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Re-Reading Vitoria: Re-Conceptualising the Responsibility of Rebel Movements

Kathryn Greenman*

1. Introduction

*There is fiction in the space between
The lines on your page of memories
Write it down but it doesn't mean
You're not just telling stories*

– Tracy Chapman

The past is a foreign country: they do things differently there.

– LP Hartley

The recent turn to history in international legal scholarship¹ has seen an enthusiastic revisiting of the jurisprudence of Francisco de Vitoria. Critical histories of international law in this vein include notable works by Anthony Anghie and Martti Koskenniemi.² These studies, through a postcolonial reading of Vitoria, trace the imperialist origins of concepts such as, for example, sovereignty, in Anghie's case, and private property, in Koskenniemi's, which, it is argued, continue to give an imperialist structure to international law. Along similar lines, I want to draw attention to an aspect of Vitoria's jurisprudence yet to be given significant consideration thus far: namely, his development of a concept of responsibility. I will argue that this concept of responsibility which Vitoria elaborates plays a central role in his construction of an international legal framework for the management of the Indians by the Spanish. To grasp fully the significance of this 'management model' I propose that we must understand how it operated so as to legitimise Spanish administration of the colonised world and ultimately to consolidate the emerging authority of the European sovereign state. In what follows I begin with some methodological considerations. I then proceed to my analysis of Vitoria's famed lectures on Spanish relations with the Indians, *De Indis et De Iure Belli (On the Indians and the Law of War)*.³ Finally, I reflect on how my reading of Vitoria might help us to make better sense of present international law and practice regarding the responsibility of rebel movements.

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¹ See, e.g., B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012).

² A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005); M. Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', 61 *University of Toronto Law Journal* (2011) p. 1.

³ F. de Vitoria, *De Indis et De Iure Belli Relectiones: Being Parts of: Relectiones Theologicae XII* (E. Nys ed., J. Pawley Bate tr., Carnegie Institution of Washington, Washington, DC, 1917).

2. The Turn to History in International Law: Some Methodological Considerations

As an international lawyer turning to history, I am faced not only with the methodological dilemmas, contested boundaries and uncertain foundations of my own discipline but also with those that I had previously always left it to my colleagues in the history faculty to fret over. The ‘historical turn’ would seem to raise more questions than it answers. How should we read the historical texts of international law? What is the relationship, if any, between international law’s past and present?

2.1. Contextual versus Textual Analysis

Vitoria starts his first lecture defending why he is even considering the question of the justification for the Spanish conquest of the Indies at all:

[I]t might seem at the very outset that the whole of this discussion is useless and futile ... because neither the sovereigns of Spain nor those at the head of their councils are bound to make completely fresh and exhaustive examination of rights and titles which have *already been elsewhere discussed and settled*, especially as regards things of which *the sovereigns are in bona fide occupation and peaceful possession*.⁴

Furthermore, Vitoria ends by concluding that the giving up of the Indies would be “to the great loss of the Spaniards and also to the grave hurt of the royal treasury (a thing intolerable)” and neither “expedient” nor “lawful”.⁵ Given this, and with Spanish title to the Indies already established and abandonment unthinkable, the question arises what purpose it served to re-open the matter; for at the end of *On the Indians and the Law of War* Vitoria leaves the Indians as enslaved as he found them. Yet it clearly achieved some end to replace one model of subjugation with another. Vitoria’s arguments were quickly taken up by the Spanish authorities as the leading justification for the colonial project.⁶ To appreciate why, we must look beyond the text itself, which cannot offer any answers in this respect. The contextual school of intellectual history associated with Cambridge’s Quentin Skinner proposes that the best way to understand a historical text is to read it as a ‘political intervention’ in a certain context and in particular relations of power.⁷ It is approaching Vitoria’s jurisprudence thus that, I suggest, offers the most potential for fruitful analysis.

2.2. Determining the Appropriate Context

Unfortunately, a text’s context, rather than offering a means to resolve all of our interpretational struggles, simply displaces and multiplies them. The decision to read Vitoria

⁴ *Ibid.*, p. 116 (emphasis my own).

⁵ *Ibid.*, pp. 161–162.

⁶ R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, Oxford, 1999) p. 75. *C.f.* L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (SMU Press, Dallas, 1949) p. 152, noting that the extent of Vitoria’s influence has been questioned.

⁷ For an expanded explanation of this approach to history from an international lawyer’s perspective, see A. Orford, ‘On International Legal Method’, 1 *London Review of International Law* (2013) p. 170.

in context is only the first step in a longer process.⁸ We then face the more complicated task of defining the appropriate scope, both material and temporal, and scale of that context. Regarding material scope, we have to decide whether our history will be one of ideas, that is, of concepts, rules and principles; one of practices and policies; and/or one of institutions. Once this choice has been made, there still remains to be settled which ideas, which practices and policies, and which institutions fall within the ambit of international law for our purposes and which do not. In terms of scale, we must think about whether our history will be an individual biography or that of a nation, a region or even the world.⁹

According to Skinner, understanding a historical text is a matter of reconstructing the author's intentions for it: of figuring out what the author was trying to achieve with that text.¹⁰ Such an approach has implications for the determination of the appropriate context in which to read it, particularly, although not exclusively, in terms of temporal scope. However, for a number of reasons I shall depart from it.¹¹ None of the choices that we have to make regarding context can be considered automatic.¹² First, it is not simply to be assumed that the relevant context is, or is solely, that contemporaneous with the author's lifetime.¹³ Not only may an author have intended a text as an intervention in his or her past as much as in his or her present but also a text may later be redeployed in an entirely different context unimagined at the time of its writing.¹⁴ It may be used for purposes "other and even antithetical" to those of the author and be subjected to "unexpected transformations and reinterpretations" in the process so that in another context its arguments take on an entirely different meaning.¹⁵

Furthermore, the assumption that there exists a straightforward relationship between a text, a single identifiable author and a distinct moment of publication is problematic.¹⁶ In this respect, we might comment regarding Vitoria that *On the Indians and the Law of War* was originally given as a pair of university lectures in 1539 rather than being intended for print. Vitoria's lectures were not published until 1557, over a decade after his death, from his

⁸ M. Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View', 27 *Temple International and Comparative Law Journal* (2013) p. 232.

⁹ *Ibid.*, pp. 232–238.

¹⁰ See Orford, *supra* note 7, pp. 170–171.

¹¹ Koskenniemi also addresses its limitations, *supra* note 8, pp. 229–232.

¹² *Ibid.*, p. 232.

¹³ Skinner himself came to acknowledge this. Q. Skinner, *Visions of Politics: Volume I, Regarding Method* (Cambridge University Press, Cambridge, 2002) p. 116, cited in Orford, *supra* note 7, p. 174.

¹⁴ Orford, *ibid.*, pp. 173–174.

¹⁵ C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G. L. Ulmen tr., Telos Press, New York, 2006) pp. 115–119, 124–125. For example, it has become clear that Vitoria was neither a pioneering forefather of modern international law and brave champion of indigenous peoples' human rights nor a mere apologist for Spanish imperialism. He was a much more complex figure than this. Yet this does not change the fact that his work has subsequently been appropriated for both such purposes. See A. Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge University Press, Cambridge, 1982) pp. 64–65; P. Niemelä, 'A Cosmopolitan World Order? Perspectives on Francisco de Vitoria and the United Nations', 12 *Max Planck Yearbook of United Nations Law* (2008) pp. 335–337.

¹⁶ This is acknowledged by David Kennedy in his reading of Vitoria, referring to the work of Roland Barthes. D. Kennedy, 'Primitive Legal Scholarship', 27 *Harvard International Law Journal* (1986) p. 13.

papers and his students' notes.¹⁷ During the intervening period, they had, however, been widely available in manuscript.¹⁸ Simply put, a text has a life far beyond and independent of its (supposed) author's (alleged) intentions for it at the (purported) moment of its publication. It is this life of *On the Indians and the Law of War* that I propose to explore here. I seek to understand how the arguments it put forward came to be the favoured justification of the colonial project among the Spanish authorities. It is by considering the wider interests which Vitoria's jurisprudence was instrumentalised so as to serve, rather than by seeking to understand what he was trying to do with it, which will allow us some insight in this respect.

With my reading of Vitoria I therefore make no pretence to be attempting to reconstruct his intentions (assuming, even, that such a thing was possible). I refer here to the idea of "intentional" or "productive mis-reading": that is to say, reading texts in a way that they were never meant to be read in order to allow them to tell a different story.¹⁹ This approach is inspired by the work of Gayatri Spivak, who describes her "mistaken" reading of a particular philosophical text as a "scrupulous travesty in the name of producing a *counternarrative*".²⁰ I therefore will not be focusing on Vitoria's intellectual or spiritual background, his work on Thomas Aquinas, his theological training in Paris, his counter-reformist views, or his role as adviser to the Spanish Crown. Instead I will be concentrating on the wider context of the 16th century in which his jurisprudence was initially received and taken up. I will read Vitoria in light of the policies, practices and institutions of Spanish imperialism of this period; the power struggles within the Holy Roman Empire between central and territorial authorities during the same time; and the situation of these phenomena within the wider historical 'moment' of the emergence and consolidation of the modern European state system during what we might term, very broadly, the Renaissance.²¹

2.3. In Praise of Anachronism: A Foucauldian History of the Present²²

The other reason for modifying the type of contextual approach associated with Skinner is that it seems to deny that Vitoria's jurisprudence has any relevance for the present. It proposes that Vitoria is to be understood on his own terms and in his own time and not with

¹⁷ E. Nys, 'Introduction', in Vitoria, *supra* note 3, pp. 81–82; R. Hernández, 'The Internationalization of Francisco de Vitoria and Domingo de Soto', 15 *Fordham International Law Journal* (1991) p. 1039; C. Covell, *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (Palgrave MacMillan, London, 2009) p. 27.

¹⁸ Pagden, *supra* note 15, p. 66.

¹⁹ See, e.g., A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge, 2003) pp. 38 *et seq.*; R. Buchanan and R. Johnson, 'The "Unforgiven" Sources of International Law: National-Building, Violence and Gender in the West(ern)', in D. Buss and A. S. Manji (eds.), *International Law: Modern Feminist Approaches* (Hart, Oxford, 2005) pp. 134–135.

²⁰ G. C. Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, Cambridge, MA, 1999) p. 9 (emphasis my own)

²¹ Koskenniemi notes that such a "wide-angle lens" approach is common in histories of international law and that it can have "overly generalizing" tendencies, a danger which I recognise and to which I shall have to remain alert. Koskenniemi, *supra* note 8, pp. 235–236.

