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"By What Right?": The Contributions of the Peninsular School for Peace to the Basis of the International Law of Indigenous Peoples

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Abstract[1]

This paper aims to investigate the Peninsular School for Peace's contributions in the sixteenth and seventeenth centuries to the establishment of international law for indigenous peoples within a proper collective dimension. The recognition of collective rights of indigenous peoples is part of a phenomenon which occurred in the transition to the twenty-first century and is known as the collectivization of the international law of human rights. The first section of this article will discuss the inadequacy of modern human rights sources to recognize indigenous peoples as subjects of collective rights. This inadequacy stems from the lack of legal mechanisms that are able to reach the collective dimension of claimed international human rights in the context of contemporary indigenous movements. Thus, the second section will defend a pre-Westphalian conception of international law and support the return to its historic origins – in the *Jus Gentium* condition in an earlier view of the consolidation of the Modern Nation-State – in order to understand how the theorists from the Peninsular School for Peace faced questions of conscience generated by the collision between the Luso-Spanish kingdoms and indigenous sovereignty in the New World. For this purpose, the works of theologians Francisco de Vitória (1492-1546), Luis de Molina (1531-1600), and Francisco Suárez (1548-1617) provide insight. In this context, this paper endeavors to redeem the democratic peninsular doctrine towards a new reasoning for the international law of indigenous peoples.

A. Introduction

This article investigates the Peninsular School for Peace's possible contributions in the sixteenth and seventeenth centuries[2] to the current

[1] The author would like to express sincere thanks to Professor Dr. Pedro Calafate, for the knowledge imparted during the Post-Graduation Seminar, taught during the semester 2012/2013 in the Philosophy Course/Department of Letters, University of Lisbon. The author would also wish to thank the team of the Reading Blind Area of the National Library of Portugal, especially Carlos, Maria, and Paulo for their indispensable support. Certainly, this work would not have been possible without the support of these institutions and people. Finally, the author is also grateful to Joelson Rodrigues Cavalcante (Master in Enviromental Law at University of the State of Amazonas) who carefully translated this text from the original in Portuguese to English.

[2] The historical background and philosophical concern of the Peninsular School for Peace will be discussed in subheading C. I. 2.

international law of indigenous peoples.[3] This section lays the necessary theoretical ground for the consolidation of this new and original field of international human rights law within the jus-philosophical debate at that time, especially with regard to the justification of the conquest of the New World.

The preliminary section of this article argues for the return to the origins of this debate because, as later explained, the legal and philosophical bases developed from the movement of the internationalization of human rights protection were insufficient to reach the collective dimension of the rights claimed within the context of contemporary indigenous movements.

Thus, a pre-Westphalian conception of international law will be defended, and the return to its historic origins supported – in the *Jus Gentium* condition, in an earlier view of the consolidation of the Modern Nation-State – in order to understand how the theorists from the Peninsular School for Peace faced questions of conscience generated by the collision between the Luso-Spanish kingdoms and indigenous sovereignty in the New World.

The main theoretical frameworks consist of the writings of theologians Francisco de Vitória (1492-1546), Luis de Molina (1531-1600), and Francisco Suárez (1548-1617), the main proponents of the peninsular thought through successive historical periods at great institutions of that time: Salamanca, Évora, and Coimbra, respectively.

The second section of this article will examine three fundamental themes: namely the origin of temporal power and its relation with spiritual power, the criticism applied to the doctrine of just war in the conquest of America, and finally the defense of the right of American indigenous peoples to property as a corollary of their natural freedom.

After the analysis of the arguments propounded by Vitória, Molina, and Suárez, the article concludes that these theorists responded to the Indian issues raised in the intense debates of that time, positioning themselves firmly against those who favored conquering the American indigenous peoples via the doctrine of just war and its legal consequences: the servitude of the indigenous peoples and the dispossession of their property.

Finally, the article argues that the theoretical basis developed by the Peninsular School for Peace bears a close relationship with the Latin American

[3] For the purpose of this article, the international law of indigenous peoples is denominated as a set of principles and rules of law arising in the international law framework, particularly from the late twentieth century, that assign to indigenous peoples the ownership and enjoyment of individual and collective human rights as well as the ability to act in the framework of international law for reparations in cases of violations of these rights.

indigenous peoples' fight for the recognition of their collective rights to self-determination, equality, and non-discrimination as well as the ownership of their ancestral lands.

B. The Inadequacy of the Modern Human Rights Basis to Recognize Indigenous Peoples as Subjects of Collective Rights

I. The Internationalization of the Human Rights Movement

The end of the Second World War is always seen as the landmark in the movement of internationalized human rights protection.[4] The annihilation of human beings by regimes that were totalitarian, despite being constitutional, raised society's awareness of the fact that human rights issues could no longer be treated as matters of exclusive national competence.[5] However, in order for that movement to be consolidated, old obstacles imposed by classical international law had to be overcome.

According to the Brazilian jurist and current judge of the International Court of Justice Cançado Trindade, the obstacles that had to be overcome were rooted in the Westphalian conception of international law, namely: a) the revision of the understanding of absolute sovereignty of States; b) the refusal to accept the existence of matters of exclusive national competence or reserved domains of States; c) the decline of reciprocity in human rights issues; d) the progressive transfer of jurisdiction to international supervisory bodies; and e) the redemption of the human being as subject of international law endowed with international procedural capacity.[6]

These extraordinary advances made during the second half of the twentieth century are undeniable, but only when considered from the standpoint of the international protection of individual rights. This is due to the fact that the foundations of the then-nascent branch of the international law of human rights

4 F. K. Comparato, *A Afirmação dos Direitos Humanos* (2003); C. Lafer, *A Reconstrução dos Direitos Humanos*: *Um Diálogo com o Pensamento de Hannah Arendt* (1988); F. Piovesan, *Direitos Humanos e Justiça Internacional: Um Estudo Comparativo dos Sistemas Regionais Europeu, Interamericano e Africano* (2006); H. J. Steiner *et al.*, *International Human Rights in Context*: *Law, Politics, Morals* (2008).

5 H. Arendt, *The Origins of Totalitarianism* (1951).

6 A. A. Cançado Trindade, *A Proteção Internacional dos Direitos Humanos: Fundamentos Jurídicos e Instrumentos Básicos* (1990), 3-12.

stem from the liberal-philosophical traditions of the eighteenth[7] century that were later incorporated in national constitutions. Therefore, human rights were defined ontologically as those rights inherent to the human person, endowed with reason and dignity.

Following World War II, the process of elaborating and generalizing the instruments for the international protection of human rights began, starting with the *Universal Declaration of Human Rights* in December 1948, preceded by only a few months by the *American Declaration of the Rights and Duties of Man*. Cançado Trindade[8] named this process the *legislative stage* in the development of the international law of human rights. This stage intensified the drafting of texts of multilateral treaties regarding human rights at the global and regional level, and it extended the scope of their general protection and the number of specialized topics related to them.

Gradually, in the course of the legislative phase, the position of the human being, then a mere object of international law, changed, and it became to be regarded as legitimate subject and recipient of international standards.[9] This cleared a path for the next step, referred to by Cançado Trindade[10] as the *implementation* phase of those instruments.

