately when the Indians acted in a manner at variance with that law, as Vitoria conceived it.\(^{53}\) The gospels (Mark 16: 15) command Christians to spread the word throughout the world, and if the Indians obstructed them, or punished the converted, the Spaniards “may take up arms and declare war on them, in so far as this provides the safety and opportunity needed to preach the Gospel”.\(^ {54}\)

In addition, despite the variations in the definition of the law of nations and its relation to the law of nature, one aspect of that law, at least, was based upon the usage or custom of “civilised” states, and to which all other nations were subject irrespective of exhibiting signs of consent. As late as 1680, Textor, invoking the example of the American Indians and Africans of the Cape of Good Hope, argued that “if there be a people so wild and inhumane as to live without Law, The Law of Nations, which Reason dictates and Usage affirms, is not on that account any the less the Law of Nations”.\(^ {55}\)

By applying the universal standards of natural law and the law of nations, even though this may have protected the Indians from some adverse consequences on grounds of invincible ignorance, Justifications could be given for waging war against them. If certain of their internal societal arrangements, such as human sacrifice and cannibalism, were an affront to humanity, intervention to save innocent victims could be justified. Even where such affronts were not acknowledged, transgressing the law of nations provided ample excuse. Impediments to the rights of passage, attempts to prevent the appropriation of “vacant land” or acquire gold from the ground that the world held in common, gave just cause for war. Sepúlveda went as far as to argue that if natural slaves, such as the Indians, resisted the natural

---


\(^{54}\) Vitoria, *Political Writings*, Q 3, Article 2, § 9–§ 11, pp. 284–5.

dominion of their superiors, they gave grounds for just war against them with no more injustice than one would hunt down a wild and savage beast.\textsuperscript{56}

The Right to Husbandry and the Duty of Cultivation

There is an aspect of Carole Pateman’s “Settler Contract” that deserves further exploration and on which the continuing grounding of obligation in God has significant bearing: the right to husbandry with the associated issues of property rights. There is no doubt, as we have seen, that such a right has strong support in the law of nations that comprises elements of natural law, the customary practice of states, the opinions of philosophers and jurists, and case law.

To focus upon husbandry as a right, however, is to imply that the natives had a duty to allow settlement (from the point of view of the settlers) and to give up lands that were vacant or not fully used. This correlation is certainly to be found in commentaries on the law of nations and nature. Locke’s influential argument is emphatic: if American Indians attempt to subject Europeans to their system of rules, or deny them the right to husbandry, it is they who have violated natural law and given just cause for war, in which case the injured parties may punish the transgressors and seek reparations. In conditions of war the injured may justifiably “destroy” the violators as “dangerous and noxious Creatures” bent themselves on destruction.\textsuperscript{57}

The emphasis of both Tully and Pateman upon the right of husbandry or of cultivation nevertheless hides from view, or at the very least obscures, the more fundamental moral justification for appropriating native lands. It is the application of a universal principle, against which savages and barbarians are found wanting. It is a principle derived from the natural law, and deeply ingrained in the Christian religion. It is the duty imposed by God upon humanity of self-preservation that requires making the earth productive and bountiful. The more efficiently this is done the better. To optimise productivity of the soil and fulfil man’s duty to God requires the development of techniques of cultivation, and just as importantly the establishment of civil society or sovereignty, to ensure good governance and security in order to protect citizens from harm and to allow them to cultivate the land in safety.

To judge indigenous peoples against the universal obligation to cultivate or exploit the land to its optimum meant that they fell short of their moral duty in a number of respects. Hunters and gatherers were deemed to be merely parasitic

\textsuperscript{56} Lewis Hanke, \textit{Aristotle and the American Indians: A Study in Race Prejudice in the Modern World} (Bloomington, 1959), p. 45.

on the land. Though rudimentary agriculture that exhausted the nutrients in the soil and required abandoning one location for another fulfilled the obligation to a greater degree, it still fell far short of efficient exploitation. Thus cultivation becomes the only recognised form of labour that fulfils the religious obligation. It is the fact that land is not cultivated that makes it no man’s land, not the fact that there are no people on it. In other words, a certain type of labour was deemed synonymous with civilization. This deeply and long held conviction was expressed without any compunction by Thomas Arnold (1795–1842), the headmaster of Rugby School: “so much does the right of property go along with labour that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages – countries which have been hunted over but never subdued or cultivated”. He goes on to suggest that the hunting grounds of the American Indians belonged to no one, and in taking them Englishmen were simply exercising “a right which God has inseparably united with industry and knowledge”.