²² This heading is chosen in deliberate tribute to Anne Orford's seminal piece on the usefulness of Foucault for international legal scholars, 'In Praise of Description', 25 *Leiden Journal of International Law* (2012) p. 609.

current standards and concerns in mind.²³ On this view, the fact that Vitoria was working on a completely different methodological basis and from a perspective shaped by radically dissimilar assumptions to those of modern international lawyers would seem to make drawing any lessons for today from his jurisprudence problematic.²⁴ For this would amount to anachronism: that is, history in the service of the present. Warnings against anachronism are helpful reminders of the dangers of drawing simplistic causal connections between Vitoria's jurisprudence and today's international law. They keep us on our guard against reductionist, universalising histories. However, international lawyers have not only argued that anachronism is unavoidable in international legal scholarship but have also produced spirited defences of its legitimate place in histories of international law. Anne Orford explains how international law is intrinsically anachronistic:

[L]aw relies upon precedent, customs and patterns of argument stretching back ... from as recently as yesterday to "time immemorial" ... [M]eanings and arguments do not necessarily heed the neatness of chronological progression ... International law is inherently genealogical, depending as it does upon the transmission of concepts, languages and norms across time and space. The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation.²⁵

Contextual historical analysis is not a door to objectivity. In the end, the turn to context cannot offer us an escape from our present or from our experiences, fears and desires any more than any other approach. These not only determine how we shape the context in which we will read our historical text. They also determine how we go about accessing that context. As lawyers we have come to terms with the fact that when it comes to legal texts there are only interpretations. We must therefore also come to terms with the fact that there are equally only interpretations of theological or philosophical texts and of social, political and economic events, circumstances and relations. What is more, these interpretations will always be informed by our present normative commitments.²⁶

However, that we are inescapably situated in the today is to be embraced rather than apologised for. An approach which rejects any relationship between past and present inhibits the production of the type of critical counter-narrative which I aim to construct. It restrains our ability to challenge the hegemonic history of progress, objectivity and universality which we are often told about international law.²⁷ It is my desire to disrupt this conventional story and to expose its, not only imperialist, but also 'masculinist' foundations, to lay bare its naivety and hypocrisy, that has ultimately determined my choices in terms of context and will determine how I evaluate that context. As international lawyers, to embark upon a history of international law offers us not a better understanding of our past but of our present. The idea

²³ Examples of this sort of reading of Vitoria by historians include B. Hamilton, *Political Thought in Sixteenth-Century Spain* (Clarendon Press, Oxford, 1963); A. Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (Cambridge University Press, Cambridge, 1997).

²⁴ Niemelä, *supra* note 15, pp. 307–309; Kennedy, *supra* note 16, pp. 10–13, 39.

²⁵ Orford, *supra* note 7, pp. 174–175.

²⁶ Koskenniemi, *supra* note 8, p. 230.

²⁷ *Ibid.*, pp. 229–231; Orford, *supra* note 7, p. 174.

of a 'history of the present' is generally associated with Michel Foucault.²⁸ Tracing the origins of a particular international legal concept can expose its continuing connections with past practices allegedly long cast off. Such a genealogy can reveal the contingency, in opposition to the widely assumed inevitably, of our current situation, allowing us to challenge and to change it.²⁹

3. Re-Reading Vitoria

The Indians 'discovered'³⁰ by Columbus are normally portrayed in contemporaneous accounts of colonialism, as well as in mainstream modern records, as passive, defenceless victims in the face of Spanish guns and diseases. Vitoria describes the Indians as "unwarlike and timid". The so-called Apostle of the Indies, Bartolomé de Las Casas considered them "submissive and delicate".³¹ Even in more revisionist histories not only the villains (such as Hernán Cortés) but also the heroes (such as Las Casas) are all white, male and European.³² Both at the time and since, the discourse of colonisation depicts the Indians as, at best, non-speaking extras and, at worst, nothing more than the inanimate backdrop against which the drama unfolds. Racialised and feminised, they are relegated to mere objects of white European masculinised perception and agency. They simply await salvation, not only from the excesses of the colonists but also, as we shall see, from their own savagery, and are never able to speak or act for themselves.

Yet while it is undeniable that Indian numbers were ravaged by war and disease in the first half-century of the conquest,³³ the depiction of their helpless submission to Spanish rule simply does not bear scrutiny. Otherwise, the extraordinary lengths to which the Spanish went to pacify and control the colonies would be inexplicable. Even Hanke admits that the *conquistadors* were defeated three times in their attempts to conquer Tuzutlán, today part of Guatemala, whose inhabitants were "ferocious, barbarous and impossible to subjugate".³⁴ Anthony Pagden notes the respect and awe with which the military capabilities of the Incas were regarded.³⁵ As well as facing indigenous resistance (and slave uprisings) almost

²⁸ M. Foucault, *Discipline and Punish: The Birth of the Prison* (A. Sheridan tr., Vintage, New York, 1995).

²⁹ A. Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law', *IILJ Working Paper 2012/2* (2012) p. 8.

³⁰ At one point Vitoria notes, without hint of irony, that given that the Indians already occupied their territories, the fact of Spanish discovery "gives no support to a seizure of the aborigines any more than *if it had been they who had discovered us*". Vitoria, *supra* note 3, p. 139 (emphasis my own).

³¹ Quoted in Hanke, *supra* note 6, p. 11.

³² Lewis Hanke, for example, refers to the Indians as "helpless natives" and to Las Casas as "the greatest Indian champion of them all". He affords only one sentence to Inca resistance leader Tupac Amaru, and this only to tell us of his execution by Francisco de Toledo ("wise lawgiver, energetic administrator, and greatest ruler Spain ever sent to Peru"). The only woman, Spanish, Indian or otherwise, to make an appearance is Queen Isabella, who likewise dies immediately. Hanke, *supra* note 6, pp. 19–20, 26, 162.

³³ For example, it has been estimated that the population of what is now the Dominican Republic and Haiti was reduced from 250,000 to less than 15,000 in the first 20 years of Spanish rule. A. Debo, *A History of the Indians of the United States* (1970) p. 20, cited in R. A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, New York, 1990) p. 85.

³⁴ Hanke, *supra* note 6, p. 78.

³⁵ Pagden, *supra* note 15, p. 72.

immediately,³⁶ the Spanish colonial project in Latin America and the Caribbean had to contend with challenges both at home and from elsewhere in Europe. This meant that from the very beginning the Spanish were looking to legitimise, rationalise and institutionalise their imperial practices and policies. What were these practices and policies? By what means were they legitimised, rationalised and institutionalised? What were the key features of this model for the management of the Indians and administration of the colonised world? What were the challenges to it which arose out of the socio-political context back in Spain and in Renaissance Europe more widely? How might we read *On the Indians and the Law of War* as a political intervention in this landscape?

3.1. Tools of Imperialism

The Spanish imperial model established in the first half of the 16th century was divine in its foundation and feudal in its nature. It derived its ultimate legitimacy from the papal bulls issued by Pope Alexander VI in the years immediately following Columbus's arrival in the Americas. Its practices included, on one hand, what basically amounted to the enslavement, taxation and conversion to Christianity of the Indians and, on the other, warfare. The papal bulls, granting the Spanish Crown "full, free and integral power, authority and jurisdiction" over the territories and inhabitants of the New World,³⁷ were based on the idea of "universal papal guardianship". The pope in his position as "shepherd of Christ's universal flock" commended the pagans of the New World to the capable instruction and supervision of the Spanish Crown, as a suitably Christian ruler.³⁸ With a papal mandate in its pocket and the threat of papal excommunication to back it up, Spain, at least initially, seemed to have the legitimate basis it needed upon which to undertake its colonial project.

The first Spaniards to settle in the newly conquered lands quickly established a feudal system in which Indian slave labour fulfilled the need for bodies in the crop fields and gold mines which sustained and enriched the colonists. This practice, not appearing particularly to accord with the mandate to convert and civilise the Indians, required justification. This it received through the *encomienda*, legally instituted by royal order of 1503.³⁹ This involved the 'commendation' of a group of Indians to a Spaniard, the *encomendero*. The *encomendero*, in return for a tribute, generally in the form of slave labour, owed a duty to protect and give religious instruction to his wards.⁴⁰ In 1512 the *encomienda* was given further rationalisation through the Law of Burgos. This extraordinarily detailed code regulated every feature of Indian life, from diet and dress to their relocation in new villages, their obligatory nine months of annual slave labour and their religious education. It determined the *encomienda* to be "in agreement with human and divine law" as the Indians' inherent irrationality and inferiority made their enforced enslavement and conversion necessary for their civilisation.⁴¹

³⁶ Columbus was forced to put down an Indian revolt, suppression of which required 500 men, as early as 1495. See Williams, *supra* note 33, p. 82.

³⁷ Other than a part which was excluded for Portugal. See Williams, *ibid.*, p. 80.

³⁸ *Ibid.*, pp. 79–81.

³⁹ Hanke, *supra* note 6, pp. 19–20; *Ibid.*, pp. 83–85.

⁴⁰ Williams, *ibid.*, p. 84.

⁴¹ Hanke, *supra* note 6, pp. 23–25; Williams, *ibid.*, pp. 86–88.

The reality of the matter being that the Indians were not the passive, defenceless victims they were often made out to be, conquest was unavoidably a matter of violent conflict. The use of force against the Indians received its rationalisation in the *Requirimiento*, which had to be read out to the Indians before the Spanish could legally make war against them. To borrow Robert A Williams' pithy summary, the *Requirimiento*, citing papal authority, "informed the Indians in the simplest terms that they could either accept Christian missionaries and Spanish imperial hegemony or be annihilated".⁴² Any harm they suffered as a result would be their own responsibility for having attempted to resist.⁴³

3.2. Threats from Home and Abroad

3.2.1. The Dominican Challenge

The loudest dissent from within Spain against the way in which the colonies were being managed came from the Dominicans, among whose number Vitoria and his colleagues at the University of Salamanca were leading voices. Denouncing the barbaric treatment inflicted upon the Indians,⁴⁴ they demanded reform of Spain's imperial instruments in accordance with their Thomist ideals. However, it must be noted that the Dominicans did not oppose the colonial project in itself; if there was one thing which troubled them more than the atrocities committed by the colonists, it was the Indians' alleged cannibalism, sodomy, bestiality and incest. As the 1917 introduction to *On the Indians and the Law of War* explained, the Indians' "infamous vices and morals, and bloody practices" were "a delicate question", which all those considering the question of Spanish imperialism could not help but address.⁴⁵ Spanish morals were apparently outraged by the fact that Indian society was not organised around a gender-based division of labour and by "the hideous idols, the human sacrifices, and the cannibal feasts".⁴⁶

It was these concerns about the perceived depravity of the Indians which, as much as anything, motivated the Dominican interest in Spain's colonisation of the Americas.⁴⁷ The Indians were never going to be saved from mortal sin if the colonists committed barbarities of their own.⁴⁸ This explains why the battle which the Dominican critique precipitated, from almost the first years of the 16th century, took the form it did. That is, one between those who, motivated by economic profit, wanted to plunder the colonies for Indian labour and natural resources and those who, motivated by spiritual concerns, were interested in the salvation of Indian souls. This dispute manifested itself most prominently in two particular

⁴² Williams, *ibid.*, p. 91.