The evolutionary steps from these two phases of development and implementation of international treaties on human rights resulted in the consolidation of the international system of protection[11] under the United Nations – UN (1948), the Council of Europe – CoE (1950), the Organization of American States – OAS (1948), and, later, the Organization of African Unity – OAU (1981) (now: African Union – AU).

However, in 1966, in the context of the Cold War, the decision by the UN to prepare two International Covenants to protect distinct "categories" of rights resulted in the categorization of human rights into civil and political rights, on the one hand, and economic, social, and cultural rights, on the other.[12]

7 C. Taylor, *Sources of the Self*: *The Making of the Modern Identity* (1992), 25-29.

8 Cançado Trindade, *supra* note 6, 521-522.

9 *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion of 24 September 1982, IACtHR Series A, No. 2, 8, para. 29.

10 Cançado Trindade, *supra* note 6, 521-522.

11 These systems can be understood as a set of norms and organizations with an international mandate for supervising compliance with the human rights obligations assumed by their member States.

12 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

The civil and political rights were established to be "susceptible of 'immediate' application, requiring *abstention* obligations by the State".[13] The adherence to these obligations is monitored by the Human Rights Committee, which may receive and consider individual complaints by victims of violations of these rights and which has quasi-judicial powers.[14] The economic, social, and cultural rights, in turn, "were likely to apply only *progressively*, requiring positive obligations (acting) of the State".[15] Therefore, for a long time, compliance with these obligations was monitored only through a reporting mechanism, under which all States are required to report on the national implementation of these rights for the common benefit.[16]

Even though this dichotomy had been reviewed at the Conference on Human Rights in Tehran (in 1968) and Vienna (in 1993), as well as in *Resolution 32/130* of the UN General Assembly (in 1977) and successive resolutions of the Assembly itself,[17] the mere political choice that led to the categorization has not yet been overcome by international law. For decades, international organizations have also failed in their effort to have collective human rights recognized – despite concrete demands for the recognition of such rights.

II. The Phenomenon of Collectivization of Human Rights Protection and the International Law of Indigenous Peoples

In the course of the twentieth century, several historic developments – in particular the decolonization of Africa in the 1960s and the indigenous movement of the 1990s triggered by the end of the Cold War – have resulted in collective demands for human rights. This phenomenon, which is called the *collectivization of the international law of human rights*, has increased the tension between the individual and the collective in the current conception of ownership of these rights.

Indeed, from the 1960's onward, new rights became part of resolutions, declarations, and international treaties, such as the rights to self-determination, development, peace and global security, environmental stewardship, genetic

13 Cançado Trindade, *supra* note 6, 39 (translation by the author; highlighted in the original).

14 *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302.

15 Cançado Trindade, *supra* note 6, 39 (translation by the author; highlighted in the original).

16 *Ibid.* See also *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, UN Doc A/RES/63/117 annex, 1. It entered into force on 5 May 2013.

17 Cançado Trindade, *supra* note 6, 40.

heritage, ethnic and cultural diversity, access to information, and democracy. Such rights have been categorized and become widely designated as global rights by scholars. What is special about these rights is that they are not placed side by side with civil, political, economic, social, and cultural rights, but their collective or diffuse ownership has been recognized. In other words, they belong to a determined social group, a nation or humanity as a whole.[18]

This phenomenon is even more evident when one examines the political actions of organized groups who started presenting demands for the recognition and protection of collective rights, both in the domestic law of the States[19] and in terms of international law, as occurs, for example, in indigenous movements, fighting for communal ownership of their ancestral lands and, as a consequence, the preservation of their way of life.[20]

At the international level, some issues relevant to indigenous peoples, for example their own physical survival, cultural integrity, and maintenance of the bonds to their traditional territories, were being put before global and regional treaty monitoring bodies, even though the rights laid down in the treaties were originally designed to protect the rights of individuals.[21] Despite the success with this strategy, the lack of an appropriate international instrument to guarantee the rights of indigenous peoples was finally provided in 1989, with the adoption of the *Convention No. 169* of the International Labour Organization, and later, in 2007, with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

18 C. Weis, *Direitos Humanos Contemporâneos* (2010).

19 During the 1970s, a discussion arose on a new philosophical theory of justice and democracy in the context of liberal States. This debate emerged in 1971, with the publication of the *A Theory of Justice* by John Rawls and, later, with the work of Dworkin. In contrast, many scholars positioned themselves as communitarians (Charles Taylor and Michael Walzer) or multiculturalists (Will Kymlycka). However, these theories are not explored in this study, since they do not have a proper internationalist approach.

20 For a detailed overview of this emancipatory process both within the United Nations and regional system, see R. L. Barsh, 'Indigenous Peoples in the 1990's: From Object to Subject of International Law?', 7 *Harvard Human Rights Journal* (1994), 33. Concerning the emancipatory movement of Latin American indigenous peoples from the 1960s to the first cases addressed by the Inter-American Human Rights System, see S. J. Anaya & R. A. Williams, 'The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System', 14 *Harvard Human Rights Journal* (2001), 33.

21 For some significant examples of successful actions, see the text of the introductory note to the *United Nations Declarations on the Rights of Indigenous Peoples* by S. Wiessner, 'The Rights and Status of Indigenous Peoples' (2008), available at http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf (last visited 15 June 2013).

These two legal instruments, however, suffer from serious enforcement problems. On the one hand, despite the meticulous negotiations on issues such as the principle of self-determination for indigenous peoples and the right of consultation regarding the exploitation of natural resources on their ancestral territories, the *ILO Convention No. 169* was ratified by only 22[22] of the 185 members of the Organization.[23] On the other hand, the instrument of the United Nations was adopted in form of a Declaration, which raises discussions as to its non-binding effect regarding the obligations assumed by States that have approved its articles.

Moreover, the rules that safeguard rights with a clear collective dimension are still faced with serious procedural obstacles to fully realize, for example, the demand for acknowledgement of indigenous ancestral lands, since such claims are submitted before implementation mechanisms strongly influenced by the liberal tradition, such as the system of petition, with a markedly individualistic bias.

Thus, the challenge of this research is to propose a new theoretical foundation that overcomes the liberal-individualist approach of the international protection of human rights, without losing sight of the great advances in the field of international human rights law made after the end of World War II as mentioned above by Judge Cançado Trindade.[24]

C. The Democratic Peninsular Doctrine: Towards a New Reasoning for the International Law of Indigenous Peoples

I. Preliminary Explanations

Before delving into the analysis of this section's theme, three preliminary clarifications are necessary, so that the less familiar reader does not read this text on the basis of modern concepts derived from modern political philosophy. These modern concepts were formulated over five hundred years after the

22 ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (2012), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0: :NO::P12100_INSTRUMENT_ID:312314 (last visited 15 June 2013).

23 ILO, 'Alphabetical List of ILO Member Countries (185 countries)' (2012), available at http://www.ilo.org/public/english/standards/relm/country.htm (last visited 15 June 2013).

24 Cançado Trindade, *supra* note 6, 3-17.

historic moment that serves as the basis for the reflections developed by the Peninsular School for Peace.

These warnings emphasize that the peninsular kingdoms' colonial project was not carried out with the cruel simplicity of wars of conquest. Rather, in the sixteenth and seventeenth centuries, the use of the doctrine of just war against the American indigenous peoples was triggered by a profound debate about the legitimacy of establishing domain over the New World. In these controversies, theologians were considered the highest authorities, not only because they were held to be universally wise, but also because they analyzed the treatment of indigenous peoples in light of divine and the natural law.