Locke’s theory of private property in the state of nature does not require the context of civil society. In addition to Grotius’s primitive form of property, in which each has the right to the fruit he or she picks, and of the animals hunted and killed, Locke wants to go further and establish ownership of land. The problem was how to do this without conceding that the American Indians already owned the land. The device he used was to employ a very restricted definition of labour.

Locke’s subtle shift from ownership of things to ownership of land is nothing short of masterly. Hunter-gatherers, deep-sea fishermen, bakers or craftsmen in the state of nature are entitled to what they have killed, gathered or made. Land, however, is a different matter. Not all labour generates a property title. Locke recounts that the curse placed upon Adam required men to labour because of their impoverished and destitute condition. Only sustained labour yields the full potential of the fruits of the earth. Neither mere occupation nor appropriation (that is, taking possession) counts as sustained labour.

Locke ingeniously restricts labour and ownership to that type of activity which is associated with cultivation. He argues that “As much Land as a man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property”. In order to secure a property title, then, it is not enough to roam over uncultivated land, engage in hunting and gathering, or to graze one’s sheep on it. Locke does not stop here. Not only is private property an entitlement of the special type of

59 Locke, Two Treatises, I, pp. 144–5.
labour he calls cultivation; Locke also wants to make the much stronger claim that there is a moral obligation to engage in labour. Mixing one's labour in the land by, for example, enclosures, planting trees and crops falls far short of what Locke intended to convey. He wants to say that we are obliged to develop land to its greatest productive capacity. As industrious and rational creatures, men were given the world by God “for their benefit. And the greatest Conveniences of Life they were capable to draw from it”.61

By implication, the American Indians, and any peoples who fail to cultivate the land to its full productive capacity, failed to exhibit the industriousness and rationality required of them by God and had no good reasons for objecting to those who are more capable of fulfilling God’s will. Locke’s argument provided the philosophical grounds for the contention that the British had just as much right to settle “wasteland” as those who lived on there but merely roamed over it. In landing in Australia, for example, the British simply exercised a right that they held in common with Aboriginals, and of which the Aboriginals singularly had failed to avail themselves.62

For most of the eminent writers on the natural law and law of nations, native peoples, were therefore morally derelict in fulfilling their obligation to God to make the earth bountiful and to establish civil societies so as to ensure efficient exploitation of the soil. Locke, for instance, admonishes hunter gatherers for producing one hundredth or even one thousandth of the products for commodious living that their European counterparts produce. Europeans use one tenth, or even one hundredth, less land than American Indians to produce the same or equivalent products.63

Vattel was not so specific in quantifying the extent to which native peoples fell short of their obligation, but he was equally admonishing: “Every nation then is obliged by the law of nature to cultivate the land that has fallen to its share”, and those which do not “have, therefore, no reason to complain, if other nations, more industrious and too closely confined, come to take possession of part of those lands”.64

Strategies were pragmatic, of course, and the use of the idea of wasteland, terra nullius, was one such strategy to take possession of lands that were not under cultivation. Even Māori, who were deemed to occupy a higher level of civilization than the Australian Aboriginal, and were designated agriculturalists, acknowledged to own the land they cultivated and (unlike the Australian

63 Lucke, Two Treatises, II, §§ 40–42.
Aboriginals) were credited with a capacity to alienate it, nevertheless failed to meet the conditions necessary for the full exercise of the universal rights enjoyed by civilized nations. The Māori, and American Indian farmers, were thought rudimentary agriculturalists who had not developed plough technology. When the soil was exhausted, they moved on to new lands. The fact that they were not hunters was used by many to the opposite effect from what one would expect, namely in order to argue that such peoples did not need as much land as hunter gatherers over which to roam in search of game, and that their proprietary rights should be restricted to that land which they actually cultivated and not extended to that which they claimed.65

Political Society and Sovereignty

Whether or not indigenous peoples were acknowledged to have private property rights was to some extent secondary to the issue of whether they had the collective right of sovereignty. Even though Indians entered into so called treaties, such arrangements never had the full imprimatur of international law.