⁴³ Hanke, *supra* note 6, p. 33; *Ibid.*, pp. 91–92.

⁴⁴ Vitoria refers to the "many massacres [and] plunderings of innocent men", *supra* note 3, p. 119.

⁴⁵ Nys, *supra* note 17, p. 87. See also Pagden, *supra* note 15, pp. 79 *et seq.*, who discusses this at length.

⁴⁶ Nys, *ibid.*, p. 88, citing E. J. Payne, *History of the New World called America, vol. I* (Oxford University Press, Oxford, 1892).

⁴⁷ It was the question of cannibalism which initially led Vitoria to the topic of the Indians. Pagden explains that the Indians' cultural and social practices, diverging such as they did from those of the Spanish, posed a real problem for the Dominicans' Thomist belief in "the biological and psychological unity of man", *supra* note 15, p. 65.

⁴⁸ See the quote from Las Casas cited by Hanke, *supra* note 6, p. 7. See also Williams, *supra* note 33, p. 95.

episodes. First, we have the socio-anthropological investigations undertaken in the colonies, with royal sanction, in the first half of the 16th century. These attempted, through either inquisition or experiment, to determine if the Indians were capable of learning to live and worship like the Spanish or whether they could only be converted and civilised by force.⁴⁹ Second, there was the New Laws crisis of 1542.⁵⁰ The Dominican challenge had also forced the setting up of the royal council which produced the Law of Burgos.

3.2.2. Power Struggles Inside and Outside Europe

Given the existence of these tools of empire already legitimising Spanish title to the Indies and rationalising their administration, one might wonder why such attention was paid to the critique put forward by Vitoria and his fellow Dominicans. This brings us on to the wider context into which Vitoria's jurisprudence was received. At this time, power relations within Europe were undergoing a period of intense re-configuration. We see a struggle between state and religious power that would eventually lead to the modern system of secular sovereign states emerging out of the existing medieval system of feudal principalities gathered under an authority derived ultimately from the pope. However, the territorial polities which made up the Holy Roman Empire not only sought to assert their increasing independence against the central authorities but also against each other. The flows of trade and commerce which the conquest of the New World was facilitating offered unprecedented opportunities for enrichment and this created an intense rivalry among the European powers for pre-eminence within the new political landscape that was developing.

In Spain, the *Reconquista* had been completed as recently as 1491 when the last Islamic Kingdom was expelled from the Iberian Peninsula. It was only in 1506 when a number of the Iberian kingdoms were brought together under Habsburg rule, creating for the first time something that resembled a unified Spanish state. Spain was therefore looking to consolidate this nascent unified identity. This was aligned with the prevailing concerns of Spain's religious authorities as well after the Spanish church had been nationalised following a battle with Rome for control. This shared opposition of Spanish church and state to perceived attempts by the religious authorities in Rome to interfere in Spain's affairs intensified when King Charles I of Spain became Holy Roman Emperor in 1519.⁵¹ Spain was also defending its colonial ambitions from attempted usurpations by the Portuguese. In 1514, a further papal bull appeared to give the Portuguese jurisdiction over the Pacific precipitating a 15 year diplomatic dispute between the two rivals.⁵²

⁴⁹ These include, notably, the Jeronimite interrogatory and Las Casas' efforts to set up his own 'model' Indian villages where he attempted to teach the Indians the Spanish Christian way of life by peaceful means, including in one infamous attempt by importing a number of Spanish farmers to show them how it was done. Hanke, *ibid.*, pp. 42–45, 54–82; Williams, *ibid.*, pp. 94–95.

⁵⁰ The so-called 'New Laws' put the Indians under the administration of the Spanish Crown rather than the *encomenderos* and established some regulations for their "good treatment and preservation". However, after causing uproar in the colonies, they were almost immediately revoked. Hanke, *ibid.*, pp. 91–92, 95–102.

⁵¹ Williams, *supra* note 33, p. 96. Regarding the ecclesiastical aspect of this conflict, see Nys, *supra* note 17, pp. 72–74.

⁵² Tuck, *supra* note 6, p. 72. Also on this point see Niemelä, *supra* note 15, pp. 326–327.

The result of this was that Spain's rulers were unenthusiastic about justifications for the colonisation of the Indies which derived from ecclesiastical authority. They did not want to have to rely on any external power to grant and maintain their title over the American colonies.⁵³ Therefore a rationalisation for the colonial project was needed which accorded with the Spanish authorities' claims "to a natural and autonomous right of existence" independent of papal authority.⁵⁴ If such rationalisation also responded to the well-known concerns of the influential Dominicans then all the better. The existing model clearly did not fit the bill given its theocentric and feudal nature. It was into this melee that stepped Francisco de Vitoria and his *On the Indians and the Law of War*.

3.3. *On the Indians and the Law of War*

In this section I will elaborate my reading of *On the Indians and the Law of War*. I will re-interpret Vitoria's jurisprudence as constructing, through his particular conceptualisation of international law and the law of war, in which a concept of responsibility plays a central role, a model for the management of the Indians by the Spanish. I will explain how and why this model became the official justification for the Spanish colonial project. What were its key features? How did these characteristics enable it to serve a series of wider objectives?

3.3.1. The Indians as Human Beings: Vitoria and International Legal Personality

Vitoria begins his argument by acknowledging the Indians' capacity for reason, which is, for him, "the most conspicuous feature of man".⁵⁵ This was in direct challenge to the feudal nature of the prevailing rationalisation for colonisation, which ultimately characterised the Indians as belonging to some lesser order of being.⁵⁶ It is this aspect of Vitoria's jurisprudence, which has, more than any other, served to cement his legacy as an early defender of the human rights of indigenous peoples. However, there is nothing remotely humane about it.⁵⁷ Williams' assertion regarding missionaries such as Las Casas, that despite their criticism of Spanish colonial rule they were simply unable to see the Indians as anything more than "a supplement to more imperative, European-defined goals", seems to apply equally to Vitoria.⁵⁸ Vitoria bases his recognition of the Indians' humanity on the extent to which their practices look like those of the Spanish:

The Indian aborigines ... 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. Further, they make no error in matters which are self-evident to others.⁵⁹

⁵³ Tuck, *ibid.*

⁵⁴ Williams, *supra* note 33, p. 96.

⁵⁵ Vitoria, *supra* note 3, p. 127.

⁵⁶ Schmitt, *supra* note 15, pp. 102–103.

⁵⁷ *C.f.* Anghie, *supra* note 2, p. 19.

⁵⁸ Williams, *supra* note 33, p. 95.

⁵⁹ Vitoria, *supra* note 3, p. 127.

The humanity which Vitoria, apparently so progressively, affords the Indians does not exist in and of itself nor for its own ends. It exists only by reference or in comparison to that of the Spanish. In this way, the granting of the status of human beings to the Indians is in fact more about the constitution and consolidation of Spanish subjecthood. This becomes even more apparent when we see that Vitoria's acknowledgement of the Indians' possession of human reason turns out to serve as nothing more than a recognition of their potential "civilisability".⁶⁰ As Pagden explains, according to Vitoria, "the Indian is ... some variety of fully grown child whose rational faculties are complete but still potential rather than actual [and who has] to be trained".⁶¹ The Indians' capacity for reason subsequently forms the basis for the imposition on them of a system of (supposedly) universal international law rules.⁶²

3.3.2. Developing a Common Framework: Vitoria's Law of Nations

Vitoria draws his law of nations from natural law: that is to say, "[w]hat natural reason has established among all nations" and what is considered humane between them.⁶³ Given that the Indians share this humanity and reason with the Spanish and are as a result included within "natural society and fellowship", it follows that there can be no objection to their inevitable subjection to the law of nations. As Pagden argues:

Vitoria [was] effectively claiming ... that any man who is capable of knowing, even in retrospect, that something is in his own interest may be said to have consented to it, even where there is no question of his having exercised any freedom of choice. Such inescapable contractualism fitted conveniently with the claim ... that although of the power of the state depends on a contract between the people and their rulers, the conditions of the pact are not the consequence of a free agreement, but have been determined beforehand by natural law.⁶⁴

This offered a justification for the colonial project which affirmed, rather than undermined, not only Spain's autonomy from Rome but also its unified identity, delegitimising as it did any internal dissent against the political status quo.⁶⁵ That it came from within the very heart of domestic criticism of the way in which the colonies were being administered, from the founder of the influential School of Salamanca, was a further plus point.⁶⁶ Vitoria's arguments enabled the colonial project to be uncoupled from feudal and theological authority and placed on a humanist, secular footing matching up perfectly with the prevailing interests

⁶⁰ Williams, *supra* note 33, p. 100 *et seq.*

⁶¹ Pagden, *supra* note 15, p. 104.

⁶² Anghie, *supra* note 2, p. 22.

⁶³ Vitoria, *supra* note 3, p. 151.

⁶⁴ Pagden, *supra* note 15, p. 105.

⁶⁵ Various aspects of Vitoria's jurisprudence reveal this conservative tendency to favour the existing state of affairs. For example, he declares that the state has the right to use violence against "internal wrongdoers and seditious citizens". He argues that where the justice of a cause is in doubt, the benefit lies with the party in possession and that for ordinary citizens, that war is being waged by a public authority is sufficient evidence of its justice. Vitoria, *supra* note 3, pp. 166, 174.

⁶⁶ Tuck, *supra* note 6, pp. 72, 75.

of the Spanish authorities.⁶⁷ As a result, “the European state system’s legal discourse was ultimately liberated from its stultifying, expressly theocentric, medievalized moorings and was adapted to the rationalizing demands of Renaissance Europe’s secularized will to empire”.⁶⁸

I will now look in more detail at how Vitoria can be understood as constructing a model for the management of the Indians by the Spanish on this basis. First, he identifies a number of rights which are conferred by the rules of reason and humanity applying between nations. Vitoria finds the rules of his law of nations in a series of exclusively Western, Christian and European sources, all written by men. These he puts together so as to assemble a set of natural-law rules regulating their relations, supposedly accepted by all “civilised” societies.⁶⁹ By seeming to have its source in natural law, that is to say in that conception of what is humane and reasonable supposedly shared by all humanity, Vitoria’s law of nations manages to present an idealisation of particular Spanish political and cultural arrangements as universal.⁷⁰ However, in their application to the particular context of the Spanish colonisation of the Indies the supposed universality of Vitoria’s rules is quickly exposed for what it is.