In order to provide a comprehensive background for these issues, three main subjects will be developed in this section: First, the article will explore the origins and the aggravation of the Indian issue caused by wars of conquest waged against the native peoples of America. Secondly, the article will discuss the role played by the Peninsular School for Peace as the central focus of almost all discussions derived from the Indian issue in Europe and overseas. And finally, the article will examine the importance of the theological view of the peninsular writings for the analyses of the Indian controversy from the divine and natural laws perspectives.

1. The Debate About the Indian Issue as a Matter of State in the Sixteenth Century

Since the early years, after the arrival of Columbus at Hispaniola, the Dominican missionaries had questioned *by what right* the wars of conquests in the New World were waged. They also denounced the exploitation and the mistreatment of the indigenous peoples under the system of *encomiendas*.

Suddenly, these issues became the subject of heated disputes on jus-theological thought at the major universities of that time – Salamanca, Évora, and Coimbra. In this early period of colonization, jurists and theologians had the opportunity to develop solid doctrinal arguments to defend the basic rights of the Amerindian indigenous peoples.

At the end of the fifteenth century, the Luso-Spanish kingdoms that occupied the Iberian Peninsula kept the same medieval mentality of the *orbis christianus*, which revolved around the power struggles between the Popes and the Emperors. The issue of infidelity of Pagans, Jews, and heretics challenged the universalism of *orbis christianus*, as well as disputes over the legitimacy of the use of *just war* as a way of fighting paganism were at the centre of debates.

It is interesting to note that the different infidels, whose only similarity was that they were non-Christians and therefore outsiders of the *orbis christianus*, were treated completely differently under the legal system. The heretics were persecuted by the Inquisition because of their break of the previous legal-ecclesiastic bond – received with baptism – and their failure to comply with the duties to the church. The Jews lived under an extremely segregationist legislation, although they enjoyed some protection against physical attacks. The Pagans (moors or gentiles) lived in a permanent state of conflict with the Christian world, and the just wars were allowed against them.[25]

The German cardinal and theologian Joseph Höffner reports that the concept of *war* qualified as *just* was applied to the gentile peoples in its full rigor. From this perspective, the prisoners of war's servitude was legitimate and, in this condition, these servants lost their rights over their property. The doctrine of *just war* was based on the scholastic tradition developed by the bishop of Hipo Saint Augustine, who influenced the Decree of Graciano, which, in turn, was transmitted to Saint Thomas Aquinas (*Suma Theologica*, *Question XL, Secunda Secundae*). Thus, quoting Saint Thomas Aquinas, the author articulates the three requirements for the use of just war, which were repeated by the thinkers of the Peninsular School for Peace within the scholastic disputes about the injustice of wars of conquest against American Indians:

> "For a war to be fair, three requirements should be fulfilled. 'First, the authority of the prince must have a mandate to pursue war.' Private wars are not licit. Only the prince has a legitimate right to use the sword against the enemies both internal and external. 'Second, there must be a just cause. For those against whom the war is directed, they should have deserved such aggression by any their own fault […]. Third, war is supposed to be waged with the right intention; that is, for the purpose of promoting the good and combating evil.' Because of this, Saint Augustine says: 'It is it quite rightly mislabeling to regard a war as just when there is a [...] and revenge [...]. Whoever wars with similar intentions incurs a serious guilt, even though the government has initiated the war for a just cause."[26]

[25] J. Höffner, *La Etica Colonial Española del Siglo de Oro: Cristianismo y Dignidad Humana* (1957), 3-95.

[26] *Ibid.*, 75-76 (translation by the author).

Based on this medieval tradition, convinced of Christian civilization's superiority and aware of its evangelizing mission under the Bulls of Pope Alexander VI,[27] the nascent Spanish kingdom undertook overseas discoveries. However, the violent reality of colonial politics on the Hispaniola Island quickly called into question the political and legal bases upon which the Spaniards affirmed the legitimacy of the conquest expeditions and the system of *encomiendas* – servitude system under which indigenous peoples were exploited and mistreated in pursuit of wealth. Soon the crisis triggered by this colonial system arrived on the Hispaniola Island.

The Amercian historian Lewis Hanke records that the first major and revolutionary public protest against the treatment that the Spanish colonists imposed upon native Americans took place in a humble church on the Hispaniola Island, on Sunday, 21 December 1511. In his sermon, the Dominican friar Antonio de Montesinos sowed the seeds of doubt about the direction the Spanish colonial process was taking;

> "[...] [t]ell me, by what right or justice do you keep these Indians in such a cruel and horrible servitude? On what authority have you waged a detestable war against these people, who dwelt quietly and peacefully on their own land? […] Why do you keep them so oppressed and weary, not giving them enough to eat or taking care of them in their illness? For with the excessive work you demand of them, they fall ill and die, or rather you kill them with your desire to extract and acquire gold every day. And what care do you take that they should be instructed in religion? […] Are these not men? Have they not rational souls? Are you not bound to love them as

[27] Professor Carlos E. Castañeda, from Texas University, remarks that the force of the bulls of Alexander VI "derived from a medieval concept, one that had been well established long before the King and Queen of Spain requested confirmation of their title, already unquestionably established by the recognized pre-emption of first discovery". The author catalogues many examples, since 1016, of papal bulls that granted to Christian rulers, lands on condition that they instruct the natives in the Christian faith and convert them to Christianity. Until the arrival of Columbus in America and the issue of the Inter Caetera bull in 1493, "no outcry was raised in those days against the authority and the power of the Pope to make such grants". According to the Bull of 1493, an imaginary line was divided across the oceans of the world between Spain and Portugal. This was not accepted by the other Christians crowns, for instance, the French and Dutch kingdoms. (C. E. Castañeda, 'Spanish Medieval Institutions in Overseas Administration: The Prevalence of Medieval Concepts', 11 *The Americas* (1954) 2, 115, 117).

> you love yourselves? […] Be certain that, in such a state as this, you can no more be saved than the Moors or Turks."[28]

The Spanish settlers' reaction to the preaching of Montesinos followed immediately. When Montesinos warned the settlers in his preaching the following Sunday that no friar would receive them in confession and absolve their sins if they continued with their errors, they appealed to King Fernando and to the Superior of the Dominican Order, Friar Alonso de Loaysa, asking them to make Montesinos stop preaching.[29] Montesinos appealed to the King of Spain at the same time the settlers sent their attorney, the Franciscan friar Alonso de Espinar,[30] to court.

As a consequence of the reactions triggered by the Montesinos' speeches, King Fernando summoned the *Juntas* of Burgos and Valladolid (1512-1513). Among the results of the works of the Juntas, the *Requerimiento* by the Spanish jurist Juan Lópes de Palacios Rubios of 1513 is of special interest for this study.

The *Requerimiento* was influenced by the presentation made by Martin Fernández de Enciso at the meeting held in the Dominican convent of San Pablo, at Valladolid, in late July 1513. Enciso was a celebrated lawyer, cosmographer, and member of the expeditions of Pedrarias, which had been delayed by order of the King until the Spanish occupation of America could be justified. In his memorial, Enciso founded his argument in favor of the continuation of the expeditions of conquest, in the Bulls of Pope Alexander VI and in the Old Testament.