It was argued by Locke that the obligations to God of self-preservation and of cultivating the earth, in order to make it more productive and conducive to self-preservation, are better discharged within a political society. The implication of Locke’s arguments is that the American Indians fell far short of adequately discharging their obligations to God. They still lived outside political society in a state of nature and they failed to add to the common stock of mankind by improving the productivity of the land. In so doing, they had no claim on vast territories in the Americas that “lie waste”.66 Locke’s was not the only view. Grotius makes the distinction between property and jurisdiction. Jurisdiction remains with the “ancient nation” even when strangers justifiably lay claim to wasteland. Pufendorf’s position was that nations exercise eminent domain, or sovereignty, even over those tracts of land that appear to “lie waste”, and the seizure of such lands is therefore contrary to the laws of nature and nations, a position ostensibly endorsed by Christian Wolff.67 Wolff contended that the original position of

65 Mark Hickford, “Decidedly the Most Interesting Savages on the Globre: An Approach to the Intellectual History of Māori property Rights, 1837–53”, History of Political Thought, xxvii (2006): 123. Further evidence that the central idea to focus upon is the failure to exploit the potential productive capacity of the land is the fact that this argument was used to justify European trusteeship in Africa in the latter part of the nineteenth century. See William Bain, Between Anarchy and Society: Trusteeship and the Obligations of Power (Oxford, 2003), p. 62.
66 John Locke, Two Treatise, II, § 38, p. 295.
land in common was modified by families or communities jointly coming to hold territory as a proprietary right. The use of the land made no difference to ownership. Land belonging to such families or communities cannot be taken or occupied by others coming into the territory.68 Those who occupy the sovereignty of a territory also exercise eminent domain over property and persons.69 This would seem to imply that Native Americans owned and had sovereignty over the lands they occupy. For Locke, they still lived in a state of nature. Just as earlier theorists tried to disqualify American Indians on grounds of their lacking full human attributes, or because of their sinfulness, or because they engaged in the wrong sort of labour, Wolff applies stringent criteria for what constitutes a nation. He argues that “it denotes a number of men who have united into a civil society, so that therefore no nation can be conceived of without a civil sovereignty. For groups of men dwelling together in certain limits but without civil sovereignty are not nations”.70 For Adam Smith, nations of hunter-gatherers, whose society could not sustain or maintain an army for self-defence, could properly be considered neither a commonwealth nor sovereign.71

In practice even when it was acknowledged that native peoples exercised ownership rights, the colonising country laid claim to the rights of eminent domain and denied sovereignty to native peoples on the grounds of conquest or secession. Even where the natural right of individuals to property was acknowledged, community rights under the law of nations were denied because the indigenous peoples were not deemed fully sovereign nations. Indeed, although treaties paid lip service to Indian sovereignty, there was no suggestion of equality. During the eighteenth century in the Americas it became common practice among British officials to acknowledge the land rights of the Indians while emphasizing that sovereignty had been ceded.72 Joseph Story articulates the principle well when he commented on the Indians that “As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations”.73 Christian Wolff, for example, confirms that uninhabited lands may be colonised and appropriated because they are the property of no one. The nation appropriating the vacant land acquires property rights in it and

---

68 Also see Borch, “Rethinking the Origins of *Terra Nullius*”, p. 234.

72 See Borch, “Rethinking the Origins of *Terra Nullius*”, p. 229.
73 Joseph Story, *Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States Before the Adoption of the Constitution* (Boston, 1833), Book 1, chap. XVI, § 152.)
sovereignty over it. He acknowledges ownership and sovereignty by nations over the lands they occupy, even if those lands are waste and barren. Nevertheless, since every nation should perfect its condition, such vacant land should be given to foreigners.  

Conclusion

Most of the great early modern and enlightenment philosophers, who are hailed as champions of reason and liberalism, were complicit in the use of universal standards to dispossess peoples of their lands, oppress them, deny them sovereignty and condemn them to permanent exclusion from the international society of nations. It was an exaggeration to contend that the American Indians did not engage in agriculture. Colonists frequently reported agricultural activity throughout eastern North America, and it was well known that parts of what is now North Carolina had extensive cultivated fields. It was the growing acknowledgement that Indians farmed the land that contributed to the recognition of their right to property. Whether indigenous peoples were deemed to own the land over which they “roamed”, or whether they merely had a use right in common, they were not deemed to have entered into a social contract among themselves and were therefore not deemed to have instituted sovereign political societies. These arguments were almost invariably sustained by invoking the authority of God who obliges us to conform to the natural law, which includes cultivating the land to its productive capacity.

75 Banner, How the Indians Lost Their Land, p. 38.