The rights granted by Vitoria’s rules include nothing of particular novelty or surprise for the modern international lawyer. In today’s vernacular we might characterise them as rights to freedom of movement, freedom of trade, the common use of natural resources, citizenship, freedom of religion and humanitarian intervention.⁷¹ However, when they are translated from the level of abstract idea to concrete practice, what initially appear as universal rights become for the Indians nothing more than specific duties imposing limits on their freedom. The result is that it is unlawful for the Indians to refuse the Spanish entry to or expel them from their territories, obstruct them from trading, prevent them appropriating their natural resources or deny them citizenship. Freedom of religion amounted to a prohibition on the Indians impeding Spanish attempts to convert them to Christianity. The right to humanitarian intervention meant that the Indians could be forced to refrain from their cultural practices to the extent that these, at least in Spanish popular imagination if not in reality,⁷² departed from, for example, sexual, gender and dietary norms prevailing in Europe at the time. For instance, Vitoria states that:

Spaniards can stop all ... nefarious usage and ritual [such as that which allows the sacrifice of innocent people or the killing in other ways of uncondemned people for cannibalistic purposes] among the aborigines, being entitled to rescue innocent people from unjust death ... the natives can also be compelled to abstain from such ritual.⁷³

⁶⁷ Of course, this is not to say that Vitoria was a liberal, secular humanist, rather he was a theologian and a medieval scholastic, but simply that his arguments were open to appropriation for such ends. See Williams, *supra* note 33, pp. 97–98; Schmitt, *supra* note 15, pp. 105–106, 114–115; Niemelä, *supra* note 15, p. 325.

⁶⁸ Williams, *ibid.*

⁶⁹ *Ibid.*, p. 101.

⁷⁰ Anghie, *supra* note 2, p. 21.

⁷¹ Vitoria, *supra* note 3, p. 151–153, 156–159.

⁷² There is no evidence beyond the anecdotes of colonists to suggest that the Indians actually ate human flesh or practiced what Vitoria would have termed sodomy, bestiality, or incest. See Pagden, *supra* note 15, pp. 82–83.

⁷³ Vitoria, *supra* note 3, p. 159.

Having used the Indians' membership of a common humanity to justify their subjection to these apparently universal rules, Vitoria then takes a very different direction. In rather stark contrast to his supposed revindication of their human rights, he states that, in part thanks to "a bad and barbarous upbringing", the Indians seem "unintelligent and stupid".⁷⁴ They are reportedly "inept" and of marked "dullness of mind", such as infants or other "people of defective intelligence".⁷⁵ According to Vitoria:

[T]he aborigines in question ... really seem little different from brute animals and are utterly incapable of governing ... Although ... not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessities, of human life.⁷⁶

Their capacity for reason turns out to be nothing more than hypothetical. On this account, as Anghie explains, the Indian, as he exists in his particular manifestations as a product of his sociocultural context, will be simply incapable of complying with the rules which Vitoria's international law imposes on him.⁷⁷ Suddenly, what counts is not the ways in which the Indians are like the Spanish but the ways in which they are different. To this measure, their social arrangements and cultural practices are rendered inherently unnatural and unlawful.⁷⁸

3.3.3. The Law of War and Practices of Management: Vitoria's Concept of Responsibility

The aspect of Vitoria's jurisprudence, which has not yet been fully explored, and which is of importance for our purposes, is that not only is the Indian certain to violate international law, but he is also incapable of responsibility for his violations. Accountability being ultimately to God,⁷⁹ it is inherently beyond the Indian. For Vitoria, "pagans ... can never make amends for the wrongs and damages they have wrought".⁸⁰ When we come to Vitoria's law of war this turns out to be highly significant. Just as Vitoria has been considered a progressive defender of the human rights of the Indians, his law of war has also been applauded as greatly enlightened for its time. This is firstly for the reason that, at least on the face of it, it prohibits the waging of war for reasons of difference of religion, personal gain of a ruler or imperial expansion. According to Vitoria, "there is a single and only just cause for commencing a war, namely, a wrong received".⁸¹ This is given a rather wide interpretation: war may be justly

⁷⁴ *Ibid.*, pp. 127–128.

⁷⁵ *Ibid.*, pp. 128, 161.

⁷⁶ *Ibid.*, pp. 120, 160–161. *C.f.* Anghie, *supra* note 2, p. 20, arguing that Vitoria recognises a certain level of governance among the Indians.

⁷⁷ Anghie, *ibid.*, pp. 21–22.

⁷⁸ Pagden, *supra* note 15, pp. 79–80; *Ibid.*, pp. 22, 28–29.

⁷⁹ According to Vitoria, "we all have one common Lord, before whose tribunal we shall have to render account", *supra* note 3, p. 187.

⁸⁰ *Ibid.*, p. 181.

⁸¹ *Ibid.*, p. 170.

commenced so as to safeguard from future wrong, defend against imminent wrong and to avenge past wrong.⁸²

As with Vitoria's law of nations, it is in its translation from the abstract to the particular that his law of war starts to look considerably less benevolent. Vitoria states that, "when the Indians deny the Spaniards their rights under the law of nations they do them a wrong. Therefore, if it be necessary, in order to preserve their right, that they should go to war, they may lawfully do so."⁸³ In light of the fact that the Indian will inevitably be in violation of international law rules which revolve around Spanish social and political arrangements, the fact that such a violation (past, present or future) gives rise to a right to wage war suddenly seems somewhat one-sided. Should the Indians deny the Spanish entry to their lands or try to expel them, decline to trade with them or allow them to appropriate their natural resources, or should the Indians refuse to abstain from what the Spanish perceived as immoral practices, "it is a good ground for making war on them".⁸⁴ While their refusal to accept Christianity is not a basis for commencing hostilities against the Indians,⁸⁵ any attempts they might make to obstruct Spanish efforts at conversion would be, given that the law of nations affords Christians "a right to preach the gospel in barbarian lands".⁸⁶ Vitoria's claim that war cannot be waged for reasons of difference of religion, personal gain or imperial expansion appears in this light rather hollow.

The second basis on which the progressive nature of Vitoria's law of war is often presented is the limits it places on the conduct of war. Vitoria departs from the existing model here, again at least on the face of it, in that the *Requirimiento* justified unlimited harm being done to the Indians. Like much of Vitoria's law of nations, these limits on the lawful conduct of war will be immediately familiar to the student of modern international humanitarian law. They basically encompass the principles of distinction, proportionality, military necessity and humane treatment.⁸⁷ However, again, upon application to a war between the Spanish and the Indians all is not as altruistic as it seems. Due to the Indians' inherent lack of responsibility they are excluded from the benefit of many of the generally applicable limits:

[I]nasmuch as war with pagans is ... perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery ... Sometimes it is lawful and expedient to kill all the guilty ... this is especially the case against unbelievers from whom it is useless ever to hope for a just peace on any terms.⁸⁸

Given the role which Vitoria gives to fault and wrong as the basis of the right to wage war, it is perhaps not a surprise that responsibility, rather than humanitarianism, is at the centre of his law of war. Vitoria's rules regulating the conduct of war are presented as a universally

⁸² *Ibid.*, pp. 167–170.

⁸³ *Ibid.*, p. 154.

⁸⁴ *Ibid.*, pp. 154, 159.

⁸⁵ *Ibid.*, pp. 137–138.

⁸⁶ *Ibid.*, p. 156.

⁸⁷ *Ibid.*, pp. 171, 178 *et seq.*

⁸⁸ *Ibid.*, pp. 181, 183.

applicable framework for the redress and sanction of violations of international law and for the encouragement of future compliance. A violation of international law gives rise to a claim on the part of the injured party, enforceable through war, to restorative and punitive damages as well as war expenses.⁸⁹

Vitoria has no concept of attributable and non-attributable conduct: the enemy is bound to redress the wrongdoing of all its subjects. Should he fail to do so, the injured party can satisfy his claim even against innocent civilians.⁹⁰ In order to satisfy his claim, Vitoria's law of war vests in the injured party almost everything which he might imaginably capture during his just war. These include all "movables", such as money, garments, silver, and gold, even if their value exceeds what would be necessary to compensate the injured party for his losses. "Immovables", such as fortresses, towns and land, can be retained "as is just, in way of compensation for damages caused and expenses incurred and of vengeance for wrongs done".⁹¹ Finally, it is lawful for the injured party to "impose a tribute on conquered enemies, not only in order to recoup damages, but also as a punishment and by way of revenge".⁹²

In the abstract, Vitoria's responsibility is a matter of guaranteeing "peace and security" and the "happiness" and "good of the whole world" and of protecting the "good and innocent".⁹³ However, once again, when applied to the particular context of Spanish colonisation of the Indies, it does not quite work out like this. The Indians, being incapable of making amends, will seemingly always fail to redress their wrongdoing. This means that the Spanish will be able to satisfy their claims by undertaking hostilities against innocent civilians. In light of the fact that in practice it will always be the Spanish waging just war on the Indians, what are presented as universal limits on what is lawful in the conduct of war, translate into extensive rights for the Spanish to plunder, enslave and conquer the Indians and their territories. Once all peaceful means of enforcing the Indians' duties under the law of nations have been exhausted, the Spanish may "enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones".

In this way, *On the Indians and the Law of War* offered an alternative rationalisation for the practices which the Spanish were using to manage the Indians, much more palatable in light of the prevailing political circumstances than the *encomienda*, the Law of Burgos and the *Requirimiento*. Spain had found a legitimisation for its colonial project which enabled it to be defended against internal critics and European rivals independently of any external authority. The Indians could now be managed, through enslavement and taxation, and the colonies administered, through war and plunder, so as to serve the purposes of Spanish imperialism on the basis of a system of supposedly universal and objective rules drawn from reason and common humanity.

⁸⁹ *Ibid.*, p. 171–172.

⁹⁰ *Ibid.*, p. 181.

⁹¹ *Ibid.*, pp. 184–186.

⁹² *Ibid.*, p. 186.

⁹³ *Ibid.*, pp. 167, 172.