In his memorial, Enciso held that, just as God had given the Jews the Promised Land, God also gave the Spaniards the New World through the Pope. For this reason, much as Joshua regained Canaan by force, the Spaniards had legitimate grounds to declare a just war against the indigenous peoples who refused the opportunity to convert peacefully. As a last reason, the fight against idolatry of indigenous Americans was a sufficient argument for war, to take possession of their goods and reduce them to servitude, as Joshua did in the Promised Land.[31]

28 L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (1959), 16-17 [Hanke, The Spanish Struggle for Justice].

29 *Ibid.*, 18.

30 L. Pereña, *La Idea de Justicia en la Conquista de América* (1992), 32 [Pereña, La Idea de Justicia].

31 Hanke, *The Spanish Struggle for Justice*, *supra* note 28, 30-32.

According to the lessons of the Spanish theologian Isacio Fernández, who is one of the most important specialists in the work of Fray Las Casas, the *Requerimiento* can be defined as a general normative legal document, which set a practice which was used in the occupation of the Canary Islands and, later by Columbus when he took possession of the New World in the name of Queen Isabella.[32] It is based on a theocratic worldview and, as its name suggests, it contains the formal requirement that the native Indians convert to the Catholic faith and submit themselves as vassals to the kings of Spain, otherwise, as punishment, a just war would be waged against them. Professor Isacio Fernández asserts that

> "[t]he 'Requerimiento', therefore, was not being required by the Dominicans, but by those supporting conquests. It was an ingenious solution by which they tried to make the conquests look like honest and legitimate military actions; but the condition was utopic, i.e. an official text apt to be read at the study table, but not to be read with regard to occasions and places that the same document was being applied to. In fact, in practice, from the first moment, it turned into a farce [...]."[33]

By reference to the theocratic medieval doctrine of Pope Gregory VII and Pope Innocent III, which was updated by Palácios Rubios[34] and became the final doctrine for America,[35] Luciano Pereña, Professor at the Pontifical University of Salamanca, teaches that, under the single title of power and universal jurisdiction of the Pope, the Catholic kings, in all fairness, could enslave the Indians and require them to deliver goods and services to compensate for the expenses incurred in the conquest and government of those lands.

According to Professor Luciano Pereña, the Hispaniola Island conflict became a matter of State. In the early sixteenth century, it led to the emergence of two opposing views, two antagonistic trends, regarding the legitimacy of the *encomiendas* and the treatment of the Indians. Indeed, this conflict called the legitimacy of the Spanish conquest of America in itself in question.[36]

32 I. P. Fernández, *El Derecho Hispano-Indiano*: *Dinâmica Social de su Proceso Histórico Constituyente* (2001), 130.
33 *Ibid.*, 131 (translation by the author).
34 Pereña, *La Idea de Justicia*, *supra* note 30, 37-38.
35 *Ibid.*, 37-38.
36 *Ibid.*, 32.

2. The Peninsular School for Peace's and the University's Answers to the Indian Question

After the conquests of Mexico and Peru between 1519 and 1533, based on the text of *Requerimiento*, the crisis of national consciousness about the justice of the wars waged against the native peoples in America deepened further. Charles V officially raised this question when he summoned another *Junta* at Valladolid, in 1550, to hear both sides of the controversy.

The debate was centered on two outstanding figures of that time: Bartolomé de las Casas and Juan Ginés de Sepúlveda. The first was a Dominican Friar and the Bishop of Chiapas, who defended the assertion that the Amerindians were free and equal to Spaniards and therefore their property rights should be respected. The other, a Franciscan humanist, argued on the basis of the Aristotelian tradition that the American Indians should be considered as natural slaves of the Spaniards and that their alleged crimes against nature (such as cannibalism) should be punished.[37]

It is important to note that this famous disputation reveals more than a personal antagonism between Las Casas and Sepúlveda. Rather, it shows the theoretical backdrop of two intellectual positions on the same practical problem: How should the colonial politics in the New Word be oriented? The birthplace of these reflections was undoubtedly Salamanca and its most distinguished thinker was Francisco de Vitória.

According to Professor Luciano Pereña, it is a historical fact that Vitória's *Relecciones* (1526-1546) exceptionally influenced the ethics of the conquest. In the author's view, the Victorian hypotheses, based on the natural law, is the fundamental source of the Salamanca School. Professor Pereña also explains that the Salamanca School was a doctrinal centre and its three generations of Vitória's disciples can be characterized by their dynamic thinking, consciousness of unity, and expansionary strength. In short, they were academics working from the same sources and their own reflections were added to the collective effort of the School.[38]

[37] For a detailed study of this debate see L. Hanke, *All Mankind is One*: *A Study of the Disputation Between Bartolomé de las Casas and Juan Ginés de Sepúlveda in 1550 on the Intelllectual and Religious Capacity of the American Indians* (1974) and L. Hanke, *Aristotle and the American Indians*: *A Study in Race Prejudice* (1970).

[38] L. Pereña, 'La Escuela de Salamanca', in L. Pereña (ed.), *La Etica em la Conquista de América*: *Francisco de Vitória y la Escuela de Salamanca*, Vol. XXV (1984), 291, 305-308.

The first generation is *inter alia* composed of Domingo de Soto, Melchor Cano, Diego de Covarrubias, and Martín de Azpilcueta; that is, the inner circle of Vitória's disciples who learned his ideas directly at Salamanca. The second and the third generation represent the movement of expansion in Salamanca thoughts to other universities in Spain, Portugal, and America. Particularly in Portugal, Professor Luciano Pereña asserts that, through the university's official channels, the Victorian answer to the Indian question became prominent at Évora and Coimbra and was established as an "ideological trade" between Evora, Coimbra, and Salamanca, as existed in Spain among Salamanca, Valladolid, and Alcalá:

> "The handwritten teachings by scholars from Salamanca were received almost instantly at the Portuguese universities, and in turn manuscripts from Evora and Coimbra arrived quickly to Spanish universities. Today one of the richest collections of scholars from Salamanca can be found in the Coimbra University Library, and among Spanish funds, at the *Colegios Mayores* of Salamanca, one discovers the most important lectures from Coimbra. This constant communication of ideas contributed to the progress of the school and further strengthened its doctrinal unity."[39]

Considering this vivid exchange, the Portuguese scholar Professor Pedro Calafate proposed to combine these academic efforts at the Peninsular School for Peace.[40] Professor Calafate suggests that the major theoretical pursuit of peninsular thought is the search for peace through the rule of law. To reach this end, the peninsular scholars defended the subordination of politics to ethics and the prevalence of humanist values.[41]

Although the birthplace of the Peninsular School for Peace is Salamanca, and its central figure is Francisco de Vitória, the ideas born in the San Esteban Monastery crossed the Spanish border and spread overseas. Another important historical fact to be remembered in this context is the Iberian Union, between 1580 and 1640, when Portugal and Spain formed a single political unit under

39 *Ibid.*, 308.

40 This term was coined by Professor Dr. Pedro Calafate Villa Simões, in the scope of the research project *Corpus Lusitanorum de Pace*: *The Portuguese Contribution to the Peninsular School for Peace (XVI and XVII Centuries)*, currently under development at the University of Lisbon (Philosophy Center/Department of Letters).

41 P. Calafate, *Da Origem Popular do Poder ao Direito de Resistência*: *Doutrinas Políticas no Século XVII em Portugal* (2012).

the crown of Philip II. It is also of note that, in the fifteenth and sixteenth centuries, the inhabitants of the Iberian Peninsula used to designate themselves as Hispanics.[42]

The two outstanding figures of the Portuguese branch of the peninsular doctrine are Luís de Molina, who taught at the University of Évora (1574-1583), and the Jesuit Francisco Suárez and disciple of Salamanca, who taught at the University of Coimbra (1594-1616).[43] The Peninsular School for Peace in Portugal did more than just repeat Salamanca's lectures. The Portuguese authors confronted the distinct realities in the Lusitanian Empire and tested the Victorian hypotheses there. They summarized their own conclusions and thus contributed to the collective work of the School.[44]

Hence, it follows that the Peninsular School for Peace reunited a doctrinal current formed by Hispanic theologians and jurists who, in scholastic fashion, debated and deepened essential themes of their times in search of universal truths. The sources studied by the peninsular authors were those of common knowledge to Western Christian culture, such as Greek philosophy (mainly the texts of Cicero and Aristotle), the Roman law and their medieval glosses, the works of Church scholars (mainly Saint Augustine and Saint Thomas Aquinas), ecclesiastical documents, and the Bible itself.

Among the main topics of concern to the jus-theologians of this school are: a) the disputes between theocrats and monarchists; b) the popular source of power and the right of resistance against tyranny; c) the achievement of universal empire; d) the law of war and the maintenance of peace; e) the discussion of title domain in the American lands and the role of ethics in the process of colonization. On this last issue rests, more specifically, 'the Indian question', which is discussed in the context of political philosophy traced by the previous themes.

42 See F. C. Weffort, *Espada, Cobiça e Fé* (2012), 19-20.

43 It is important to mention the writings of Martín de Ledesma, Pedro Simões, Fernando Pérez, and Fernando Rebello. These works are still unpublished but they are being translated from Latin to Portuguese in the research project *Corpus Lusitanorum de Pace*: *The Portuguese Contribution to the Peninsular School for Peace (XVI and XVII Centuries)* (*supra* note 40). Other important figures that deserve to be mentioned are the Jesuits Manoel da Nóbrega and Antonio Vieira who carried out the Brazilian colonial project based on this peninsular thought.

44 For example, the Brazilian indigenous peoples were very different from the Mexican and Peruvian ones. Despite the temporary political union, Portugal and Spain had different colonial projects. Therefore, the Portuguese Jesuits found other strategies quite different from those of the Spanish Dominicans.

3. The Theological Character of the Texts of the Peninsular School for Peace

This third section, which is directly related to the earlier explanations, refers to the accusation that the texts resulting from these studies are 'theological'. In defense, the author of this article will adress this misunderstanding based on the work of the Spanish philosopher Jesús Cordero Pando, who examines this in relation to the Victorian doctrine. According to this author, it is an adjective often used to disqualify, in a way, the texts of that time from the perspective of political philosophy. However, this decontextualized attitude creates anachronisms, prejudicing the comprehension of these texts' basis, scope, and meaning.[45]

Also, according to Jesús Cordero Pando, in the historical and intellectual moment in which Francisco de Vitória lived (like other peninsular authors), it was the duty of the theologian to know all matters related to human behavior, both individually and collective: the Dean of Theology was the most important and best paid in the university and the Professor of Theology was considered as 'universal wise'. Therefore, in that context, a distinction between different functions like philosopher and theologian was totally out of place.[46]

Cordeiro Pando warned that, beside the all-encompassing nature of theology, which enabled the theologian to pronounce on any human subject, the vision was no longer one of the medieval theocentrism. Therefore,

> "[in the] new theological conception, and since the focus that gives Vitória, [...] the universal referent is the man. It is a more *anthropocentric* approach, the humanism renaissance of Christianity itself. Undoubtedly, it is seen that the man is a creature of God and open to Him, with a destiny that transcends the present history; but, under this condition, it is interesting that it studies itself and, with all the realism, in the problems that are concerned with humanity."[47]

45 F. de Vitória, S*obre El Poder Civil*: *Estudo Preliminar, Tradução e Notas de Jesús Cordero Pando* (2009), 21 [de Vitória, Sobre El Poder Civil].

46 *Ibid.*, 21-22.

47 *Ibid.*, 22-23 (translation by the author; highlighted in the original).

Cordero Pando continued, adding that:

> "Within this mentality, this 'professional' theological consciousness, it is clear that he is forced to know this human reality, to address their problems, incorporating their treatment, integrating the totality of knowledge that regarding to them: theology and the Law. But it is especially the theologian's use of more rigorous reasoning, reflecting until having exhausted its own capacity to argue a point. Thus, it is designed as a rigorous philosophical discourse. The direct recipients of their lessons are Christians believers, who profess the truth of the doctrine transmitted by the Bible and recognize the authority of the Christian tradition, inevitably supporting this teaching in these other arguments, thus, realizing also a theological discourse."[48]

Indeed, it is Francisco de Vitória himself, who, in the prologues of his lessons about temporal power (1528) and about the Indians (1539), exposes the reasons that enable him as a theologian,[49] to address political issues even with greater authority than the jurist would treat them.[50] This is especially true with regard to the question of the indigenous peoples because, for him, this issue should not be discussed in the light of positivist European law, but in the framework of divine and natural law, which makes the theological approach more appropriate.[51]

48 *Ibid.*, 23 (translation by the author).

49 In the lesson about temporal power, Vitória said: "The work and the task of the theologian encompasses to a certain extent, that no argument, no controversy, no matter seems to be out of the profession and object care of the theologian. This may be the cause, as the orator Cicero said, that there is so great a scarcity of good, solid theologians, since there are so few illustrious and excellent men in all kinds of disciplines and all arts. Well, certainly, theology is the first of all disciplines and world studies, one to which the Greeks called the Treaty of God. Therefore, it should not seem at all strange that there are not many fully competent in so difficult a subject." (de Vitória, *Sobre El Poder Civil*, *supra* note 45, 55) (translation by the author).

50 In the lesson about the Indians, to introduce the problems Vitória says: "Secondly, I note this discussion does not belong to the jurists, at least exclusively. Because those barbarians are not the subject, as I shall say soon, of the positivist law, and therefore things are not to be considered by human laws, but by the divine, which jurists are not competent enough to define themselves such questions." (F. de Vitória, *Relectio de Indis o Libertad de los Indios* (1967), 13 (translation by the author) [de Vitória, Relectio de Indis]).

51 de Vitória, *Sobre El Poder Civil*, *supra* note 45, 31.

II. The Peninsular Democratic Doctrine as a Humanist Response to the Indian Question

Under the premises explained above, the author will examine the three main themes that have been the object of profound reflections of the authors selected in this article, in order to contribute to building the university's answer to the Indian question, namely: the origin of the temporal power and its relation with spiritual power, the criticism to the just war doctrine as applied in the conquest of America, and finally, the defense of the right of domain of the American indigenous peoples over their properties as a corollary to their natural freedom.