As Anghie argues, rather than championing Indian human rights, Vitoria's jurisprudence can be "read as a particularly insidious justification of conquest precisely because it is presented in the language of liberality and even equality".⁹⁴ Behind its talk of universality and objectivity, is constructed a series of narratives of exclusion and salvation. In these narratives "the violent and savage order is displaced, even vanquished, by the arrival of sovereign law ... [and] the legal order [is produced] as masculine, and the legal subject as male, while displacing both the feminine and female subject to a space that is outside the law".⁹⁵ The (racialised/feminised) Indians, trapped in the devastation and pillage of the colonised world, are portrayed as victims and the law of nations as the (masculinised) "agent of their rescue". The Spanish sovereign state is depicted as "the bounded and masculine subject" of that law of nations, erasing any non-male, non-Christian, non-white, non-European agency and identity. These stories (re)produce and reinforce a sequence of categories, structured along hierarchical binary distinctions: universal/particular, male/female, inside/outside, law/violence, civilised/savage.⁹⁶

Pagden notes that the "cannibal myth" has been used in numerous cultural and historical contexts to construct the outsider. It was no different in respect of the Indians, as he explains:

Nearly all supposedly eye-witness accounts of Amerindian cannibal rituals follow closely an established pattern. The link with human sacrifice, the propitiatory rites to placate the gods, the orgiastic wine-sodden 'mingling of males with females', the total collapse of an in any case fragile social order so that the proper distinction between the social categories male/female, young/old, kin/non-kin dissolves in a tumble of bodies 'devoid of any sentiment of modesty' and finally in the frenzied consumption of the sacrificial victim ... may be found ... in most European accounts of Indian cannibal festivities. The associations in all these fantastical accounts are clearly set out. The 'outsider', whatever the cause of his foreignness, is marked down, not only as a man-eater, but also as one who is willing to violate both the incest taboo and the traditional lines of social demarcation.⁹⁷

In this way, the arguments found in *On the Indians and the Law of War* serve what Spivak calls imperialism's "subject-constituting project": the configuration of a racialised/feminised and colonised other through which is consolidated the masculine imperialist self.⁹⁸ By marking out the Indian as other in this way, the savage and violent chaos of Indian society is contrasted with the law and order of the Spanish. The universal comes to be a synonym for that which is masculine, Christian and European. Granting the Indian a measure of international legal personality, rather than recognising his legitimacy as a full member of the human community, ends up being a means to control him for Spanish imperial purposes and to reinforce Spanish sovereignty.

⁹⁴ Anghie, *supra* note 2, p. 28.

⁹⁵ Buchanan and Johnson, *supra* note 19, pp. 132–133.

⁹⁶ *Ibid.*, p. 133.

⁹⁷ Pagden, *supra* note 15, pp. 80–83.

⁹⁸ Spivak, *supra* note 20, pp. 125, 130.

4. Vitoria's Relevance Today: The Responsibility of Rebel Movements

I will now move on to reflect on how the reconstruction of Vitoria set out above might help us to make better sense of present international law and practice regarding the responsibility of rebel movements. To begin I will set out the approach taken by the current mainstream international law scholarship in this respect and identify the narratives which situate and justify it. I will then demonstrate the limitations of this current mainstream approach in terms of its capacity to offer a plausible account of how we came to be where we are.

4.1. The Current Mainstream Approach

Since the early 1990s, there has emerged a growing body of literature in the fields of international humanitarian and international human rights law addressing rebel movements which, from the turn of the millennium onwards, has increasingly focused on the question of their responsibility.⁹⁹ The overwhelming trend therein is to present the lack of a system of international rules providing for the responsibility of rebel movements as a self-evident gap in international law.¹⁰⁰ We can identify a number of assumptions upon which this gap's apparent self-evidence is constructed. The first is that rebel movements are a problem to which it is necessary and appropriate that international law respond. That is to say, it is assumed that international law has a "legitimate and increasing interest" in rebel movements.¹⁰¹ However, the recent nature of the scholarship prompts questions about where this interest has come from.

The literature offers an account of this growing concern in which the responsibility of rebel movements is presented as an essential next step in the history of the progressive development of international law.¹⁰² This narrative of progress tells us that order between

⁹⁹ L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, Cambridge, 2002) remains the seminal piece in this respect.

¹⁰⁰ See, e.g., Zegveld, *ibid.*, who devotes an entire section to "the accountability gap"; E.-C. Gillard, 'Reparation for Violations of International Humanitarian Law', 85 *International Review of the Red Cross* (2003) p. 535; J. K. Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes', in H. van der Wilt *et al.* (eds.), *System Criminality in International Law* (Cambridge University Press, Cambridge, 2009) pp. 259–260; A. Constantinides, 'Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council', 4 *Human Rights and International Legal Discourse* (2010) p. 89; R. Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups', 93 *International Review of the Red Cross* (2011) p. 789; C. Ryngaert and A. van de Meulebroucke, 'Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: An Inquiry into Some Mechanisms', 16 *Journal of Conflict and Security Law* (2011) p. 464.

¹⁰¹ Zegveld, *ibid.*, p. 3.

¹⁰² M. C. Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights', in M. C. Bassiouni (ed.), *Post-Conflict Justice* (Transnational, Ardsley, NY, 2002) pp. 383–384; Zegveld, *ibid.*, pp. 1–3; M. C. Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors', 98 *Journal of Criminal Law and Criminology* (2008) p. 711; V. Bilkova, 'Treat Them as They Deserve!? Three Approaches to Armed Opposition Groups under Current International Law', 4 *Human Rights and International Legal Discourse* (2010) p. 111; A. Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement', *Geneva Academy of International Humanitarian Law and Human Rights, Ownership of Norms Project – Toward a Better Protection of Civilians in Armed Conflicts, Draft for comment* (February 2010) p. 3; Constantinides, *supra* note 100, pp. 90–91; M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve

sovereign states, the discipline's founding concern, can no longer be its *raison d'être*. This is due first to the crisis in which the state-centric international order finds itself. The demarcation of state and non-state actors is blurring and action increasingly being taken by a multiplicity of actors acting in interdependent, interrelating and intersecting ways. In today's world, ever more globalised, with its technological developments and rising quantity of failed states, war has been transformed.¹⁰³ Rebel movements are, as a result, growing in number, influence and impact.

At the same time as state power wanes, humanity is marching inexorably on towards its destiny: the creation of a global community based on shared moral values with the rule of law and the primacy of individual rights at its centre. This has implicated, both inevitably and desirably, international law's transformation into a system of public order aimed at universal justice for human beings. It can no longer be a de-centralised system of co-existence and co-operation among states, fundamentally contractual in nature and without higher transnational purpose.¹⁰⁴ While traditional international law might have therefore had nothing to say about rebel movements, this is no longer acceptable. Rebel movements, a mounting threat to the liberal cosmopolitan values upon which modern international law is based, require an international law response.

This narrative is the jumping off point for a series of further assumptions which structure the path taken by the current mainstream approach. First is that rebel movements have primary obligations under international law.¹⁰⁵ When they violate these obligations responsibility must follow.¹⁰⁶ The existing mechanisms in this respect, individual responsibility under international criminal law and state responsibility under the ILC's Draft Articles,¹⁰⁷ are

Their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* (2010) pp. 7–8; Dudai, *supra* note 100; L. Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda', *Queen's University Belfast School of Law: Research Paper 2013-20* (2013) pp. 8–9.

¹⁰³ This is the so-called New Wars theory. See, e.g., M. van Creveld, *The Transformation of War* (Free Press, New York, 1991); M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Polity Press, Cambridge, 1999); H. Münkler, *The New Wars* (Polity Press, Cambridge, 2005).

¹⁰⁴ This has been referred to as international law's 'constitutionalisation' and 'cosmopolitanisation', 'moralisation' or 'humanisation'. See, e.g., T. Meron, *The Humanization of International Law* (Martinus Nijhoff, Leiden, 2006); S. Kadelbach and T. Kleinlein, 'International Law: a Constitution for Mankind?: An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles', 50 *German Yearbook of International Law* (2007) p. 303; J. Klabbers *et al.* (eds.), *The Constitutionalization of International Law?* (Oxford University Press, Oxford, 2009); A. Peters, 'Humanity as the Λ and Ω of Sovereignty', 20 *European Journal of International Law* (2009) p. 513; A. A. Cancado Trindade, *International Law for Humankind, Towards a New Jus Gentium* (Martinus Nijhoff, Leiden, 2010).

¹⁰⁵ See, e.g., J.-M. Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law', 27 *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors, 25–26 October 2002* (2003) p.123; A.-M. La Rosa and C. Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law', 90 *International Review of the Red Cross* (2008) pp. 327–328; Kleffner, *supra* note 100, p. 242; Constantinides, *supra* note 100, p. 91; Dudai, *supra* note 100, pp. 784–785; Ryngaert and van de Meulebroucke, *supra* note 100, p. 443–444; Moffett, *supra* note 102, p. 4.

¹⁰⁶ See, e.g., Gillard, *supra* note 100, p. 535; Kleffner, *ibid.*, pp. 258–259.

¹⁰⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001).

inherently inadequate: they are too limited, in terms of both scope and nature.¹⁰⁸ Finally, the remedy must take the form of a codified system of international law rules imposing secondary obligations directly upon rebel movements as such. This succession of assumptions seems to flow naturally and inexorably, one on to the next, because, simply put, anything else would be incompatible with the rule of law and the primacy of individual rights.

4.2. The Limitations of the Current Mainstream Approach

For all its pleasing simplicity and formal completeness, the current mainstream approach, with its liberal cosmopolitan narrative of progress, does not offer a convincing account of contemporary international law and practice when it comes to the international responsibility of rebel movements. It does not offer a credible explanation of how we came to be in our present situation. For a start, while it is presented as common knowledge that rebel movements are a rising menace,¹⁰⁹ the upsurge in the literature seems to have coincided with an apparent decrease in the empirical phenomenon. The proliferation of intra-state armed conflict seemingly peaked in the early 90s.¹¹⁰ Despite the perceived dominance of internal over international armed conflict since the Second World War, battle deaths between 1946 and 2002 were shared fairly equally between the two.¹¹¹ Recent research has suggested that less people were killed in war in the last decade than in any of the previous six.¹¹²

It is not only that the influence of rebel movements may be decreasing in absolute terms. There are also indications that their impact relative to that of other actors is limited.¹¹³ If we are thinking about prevalence and levels of violence, urban gangs might seem a more obvious focus for attention.¹¹⁴ Yet such groups are generally not considered a matter for international law. What is more, the empirical data also indicates that the extent of the atrocities committed by rebel movements is highly conflict specific.¹¹⁵ It might seem, therefore, that international law's "restricted vision of the scope and significance of armed groups ... is increasingly

¹⁰⁸ See, e.g., Zegveld, *supra* note 99, pp. 220–228; Sassòli, *supra* note 102, p. 9–10; Ryngaert and van de Meulebroucke, *supra* note 100, p. 565.