This article began with an analysis sharing the same opinion of Professor Pedro Calafate, to whom the origin of temporal power, allied to the additional problem of relations between temporal power and spiritual power, is the more structural theme to understand peninsular thought.[52] Also, according to Pedro Calafate, the thesis of the divine origin of the temporal power should be considered as a starting point for Christian peninsular thought of that time.[53]

From this premise, however, came three distinct theses about to whom God transmitted the temporal power. That is, did God give this power directly to the king, to the pope, or to the people? These theoretical positions are based on three distinct doctrines, which looked at the tenuous solution and the conflicted relationship between the temporal and spiritual power. For the purpose of this article, we designate these doctrines as monarchist, theocratic, and democratic, according to their argument as to who is immediate recipient of the temporal power assigned by God: the King, the Pope or the people.

Depending on these different doctrinal theses about the relation between the temporal and the spiritual powers, different solutions to the Indian question were presented in the sixteenth century:

The monarchist doctrine favored strengthening the absolute monarchy. This doctrine emerged in the wake of the conflict between Henry VIII (and later James I) and the Catholic Church.[54] To the supporters of this doctrine, the King received the power directly from God, like Saul and David according to the Old Testament, and that is why the Kings could interfere in the temporal affairs of the Church. Ultimately, therefore, the Bulls of Pope Alexander VI, and

52 Calafate, *supra* note 41, 12-13.

53 *Ibid.*, 17.

54 F. Suárez, *De Juramento Fidelitatis*: *Defensio Fidei VI. Coleção Corpus Hispanorum de Pace* (1979).

later the commercial monopoly of peninsular kings over the New World, would be questionable in light of this doctrine.

The theocratic doctrine advocated a universal sovereignty of the Pope, both temporal and spiritual. With this universal lordship, the Pope had power and jurisdiction over both Christians and Pagans. Thus, this thesis perfectly served the peninsular kings' interests because, as explained in the previous section, the Catholic kings could legitimize the occupation of the New World based on the Alexandrian Bulls and, therefore, the *Requerimiento* itself.

The democratic doctrine, defended by the scholastics of the Peninsular School for Peace, argues that the temporal power is transferred immediately from God to all men, when they come together in a political community.[55] The two pillars of this doctrine are in the understanding of God's creation of man as a social and free being. The immediate source of temporal power, therefore, is in God, but is transmitted to men by natural right and not by divine or human laws.

The first pillar of the democratic doctrine (the social nature of man) is discussed by Francisco de Vitória in the lesson about temporal power, starting with the Aristotelian tradition, according to which the man, who is endowed with reason, is fragile and helpless if compared to other animals. Thus, for him, the source and origin of the cities and republics is in nature itself, as a consequence of the needs of men for mutual defense and conservation.[56] Vitória advocates this more assertively in the lesson about the Indians, using the famous phrase of the Greek poet Plautus, saying that man is not a wolf to his fellow man.[57]

55 For theological and Roman sources of this doctrine, see Calafate, *supra* note 41, 18-19.

56 de Vitória, *Sobre El Poder Civil*, *supra* note 45, 69.

57 "And as they say in the *Digesto* law, nature has established certain kinship among men. It goes against natural law that a man hates another man without reason. No man is a wolf to his fellow man, says Plautus, but is rather a man." (Cf. de Vitória, *Relectio de Indis*, *supra* note 50, 80). Remarking on this social nature of man, Pedro Calafate adds that: "This is one the most fundamental bases of scholastic anthropology and inherent contractualism: society is constituted by the free expression of will of men, in obedience to a natural necessity; man is not a wolf to man, as Plautus said […]" (Calafate, *supra* note 41, 26). In another passage, Calafate also clarifies the basis of scholastic contractualism in opposition to the Hobbesian theory: "For the scholastic society is the affirmation of human nature and not the result of degeneration of the natural qualities of man, nor the result of fear that everyone moves when they are not submitted to an absolute authority. Accordingly, there was no principal contradiction between the state of nature and social state because man is not the wolf to man, and the natural law is not exhausted in the act of the social contract, as in Hobbes." (*Ibid.*, 18-19).

In order to discuss the source of temporal power, Francisco de Vitória reaffirms the Pauline foundation of Christian thought. According to the Pauline foundation, there is no power that does not come from God, but this power is constitutive of society, reinforcing once again the foundations of this doctrine in the social nature of man and the source of natural law.[58]

The second pillar of this doctrine, as stated above, is God's creation of man as a free being. It can be understood as the human decision to transfer the collective temporal power to another individual man, senate or assembly, adopting as a result one of the Aristotelian forms of government. Sustaining this argument, Luís de Molina affirms that the simple agreement of men to form the body of the State, generates the State power over its members to govern, legislate, administer justice, and punish them.[59]

As Suárez confirms, God created man naturally free, and they received the power from God to master the "brute animals" and the "inferior beings". According to him, the right of one man over another is God's will and has its origin in sin or some adversity. Applying this same rule to the freedom of every person to form an association with other human beings, Suárez laid the foundation to understand the issue of American indigenous sovereignty.

Suárez defines a human collectivity as

> "[…] a special act of will or common consent, where men are integrated into a political body with a social bond to help each other to a political end. Thus, they form one collective organism that is called one in a moral sense and, consequently, needs also only one leader. Well, in this community, as such, by its nature lies the power of sovereignty, in a way that now no longer depends on the human free will that integrates them socially in that way and do not accept this power."[60]

Hence, Suárez traces the guidelines of the freedom of the human communities in the following definition:

> "Because being ruled directly by God through the natural law, is free and owns itself. This freedom does not exclude the power to govern

58 de Vitória, *Sobre El Poder Civil, supra* note 45, 71.

59 L. de Molina, *De Iustitia et Iure: Libro Primero de la Justitia* (1946), disp. XXII.

60 F. Suárez, *De Legibus* (III, 1-16 *De Civili Potestate*): *Coleção Corpus Hispanorum de Pace* (1975), 21-50 (translation by the author).

> itself and its members, but includes them. Rather, it excludes the subjection [of the State] to another man while it depends only on the natural law. To any man God has given immediately such power, while it is not transferred to an individual through an institution and human election."[61]

Pedro Calafate notes that the theorists of that time have chosen broadly the monarchical form under the argument that it is the form of government that "best guarantees unity and social peace, that increased the claim of ontological superiority on the multiplicity, which is the axis of Christian metaphysics [...]".[62]

Analyzing the Indian question in the light of these two pillars, one can easily deduce why the thinkers of the Peninsular School for Peace fought with the conquerors and *encomenderos* for the freedom and sovereignty of the peoples of the New World. If the temporal power was brought about by natural law in the moment of constitution of a human community, the temporal power of indigenous peoples is legitimate and is comparable to the power of any other Christian kingdom's sovereignty.

Therefore, if the temporal power stems from the need for community meetings, nobody, under natural law has universal lordship over the whole world. Thus, the domain of peninsular kings over the peoples of the New World would only be appropriate if transferred by legitimate means, which does not include a war of conquest unfairly fought against the indigenous peoples of America. On that account the universal lordship of the emperor was not a fair motivation to submit the indigenous sovereignty to the dominion of the Christian kings.

According to this natural law perspective, the peninsular theorists equate American and European sovereignty because of something that was common to both worlds: human nature. That is why they eschewed the debate about the differences in customs and positivist laws that undeniably existed among both peoples. Similarly, they would not accept the argument of the Amerindians' alleged inferiority based on the Aristotelian theory of natural servitude.

This sense of equality is very clear in the lesson of Vitória where he asserts that the true owners of the American lands were the Indians who inhabited those territories before the Spaniards' arrival, refuting the idea of Indians' inferiority.

61 F. Suárez, *Defensio Fidei III*: *Principatus Politicus o La soberania Popular* [1965], 25 (translation by the author).

62 Calafate, *supra* note 41, 12. See also *ibid.*, 221.

> "[...] [they] are not some of unsound mind, but have, according to their kind, the use of reason. This is clear because there is a certain method in their affairs, for they have polities 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."[63]

If the Emperor was not the lord of the New World, neither was the Pope. In the wake of the democratic peninsular thought, the relations between the temporal and spiritual power were established in different spheres. The power of the Pope was only the spiritual power over the Christians. If any temporal power was granted to the Pope, this power was indirect, recognized only in those matters that were necessary to manage spiritual matters, such as the evangelization of the peoples of the New World. Hence, the Pope had no spiritual or temporal power over those who are outside the Church, that is, the infidels.[64]

Examining the position of the Pope in relation to those who were outside the Church, Luis de Molina trod the same theoretical path as Vitória, saying that infidelity is not a legitimate cause for the loss of domain:

> "Moreover, there is no more power of the Pope in temporal things than in spiritual. That is why he has no spiritual power over the infidels. As Saint Paul said [...] 'Haply, it is not for me to judge those outside?', because it has only the right to propose and explain to them the Gospel, to invite them to embrace the faith. So it is not their temporal lord; nor, therefore, is it a universal lord."[65]

In the disputes about the American problems, this question assumes great importance because, as discussed earlier, the advocates of theocratic doctrine justify the conquest of indigenous territories under the argument of papal donation to the Catholic kings. The Spanish crown could prosecute the just war against infidels who neither submitted themselves to the universal lordship of

63 F. de Vitória, *De Indis et de Iure Belli Relectiones* (1917) (using the Latin version of his name, "Victoria") *apud* S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 17, 36. Later in the same lesson, Vitória argues that the supposed unsound mind of indigenous peoples may be due in large part to their "bad and barbarian education", because he also saw among Spanish men from the fields that differed very little from the "brute animals". Cf. de Vitória, *Relectio de Indis*, *supra* note 50, 29-30.

64 *Ibid.*, 43-54.

65 de Molina, *supra* note 59, 435 (translation by the author).

the Pope nor wanted to be vassals to the Catholic kings. Therefore, when the arguments of the theocratic doctrine are confronted with the democratic thesis, it is clear how supporters of the former defend the conquest of the New World under the *Requerimiento* and the latter represents the antagonistic view.

However, considering that Vitória, Suárez, and Molina were Christian theorists, they believed that salvation was at the heart of the Catholic Church and therefore the peaceful preaching of the gospel was a fundamental duty for them.

If the Pope had lordship neither in the temporal, nor in the spiritual world, three immediate consequences resulted from the democratic doctrine. First, the spiritual power of the Pope was restricted to Christians. He had no power over the infidels of the New World. Second, the temporal power of the Pope was indirect; the Pope could choose to assign the evangelizing mission to the peninsular kings, leaving out other Christian kings. Third, the infidelity could not be a legitimate basis for war, slavery or the dispossession of the Indians.[66]

III. The Peninsular Democratic Doctrine as a Theoretical Basis for the Recognition of Indigenous Peoples as Subjects of International Law

For nearly three centuries, since the modern law of Nations was established with the conclusion of the *Westphalia Peace Treaties* in 1648 as a landmark of international law, an eurocentric and monosubjective idea of this legal discipline was spread. The *jus gentium* (that was being generated by the Peninsular School for Peace) was replaced by the new Westphalian law of Nations. Under the Westphalian system, the State is at the centre of international relations. The Westphalian system also has a strong voluntarist and positivist doctrinal bias.

Consequently, indigenous peoples were excluded from the international framework of national sovereignty derived from the Westphalian model. If, in the early American colonization, some treaties were signed between the indigenous authorities and European kings, after the establishment of Nation States, the indigenous peoples were absorbed by them. The instruments of this assimilationist and segregationist process were forced displacement, the dispossession of their ancestral lands, and even a state policy of genocide.

The Westphalian model reached its demise with the two world wars in the twentieth century, which witnessed many atrocities perpetrated against humans

66 Calafate, *supra* note 41, 193.

within the States' regulatory framework. However, according to Lillian Aponte Miranda:

> "the early post-World War II era of human rights bypassed **indigenous** peoples. The post-World War II decolonization project, grounded in human rights precepts, advanced the right of peoples to self-determination. However, self-determination applied only to an overseas colonial territory as a whole, irrespective of pre-colonial enclaves of **indigenous** peoples existing within the colonial territories and colonizing states. Accordingly, the international decolonization process also failed to recognize **indigenous** peoples' inherent sovereignty."[67]

Undoubtedly, after the colonial and post-colonial experiences of near extermination, a new awakening of the universal juridical conscience in favor of recognizing the rights of indigenous peoples was built. As Professor Lillian Miranda affirms,

> "Despite this historical exclusion under the international framework, including the early human rights framework, **indigenous** peoples continued to advocate for a collective right to self-determination. Specifically, **indigenous** peoples began to use the human rights discourse of self-determination as a starting point, and umbrella, for the assertion and design of additional particularized rights, including: (1) the right to own, use, occupy, and control ancestral lands and resources; (2) the right to recognition of independent and distinct governance and political structures; and (3) the right to meaningful consultative processes where state decisions implicated their interests. The assertion of these rights began to resonate from distinct communities of **indigenous** peoples across the globe, including those in Latin America."[68]

67 L. A. Miranda, 'Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America', 10 *Oregon Review of International Law* (2008) 2, 419, 426 (emphasis added).

68 *Ibid.*, 419 (emphasis added).

The repertoire of international bodies for the protection of human rights, both in the universal system of the UN and in the regional systems, have instances of successful reparations obtained on behalf of groups or indigenous communities victimized by human rights violations. The recognition of the *jus standi* of indigenous peoples as authentic subjects of rights at the international level is still missing from the general approach.

In this sense, the Inter-American Court of Human Rights is a trend-setter. The Court took about a decade to recognize indigenous peoples as subjects of international law arguing that Article 1 (2) of the *American Convention on Human Rights* (American Convention) has defined the person as every human being. Paradoxically, during the same period, the Court developed a progressive jurisprudence regarding collective reparations in favor of indigenous and tribal peoples, in the light of a creative and evolutionary interpretation of Article 21 of the same Convention.[69]

In 2005, when Judge Cançado Trindade explained his reasoning in *Moiwana Community v. Surinam,* he asserted that the recognition of human beings, individually and collectively as subjects of international law is an approach of our time because the protection of indigenous peoples' rights is trending towards recognition in individual and collective or social dimensions. He observes that, until that time, it was the human beings, members of such groups, who were the *titulaires* of those rights. This statement was established in the Inter-American Human Rights System by the decision of the case of *Community Mayagna (Sumo) Awas Tingni v. Nicaragua* (2001), in which the Court safeguarded the right to communal property of the Mayagna's ancestral lands under Article 21 of the *American Convention*, to the benefit of the members of that indigenous community.