¹⁰⁹ See, e.g., Zegveld, *ibid.*, pp. 1–2; Constantinides, *supra* note 100, pp. 90–91; Dudai, *supra* note 100, p. 783.

¹¹⁰ Although the Arab Spring has seen a recent spike, the overall trend over the last two decades has been downwards according to L. Themnér and P. Wallensteen, 'Armed Conflict, 1946–2012', 49:4 *Journal of Peace Research* (2013) p. 565.

¹¹¹ Internal and internationalised armed conflict accounted for 52 per cent of battle deaths during this period according to B. Lacina and N. P. Gleditsch, 'Monitoring Trends in Global Combat: A New Dataset of Battle Deaths', 21:2–3 *European Journal of Population* (2005) p. 157.

¹¹² Based on data available up to the end of 2008. Lacina and Gleditsch, *ibid.*

¹¹³ Only 10 per cent of all violent deaths around the world each year occur in conflict situations according to the Geneva Declaration on Armed Violence and Development, *Global Burden of Armed Violence 2011* (2011) p. 1.

¹¹⁴ Gang violence (along with organised crime) made El Salvador the country worst affected by lethal violence between 2004–2009. Jamaica, Honduras, Venezuela, Guatemala, and South Africa, other countries which are not conventional war zones, also feature high on the list of the world's most violent countries during this period. *Ibid.*, p. 6. Making the same point see K. Krause and J. Milliken, 'Introduction: The Challenge of Non-State Armed Groups', 30 *Contemporary Security Policy* (2009) p. 202.

¹¹⁵ *Cf.*, e.g., the troubles in Northern Ireland with the civil wars in El Salvador and Guatemala. Report of the Truth Commission for El Salvador, *From Madness to Hope: The 12 Year War in El Salvador* (1993) p. 43; Report of the Commission for Historical Clarification, *Guatemala: Memory of Silence – Conclusions and Recommendations* (1999) para. 15; regarding Northern Ireland see Moffett, *supra* note 102, p. 11.

distant from the reality of contemporary armed groups and the conflicts in which they engage”.¹¹⁶ We may even want to look beyond armed groups. Once we add up the Bhopal disaster and Agent Orange, it would seem difficult to find many contemporary rebel movements with as much blood on their hands as Monsanto. Yet it has proved extraordinarily difficult to achieve any consensus about the international obligations of multi-national corporations.¹¹⁷

This brief foray into empirical data is not an attempt to prove or disprove anything in particular about rebel movements and civil war. The point is rather that, given the inherent malleability of statistical information,¹¹⁸ how rebel movements are presented, as a growing scourge or as morally ambiguous entities in decline, reflects a normative choice rather than an observable reality. The liberal cosmopolitan narrative cannot explain why the international responsibility of rebel movements is a pressing concern now when it was not in 1980. Nor can it explain the focus on rebel movements over other non-state (armed) actors. In simple terms, it does not offer a plausible account of the inclusion of rebel movements in the expanding scope of international jurisdiction. Once put in context it no longer quite adds up.

From here, the fragility of the remaining assumptions which take this narrative as their foundation becomes rapidly evident. The current mainstream approach has always found it difficult to rationalise the existence of rebel movements’ primary obligations. The adoption of Common Article 3 to the Geneva Conventions in 1949 is generally considered a watershed moment in this respect.¹¹⁹ Yet rebel movements and their responsibility remained of little interest to international law until decades afterwards. In fact, Common Article 3 heralded an era in which rebel movements have never been less visible to international eyes, focused as they were on the conduct of states in repressing wars (perceived to be) of national liberation and their use of proxies to fight the ideological battle of the Cold War.

It has simply proved impossible to find a convincing explanation for rebel movements being bound by international law by reference to its traditional sources.¹²⁰ Nevertheless, the majority of the literature, while generally acknowledging that this issue remains unresolved, has simply moved on to consider enhancing compliance and ensuring accountability in case

¹¹⁶ Krause and Milliken, *supra* note 114, p. 202.

¹¹⁷ See, e.g., R. Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, Leiden, 2012).

¹¹⁸ The Lacina and Gleditsch report, *supra* note 111, was subject to a well-publicised controversy. See M. Spagat *et al.*, ‘Estimating War Deaths: An Arena of Contestation’, 53 *Journal of Conflict Resolution* (2009) p. 934.

¹¹⁹ Zegveld, *supra* note 99, pp. 9 *et seq.*; J. Somer, ‘Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict’, 89 *International Review of the Red Cross* (2007) p. 656; La Rosa and Wuerzner, *supra* note 105, p. 328; Kleffner, *supra* note 100, p. 247; Clapham, *supra* note 102, pp. 6 *et seq.*; Sassòli, *supra* note 102, p. 12; A. Bellal *et al.*, ‘International Law and Armed Non-State Actors in Afghanistan’, 93 *International Review of the Red Cross* (2011) pp. 53 *et seq.*; Ryngaert and van de Meulebroucke, *supra* note 100, p. 444; Moffett, *supra* note 102, p. 4.

¹²⁰ See A. Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’, 30 *International and Comparative Law Quarterly* (1981) p. 416; S. Sivakumaran, ‘Binding Armed Opposition Groups’, 55 *International and Comparative Law Quarterly* (2006) p. 369.

of violations.¹²¹ Marco Sassòli's conclusion that, "while it is controversial why armed groups are bound by international humanitarian law, it is uncontroversial that they are bound by certain international humanitarian law rules" sums up current mainstream thinking.¹²² I do not dispute the existence of an overwhelming consensus that international law is binding for rebel movements both in the scholarship and in the practice of international tribunals.¹²³ Yet Sassòli's assertion might lead us to wonder why the agreement about the fact that rebel movements are bound by international law is considered the significant point rather than the disagreement about how they are bound. The current mainstream approach cannot account for the origin or foundation of the consensus regarding rebel movements' primary obligations.

Once the story of international law's progressive development inevitably bringing rebel movements within scope is dismantled and their primary obligations can no longer be assumed, the self-evidence of the necessity of a framework for the direct responsibility of such groups also starts to disintegrate. Finally, despite everything that the current mainstream approach and its liberal cosmopolitan narrative tell us, there has been little, if any, progress towards the development and implementation of a framework of secondary rules for the responsibility of rebel movements.¹²⁴ Notwithstanding its perceived urgency, there is something about such a system that has prevented its emergence in practice. Indeed, it poses serious theoretical and practical challenges not only to international responsibility itself, its relation to fault and harm, and its means of implementation, but also to some of international law's key categories, concepts, procedures and structures, such as its subjects and sources. The mainstream, however, seems unaware of the grenade it is throwing into international law's often delicate foundations.

4.3. Telling a Different Story: Re-Thinking the Responsibility of Rebel Movements

We have seen how the liberal cosmopolitan narrative makes the inclusion of rebel movements in the expanding scope of international jurisdiction appear obvious or natural and their responsibility as essential and inevitable as part of a story of the progressive development of international law. In a number of ways our reading of Vitoria can help us to disrupt this narrative by revealing the contingency of this present situation and exposing the legacy of international law's imperial past. We saw how Vitoria's recognition of a measure of international legal personality on the part of the Indians ultimately served so as to produce and consolidate Spanish sovereignty and to justify their management for Spanish imperial

¹²¹ See *supra* note 105.

¹²² Sassòli, *supra* note 102, p. 14.

¹²³ The Special Court for Sierra Leone, for example, has felt able to state, without referring directly to any state practice or judicial authority, that, "it is *well-settled* that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law". *Prosecutor v. Sam Hinga Norman*, 31 May 2004, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para. 22 (emphasis my own).

¹²⁴ J.-M. Henckaerts and L. Doswald-Beck, *International Customary Humanitarian Law, Volume I: Rules* (ICRC, Geneva, 2005) pp. 536, 549–550; International Law Association, *Hague Conference Report on Reparation for Victims of Armed Conflict: Reparation for Victims of Armed Conflict (Substantive Issues)* (2010) pp. 12–13.

purposes. I propose that this reading of Vitoria opens the way to a re-examination of what the recent expansion of the scope of international law so as to address rebel movements really represents.

4.3.1. The “Perverse Implantation” Part 1:¹²⁵ Rebel Movements and the Subject-Constituting Project

Vitoria’s reconfiguration of the limits of the international legal order so as to incorporate the Indians is presented as bringing it into line with liberal humanistic values. Yet I have argued that by constructing the Indians’ legal personality on the basis of the extent to which their existence compares to that of the Spanish, it turns out to be nothing more than a means through which Spanish subjecthood is constituted. I suggest that this reading of Vitoria might prompt us to reconceptualise the inclusion of rebel movements in international jurisdiction as a reinforcement, rather than a weakening, of the primacy of the sovereign state in the international legal order. For just as Vitoria’s Indians are only intelligible by reference and comparison to the Spanish, rebel movements are generally understood by reference and comparison to states.

International law traditionally only takes non-state armed groups into account when they pose a direct threat to “the Westphalian project of constructing sovereign states that possess ... [a] monopoly over the legitimate use of force within a given territory”.¹²⁶ This becomes evident if we think, for example, of urban gangs and organised crime. In contrast to rebel movements, there is no consensus regarding these groups having international law obligations. This is equally true of multi-national corporations. None of these groups can be understood in simple opposition to the sovereign state. They are often transnational in character and do not, or at least not directly or principally, aim to challenge state claims to legitimate authority in a particular territory, although in effect their impact may often be to undermine such claims. We therefore see a much greater tendency to push them beyond the peripheries; for they do not serve the ‘subject-constituting project’. This would seem to offer a more convincing explanation of why it is rebel movements which have been brought within the international legal order even though other groups may be more harmful in human terms.

From this it is apparent that both state and rebel movement are normative concepts, produced rather than described by international law. We saw how Vitoria’s law of nations served to constitute the Spanish sovereign subject by constructing the Indian as the ‘other’. Re-reading Vitoria demonstrates how international law, through its regulation of the colonial encounter, functioned as part of the constitution and reinforcement of the idea of the sovereign state, rather than as a reflection of its material pre-existence. Vitoria’s international law was not a matter of bringing order to a world of sovereign states already in existence. The law of nations elaborated in *On the Indians and the Law of War* was a question of the relations

¹²⁵ My reference to the “perverse implantation” here is an extrapolation of Michel Foucault’s arguments regarding the appearance of a multitude of “peripheral sexualities” in Victorian discourses about sex in *The History of Sexuality, Volume I: An Introduction* (R. Hurley tr., Pantheon Books, New York, 1978) pp. 36 *et seq.*

¹²⁶ Krause and Milliken, *supra* note 114, p. 202.

between two entities, Spanish and Indians, within a hierarchical spectrum of actors and the recognition and legitimisation of the authority of one over the other.¹²⁷

If this was the challenge posed by colonialism to Vitoria's international legal order, it also seems to be the same challenge posed, historically and in the present day, by civil war and rebel movements to international law. Both are a matter of resolving conflict about which is the legitimate authority within a particular political society or, that is to say, the distinction between law and violence. Drawing such distinction is dependent upon the illegitimate violence of the other: for the "construction of that which is deemed law ... rests on the violent world of non-law".¹²⁸ Fundamental to this process is the inscription of a boundary between the illegitimate violence of non-law and the legitimate authority of law, between outside and inside, chaos and order, savagery and civilisation.

The accommodation of rebel movements within the international legal order therefore should not be seen as "a sign that the code has become more lax".¹²⁹ It is not the recognition of the prior existence of such groups as a problem that international law needs to solve. Rather it is a matter of the inscription of this boundary between law and violence. The rebel movement is produced by international law so as to proliferate to the margins, to the limits where law meets violence and where civilised order meets savage chaos. It is constructed as international law's 'other' through which the state is constructed as its sovereign subject. It provides the non-law to the state's law and the illegitimate violence to the state's legitimate authority. These are the very same boundaries which we saw being constructed in *On the Indians and the Law of War*. Therefore, rather than the state-centric international order being a historical fact from which international law is now trying to move on, we see instead that it is a construction which international law still functions so as to uphold.

The purpose served by the Indians and rebel movements as the 'other' to international law's sovereign subject explains why the current mainstream approach to the responsibility of rebel movements shares with Vitoria a tendency to oversimplify the world, as well as a complete decontextualisation.¹³⁰ Vitoria had no interest in interrogating whether the Indians really ate human flesh; for, as we have seen, the cannibal myth was a key aspect of colonialism's discourse of 'other-ing'. Equally, he saw no need to distinguish between them:

A concrete discussion would have to examine the matter case by case. For example, the situation of Cortez in Mexico might be completely different from that of Pizarro in Peru, so that the war in Mexico could prove to be just and the war in Peru unjust. However, the scholastic account keeps a normative distance from the matter. Its theses are concerned only with arguments; its conclusions are not directly related to the concrete historical case.¹³¹

¹²⁷ Anghie, *supra* note 2, pp. 15–16; Pagden, *supra* note 15, p. 65.

¹²⁸ N. Blomley, 'Law, Property and the Geography of Violence: The Frontier, the Survey, and the Grid', 93 *Annals of the Association of American Geographers* (2003) p. 124, quoted in Buchanan and Johnson, *supra* note 19, p. 140.

¹²⁹ Foucault, *supra* note 125, p. 40.

¹³⁰ Niemelä, *supra* note 15, p. 337.

¹³¹ Schmitt, *supra* note 15, pp. 109–110.

In the same way, international lawyers today pay little attention to the reality of rebel movements. If, instead of reducing rebel movements to one dimension, international law stopped to recognise them in all their diversity, complexity and nuance, we might suddenly find their ‘other-ness’ start to evaporate. If we paused to try and understand rebel movements in their particular concrete manifestations, to try and comprehend why someone would leave home and family to go up into the mountains and take up arms against their government, international law might actually finally undergo a humanisation. The naivety and hypocrisy of its pre-fabricated abstract universal solutions might become all at once too apparent.

What is more, we might realise that, despite international law’s desperate efforts to make it appear otherwise, rebel movements are not really so different from states. Just as in the 16th century the Indians were not conceived of as anything more than “a supplement to more imperative, European-defined goals”, the same is true today when it comes to rebel movements and states, and supplements, as we know, can be dangerous.¹³² For if the rebel movement can supplement the state, it reveals that the state has “a lack which can be fulfilled”.¹³³ Hopefully it has already become apparent what it is missing: that is, an account of the source and legitimacy of its sovereign authority. “The supplementary capacity of the [rebel movement] demonstrates that [the state] already possesses that which we dislike about [the rebel movement]”:¹³⁴ the use of violence to found a political community.¹³⁵ This deconstruction exposes what international law has always wanted to hide: that the state is incomplete and intangible, itself only a metaphor for the legitimate authority whose truth we can never ultimately know nor reality experience. It reminds us that the state cannot be the foundational concept of international law. Rather, international law is and has always been a matter of the privileging of the concept of the state over other forms of political organisation.¹³⁶

In light of this, I propose that we might come to a better understanding of the situation which currently faces us in respect of the responsibility of rebel movements if we thought about international law differently. I suggest that we would do better to consider it as “a record of attempts to think about what happens at the limit of modern political organization” rather than as a provider of “pre-packaged” solutions for political problems.¹³⁷ Thought about like this, our reading of Vitoria and of the responsibility of rebel movements challenges the idea that there is something “timeless or natural” about the organisation of authority and violence in today’s world.¹³⁸ Rather, how we respond to questions about which is the legitimate authority within a particular political society is a choice. We saw how the model adopted in

¹³² This is, of course, a reference to the concept of a “dangerous supplement” developed by J. Derrida in *Of Grammatology* (G. C. Spivak tr., John Hopkins, Baltimore, 1997).

¹³³ J. M. Balkin, ‘Deconstructive Practice and Legal Theory’, 96 *Yale Law Journal* (1987) p. 759.

¹³⁴ *Ibid.*

¹³⁵ A. Orford, ‘Feminism, Imperialism and the Mission of International Law’, 71 *Nordic Journal of International Law* (2002) p. 287.

¹³⁶ Balkin, *supra* note 133, pp. 759–761.

¹³⁷ A. Orford, ‘A Jurisprudence of the Limit’, in A. Orford (ed.), *International Law and Its Others* (Cambridge University Press, Cambridge, 2006) p. 2.

¹³⁸ J. Cockayne, ‘The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law’, 88 *International Review of the Red Cross* (2006) p. 459.

this respect in each case reflected a particular vision of authority and responded to particular historical processes, contingent events and powerful interests.

The dichotomies which seemed to put rebel movements inescapably beyond international law's grasp, state/non-state actor, inter/intra-state conflict, international/domestic jurisdiction, enemy/criminal, are no different, even though it is hard for us to conceive of international law otherwise. They are part of the production and consolidation of a particular configuration of authority rather than the reflection of a prior truth about the nature of international law, international society or war. These categories do not exist in Vitoria's thinking. Resolving conflict about which is the legitimate authority within a particular political society and distinguishing law from violence was, as we have seen, for Vitoria a question of enquiring into the justice of the cause. While far from offering a theory of revolution,¹³⁹ this left it open for anyone to wage war, even private individuals.¹⁴⁰

The transformation of war other than between sovereign states into rebellion, a domestic matter, was a product of the development of the idea that the legitimacy of an authority was a matter of its having "firm and effective control over territory and populations".¹⁴¹ This was part of the culmination of the same process of re-configuration of power relations in Europe within which we situated Vitoria: as medieval became modern, "a juridical system ... predicated on the state" replaced "the theological system ... predicated on the church".¹⁴² Today, ideas about legitimate authority are changing again.¹⁴³ The legitimacy of authority is now judged by reference to the values of liberal cosmopolitan internationalism. This sheds new light on the re-transformation of rebellion (back) to war and its return to international jurisdiction.¹⁴⁴

We see therefore that the history of rebel movements in international law has not been one of their seamless and continuous advance from beyond the outer limits of scope towards the centre. Rather, they have shifted in and out of international law's field of vision. Despite what the liberal cosmopolitan narrative tells us, international law has always been used as a means to manage and control rebel movements, even if at one point this took the form of their exclusion within domestic jurisdiction (and even then they were never entirely invisible).¹⁴⁵

¹³⁹ See *supra* note 65.

¹⁴⁰ Vitoria, *supra* note 3, pp. 167–170. *C.f.* Anghie, *supra* note 2, p. 26, arguing that the Indians "are by definition incapable of waging a just war". While we have seen that in practice it will always be the Spaniards with justice on their side, it does not seem tenable, however, that the Indians are *by definition* excluded from waging war, as Vitoria states that, "the Indians themselves sometimes wage lawful wars with one another", *supra* note 3, p. 160.

¹⁴¹ A. Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, Cambridge, 2011) p. 14.

¹⁴² Schmitt, *supra* note 15, p. 121.

¹⁴³ Orford, *supra* note 141, pp. 13–16.

¹⁴⁴ And also, perhaps, the widespread perception that the number of failed states has grown recent decades, which as we saw is a part of the current mainstream approach's explanation for rebel movements' increasing influence.

¹⁴⁵ During the 18th and 19th centuries, typically seen as the apogee of international law's state-centrism, we see the development of the doctrines of belligerency and insurgency and the responsibility for the conduct of rebel movements being addressed in the practice of international arbitral tribunals. Regarding the former, see A.

For this is essential to international law's subject-constituting project. Although international law would have us believe otherwise, the sovereign state has always been in crisis, the legitimacy of its authority in constant need of reinforcement through international law. This necessitates the construction of a non-sovereign 'other' through which its sovereignty can be constituted and in opposition to whose violence its law can be distinguished. The apparently recent appearance of rebel movements in the international legal order due to its progressive development towards its liberal cosmopolitan destiny is, in fact, best understood as a re-appearance, their renewed visibility a testament to changing configurations of power.

4.3.2. The “Perverse Implantation” Part 2: Responsibility as a Model for Management

Vitoria's recognition of a measure of international legal personality on the part of the Indians did not only function to produce and consolidate Spanish sovereignty. It also served to justify their management for Spanish imperial purposes. In the liberal cosmopolitan narrative, the recent inclusion of rebel movements in international jurisdiction is perceived as signifying a maturity on the part of international law. It is presented as part of a new openness to recognise a wider range of actors in the international legal order, to look past the state so as to regulate any and all conduct that does harm to modern international law's human values: the rule of law and primacy of individual rights. I propose that my reading of Vitoria leads us to question whether it does not, rather than amounting to a liberalisation, in fact “testify to a stricter regime and its concern to bring [rebel movements] under close supervision”, to manage them for its own purposes.¹⁴⁶

We have seen that just as Vitoria constructed the Indians' legal personality on the basis of the extent to which their existence compared to that of the Spanish, rebel movements appear in international law's vision to the extent that they look like states.¹⁴⁷ Having control over territory and the capacity to protect populations is generally a pre-condition for the application of the primary obligations of rebel movements.¹⁴⁸ These obligations are those same ones which apply equally and reciprocally to states. Likewise, the recognition that Indians and Spanish shared a capacity for reason functioned as the justification for the regulation of their conduct by universal and reciprocal international law standards. Regarding Vitoria, it has been argued that, rather than being liberal and egalitarian, it appears “absurd and condescending” to grant reciprocal rights and impose reciprocal obligations on two

Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, Cambridge, 2010) pp. 5–23; S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, Oxford, 2012) pp. 9–29. Regarding the latter, see H. Silvanie, ‘Responsibility of States for Acts of Insurgent Governments’, 33 *The American Journal of International Law* (1939) p. 78.