[69] To understand the initial discussion see the Concurring Opinion of Judge García Ramírez, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79; Separate Opinion of Judge García Ramírez, *Masacre Plan de Sánchez v. Guatemala*, Judgment of 19 November 2004, IACtHR Series C, No. 116; and Concurring Opinion of Judge García Ramírez, *Yatama v. Nicaragua*, Judgment of 23 June 2005, IACtHR Series C, No. 127. To divergent opinions see the Separate Opinion of Judge Cançado Trindade, *Moiwana Community v. Surinam*, Judgment of 15 June 2005, IACtHR Series C, No. 124 and Separate Opinion of Judge Cançado Trindade, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, IACtHR Series C, No. 146. See also Concurring Opinion of Judge Vio Grossi, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214.

> "11. In this respect, the endeavours undertaken in both the United Nations and the Organization of American States (OAS), along the nineties, to reach the recognition of indigenous peoples' rights through their projected and respective Declarations, pursuant to certain basic principles (such as, e.g., that of equality and non-discrimination), have emanated from human conscience. Those endeavours, - it has been suggested, - recognize the debt that humankind owes to indigenous peoples, due to the „historical misdeeds against them", and a corresponding sense of duty to „undo the wrongs" done to them [...].
> 12. This particular development has, likewise, contributed to the expansion of the international legal personality of individuals (belonging to groups, minorities or human collectivities) as subjects of (contemporary) international law. International Human Rights Law in general, and this Court in particular, have contributed to such development. Under human rights treaties such as the American Convention, to identify the individuals belonging to given communities presents the advantage of conferring upon them the corresponding enforceable subjective rights [...]. In the present Judgment in the *Moiwana Community* case, the Inter-American Court has rightly pointed out that the petitioners are the *titulaires* of the rights set forth in the Convention, and to deprive them of the faculty to submit their own pleadings would in fact constitute an "undue restriction" of "their condition as subjects of the International Law of Human Rights" (par. 91). Beyond that, there remains the question of the evolving condition of peoples themselves as subjects of international law [...]."[70]

After this long jurisprudential debate, in the recent case of *Indigenous Peoples of Kichwa of Sarayaku v. Ecuador,* the Inter-American Court revised its position, recognizing the collective subjectivity of those peoples. That is, indigenous peoples have guaranteed rights in a clear collective dimension and they have legal capacity to claim those rights as a group, independently from their individual members.

[70] Separate Opinion of Judge Cançado Trindade, *Moiwana Community v. Surinam*, *supra* note 69, 4-5, paras 11-12.

> "On previous occasions, in cases concerning indigenous and tribal communities or peoples, the Court has declared violations to the detriment of the members of indigenous or tribal communities and peoples. However, international law on indigenous or tribal communities and peoples recognizes rights to the peoples as collective subjects of international law and not only as members of such communities or peoples. In view of the fact that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise some rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or indicated in this Judgment should be understood from that collective perspective." [71]

However, these advances lack an appropriate theoretical framework as noted in the first part of this article. Indeed, as emphasized by Judge Cançado Trindade in his votes in the case of *Moiwana v. Surinam* and the case of *Sawhoyamaxa Indigenous Community v. Paraguay,* the violations of indigenous peoples' rights, and the reparations granted to them, have their roots in the historical processes of the laws of nations' formation, in which indigenous peoples were considered as true subjects of rights.[72] In this sense, the author suggests that this doctrinal gap can be filled by the democratic peninsular thought.

Peninsular thought's first contribution to a theoretical basis for the international law of indigenous peoples is the respect for the inherent sovereignty of the peoples of the New World. Rejecting the theories of an Emperor's and Pope's lordship over the Indians' domains, the theologians and jurists of the Peninsular School for Peace compared the Indian nations with the European kingdoms. For this reasoning, all the rules of customary international law that were valid in Christendom should have strictly applied in America, e.g. the principles of just war doctrine.

Since the international decolonization process in the 1960's did not provide a satisfactory solution to the recognition of indigenous peoples' inherent sovereignty, these guidelines drawn by the democratic peninsular doctrine offer a more authentic theoretical ground to the right of indigenous peoples to self-

71 *Kichwa Indigenous People of Sarayaku v. Equador*, Judgment of 27 June 2012, IACtHR Series C, No. 245, 66, para. 231.

72 Cf. the Separate Opinion of Judge Cançado Trindade, *Moiwana Community v. Surinam*, *supra* note 69, and the Separate Opinion of Judge Cançado Trindade, *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 69.

determination. Nowadays, it should be emphasized that the indigenous peoples' claim to self-determination is not a declaration of secession. Rather, they claim their right to keep their particular way of life with their political, legal, economic, and cultural institutions, as well as their right to consultative processes in any decision affecting them, and the guarantee of participation as citizens of the State in which they live.

The refusal of the domain titles of the Emperor and the Pope also explained that the mere fact of the arrival of the Portuguese and Spanish ships in America did not legitimize the native nations' loss of property rights. The thinkers of the Peninsular School of Peace were emphatic that the native nations were the true owners of those lands. Hence, the foundations of the right to own, use, occupy, and control ancestral lands and resources can be found in this doctrine.

Furthermore, the natural law perspective proposed by the Peninsular School for Peace to answer the Indian question permitted a respectful approach of both Indian and European institutions, avoiding what was contrary to the natural law itself. Following this reasoning, the proponents of the democratic peninsular doctrine strongly rejected the idea of slavery of the American natives based on the Aristotelian tradition. Instead, they defended the rational nature of indigenous peoples as any other member of humankind. Indeed, this analysis provides a collective dimension to the indigenous peoples' right to equality and non-discrimination.

D. Conclusion

The purpose of this article was to investigate the possible contributions of the Peninsular School for Peace from the sixteenth and seventeenth centuries and to set the basis of current international law of indigenous peoples. The theoretical framework chosen to achieve this goal was found in the works of Francisco de Vitória, Luis de Molina, and Francisco Suárez as representative proponents of democratic peninsular thought. The jus-philosophers of that time triggered a profound debate about the justice of the conquest of the New World and this backdrop served as an important starting point for the reflections about indigenous peoples' rights.

In the first part of this article, the author argued that the emphasis of international instruments and mechanisms created after 1948 lays on the protection of individual civil and political rights, influenced by liberal thought. That is the reason why special attention should be given to facilitating the access of organized groups to international systems, in order to enable them to claim collective rights, as was the case with regard to indigenous peoples rights

recognized in terms of *ILO Convention No. 169* and the UNDRIP of 2007.

In the second part of this article, the author held that the theoretical basis for a comprehensive approach of collective indigenous peoples' rights in international law could be found in the nascent *jus gentium* of the sixteenth century. It is precisely in the awakening of Christian conscience in the Peninsular School for Peace, in the context of the intense debate about the Indian question, that these foundations could be redeemed and updated. According to the author's investigations, the democratic peninsular doctrine shared by Vitória, Molina, and Suárez, based its origin on the creation of man as a social and free being. Thus, the immediate source of temporal power was in God, but it was transmitted to men through natural law. It was not in divine or human law. Therefore, the indigenous peoples were free and sovereign human collectivities, which, like any other Christian kingdom, had their right to govern themselves and dispose of their properties, as lawful actors, according to the precept of natural law.

Ultimately, this article argues that the democratic doctrine developed by the Peninsular School for Peace provides a more authentic theoretical foundation for the recognition of indigenous peoples as true subjects of collective rights to self-determination, equality and non-discrimination as well as to ownership of their ancestral lands.