¹⁴⁶ Foucault, *supra* note 125, p. 40.

¹⁴⁷ Krause and Milliken, *supra* note 114, p. 202.

¹⁴⁸ See, e.g., Article (1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva Convention Protocol II). *C.f.* Common Article 3 to the Geneva Conventions 1949. There also seems to be growing practice to suggest that de facto control over territory is the basis for rebel movements' human rights obligations. See, e.g., the practice of the UN Office of the High Commissioner for Human Rights cited in A. Bellal, ‘Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution’, in N. Gal-or *et al.* (eds.), *Responsibilities of the Non-State Actor in Armed Conflict: Theoretical Considerations and Empirical Findings* (Brill, Leiden, 2014).

entities that, in the reality of the actual contexts in which they encountered each other, were so different.¹⁴⁹ I see no good reason why we might not say the same in respect of rebel movements and states.

Furthermore, while Vitoria's law of nations was supposedly a matter of universal standards of reason and humanity, it was in fact derived from exclusively European Christian sources. In practice, it amounted to an idealisation of Spanish social and political arrangements. And while it is alleged to be reciprocal, we saw that, given the divergences between Spanish and Indians which existed in practice, it functioned so as to impose obligations on the Indians and grant rights to the Spanish. Equally, the international humanitarian law which applies to rebel movements has been drawn from standards developed in (European) inter-state conflicts and designed initially with states in mind.¹⁵⁰ International human rights law similarly reflects the political arrangements of (Western) states.¹⁵¹ In the same way that the normal limits on the conduct of war which in Vitoria's law of war apply between Christian peoples do not apply in war with the Indians, rebels do not benefit from the same gamut of protections as forces fighting in inter-state wars.¹⁵² Yet they have many of the same obligations when it comes to the protection of civilians. Nevertheless it seems unthinkable that a rebel movement might be able to enforce a state's obligations in this respect, for example regarding the treatment of civilians in territory under its control, just as was the idea of the Indians enforcing their right to, say, freedom of movement against the Spanish.

The Indians' inevitable violations of the law of nations trigger their responsibility: the application of another apparently reciprocal set of rules for the redress and sanction of such violations and for the encouragement of future compliance in the form of Vitoria's law of war. This is the final step which is supposedly to come when it comes to rebel movements, a finishing touch in the progressive development of international law towards its liberal cosmopolitan destiny. Vitoria's framework for responsibility was presented in the abstract as universal, a matter of guaranteeing peace and security and protecting the good and innocent, essential for the well-being of all mankind. Yet we saw how in practice it amounted to a rationalisation of the practices which the Spanish were using to manage the Indians and administer the colonies. Despite being presented as a series of obligations limiting when war can be undertaken and how it can be waged, it in fact functioned so as to confer right and title to govern the colonised world on the Spanish.

¹⁴⁹ Niemelä, *supra* note 15, p. 335.

¹⁵⁰ Frédéric Mégret notes that Henry Dunant was inspired by the Battle of Solferino and the Hague Conference of 1870 by the Franco-Prussian and Crimean conflicts. F. Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"', in A. Orford (ed.), *International Law and Its Others* (Cambridge University Press, Cambridge, 2006) p. 270. When standards were being developed for intra-state conflicts they were simply transposed across from the principles which already applied in inter-state conflicts. Even then, Common Article 3 was drafted with the Second World War, and the horrors committed by states against their own (white European) citizens, rather than civil wars and rebel movement atrocities, in mind.

¹⁵¹ See, e.g., M. Mutua, 'Politics and Human Rights: An Essential Symbiosis', in M. Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, Oxford, 2000).

¹⁵² For example, they do not get prisoner of war status.

This understanding of Vitoria was based on reading it as a ‘political intervention’ in a certain context and in particular relations of power. The relations of power in which the current debate about the responsibility of rebel movements operates are very different to those in which Vitoria’s jurisprudence was situated. In Vitoria’s time we saw the modern sovereign state system beginning to emerge out of the existing medieval system of feudal principalities gathered under an authority derived ultimately from the pope. Today we see an expanding “international executive authority”.¹⁵³ This has emerged out of the power vacuum left by decolonisation and the end of the Cold War,¹⁵⁴ “developed through the expansion of practices aimed at maintaining peace and protecting life in the decolonised world”.¹⁵⁵ These practices have included fact-finding, monitoring, reporting, technical assistance, diplomacy, peace-keeping and humanitarian relief aid.

The post-Cold War period has seen an extensive and ever increasing engagement with rebel movements by international organisations, most notably by the United Nations (UN) but also by other regional bodies and international non-governmental organisations (NGOs). Since the early 90s, the Security Council has in numerous country/conflict specific resolutions called on rebel movements to comply with international law and imposed targeted sanctions in cases of violations.¹⁵⁶ Since 1999 it has also addressed rebel movements through a series of thematic resolutions and presidential statements on the protection of civilians in armed conflict.¹⁵⁷ The Secretary-General also reports annually on this matter, with rebel movements’ compliance with international law being a priority area.¹⁵⁸

In 1990 the Commission on Human Rights requested all of its monitoring mechanisms to start reporting on rebel movements.¹⁵⁹ In 2005 the Security Council set up a monitoring and reporting mechanism on the use of child soldiers which explicitly contemplated the establishment of dialogue with rebel movements within its framework.¹⁶⁰ Other notable UN monitoring mechanisms include the Secretary-General’s annual reports on children and armed conflict and conflict-related sexual violence in which he names and shames rebel

¹⁵³ Orford, *supra* note 141.

¹⁵⁴ *Ibid.*, pp. 3–6.

¹⁵⁵ *Ibid.*, p. 12.

¹⁵⁶ For detailed considerations of this practice, *see, e.g.*, P. H. Kooijmans, ‘The Security Council and Non-State Entities as Parties to Conflicts’, in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (Martinus Nijhoff, The Hague, 1998); A. Franco, ‘Armed Nonstate Actors’, in D. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers, Boulder, 2004); C. Tomuschat, ‘The Applicability of Human Rights Law to Insurgent Movements’, in H. Fischer *et al* (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berliner Wissenschafts-Verlag, Berlin, 2004); Constantinides, *supra* note 100; Bellal, *supra* note 148. The General Assembly has also addressed rebel movements in its resolutions. This practice is discussed by, *e.g.*, Tomuschat.

¹⁵⁷ *See, e.g.*, the most recent of these, Resolution 1894 (UN Doc S/RES/1894); Presidential Statement (UN Doc S/PRST/2014/3). For a summary as of 2010, *see* Constantinides, *supra* note 100, pp. 103–105.

¹⁵⁸ *See, e.g.*, the most recent report *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (UN Doc S/2013/689).

¹⁵⁹ Resolution 1990/75 (UN Doc E/CN.4/RES/1990/75). The Inter-American Commission on Human Rights began addressing the conduct of rebel movements in its country reports during the 1980s. For a discussion of Inter-American practice *see, e.g.*, C. M. Cerna, ‘The History of the Inter-American System’s Jurisprudence as Regards Situations of Armed Conflict’, 2 *International Humanitarian Legal Studies* (2011) p. 3.

¹⁶⁰ Resolution 1612 (UN Doc S/RES/1612).

movements in violation of international law.¹⁶¹ UN fact-finding missions, such as the International Commissions of Inquiry on Darfur and Syria, the Panel of Experts on Accountability in Sri Lanka and the Goldstone Inquiry, have addressed rebel movement compliance and accountability in their reports.¹⁶² There has also been an increased tendency for rebel movements to become parties to special agreements considered to be of international character. These are negotiated under international auspices, with UN sponsorship or that of regional bodies like the African Union or Economic Community of West African States (ECOWAS), or international NGOs such as the International Committee of the Red Cross (ICRC) or Geneva Call. These bodies offer technical support to assist implementation and carry out compliance monitoring.¹⁶³

I propose that reading the responsibility of rebel movements as an intervention in this context offers a much more convincing account of how we came to be in our present situation. Looked at in this way, the timing of rebel movements' inclusion in international jurisdiction starts to make more sense. It did not coincide with the codification of international law standards regulating civil war. This was motivated, at least in part, by the desire of the ICRC to rationalise its involvement in intra-state conflict and defend it against states who saw it as illegitimate interference in their internal affairs.¹⁶⁴ Nor did it occur in the following decades during which the phenomenon of civil war seemed to be at its peak. Instead, the appearance of rebel movements in international law's vision was contemporaneous with the remarkable expansion of this international executive authority at the end of the Cold War. The consensus regarding their primary obligations has been driven by the practice of particularly the Security Council but also the UN Secretary-General and other UN monitoring and fact-finding mechanisms and international organisations. Given its underlying assumptions, the conventional approach necessarily passes over this practice, but it is of crucial importance in understanding the legal and political landscape which currently faces us when it comes to rebel movements.

¹⁶¹ For the most recent reports, see, *Report of the Secretary-General on Conflict-Related Sexual Violence* (UN Doc S/2014/181); *Report of the Secretary-General on Children and Armed Conflict* (UN Doc S/2014/339).

¹⁶² UN Secretary-General, *Report of the International Commission of Inquiry on Darfur*; UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict: Human Rights in Palestine and Other Occupied Arab Territories* (UN Doc A/HRC/12/48); UN Secretary-General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*; UN Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic* (UN Doc A/HRC/21/50).

¹⁶³ See, e.g., Kooijmans, *supra* note 156; Zegveld, *supra* note 99, pp. 28–30, pp. 49–51. Regarding the practice of the ICRC and Geneva Call, see, e.g., O. Bangerter, 'The ICRC and Non-State Armed Groups', in Geneva Call, Program for the Study of International Organization (PSIO), and UN Institute for Disarmament Research (UNIDIR), *Exploring Criteria and Conditions for Engaging Armed Non-state Actors to Respect Humanitarian Law and Human Rights Law* (Geneva Call, Geneva, 2008) p. 74; P. Bongard and J. Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment', 93 *International Review of the Red Cross* (2011) p. 673.

¹⁶⁴ The matter was on the agenda at the 1912, 1921 and 1938 International Red Cross Conferences. The latter adopted a resolution paying tribute to "the work spontaneously undertaken by the International Committee of the Red Cross in hostilities of the nature of civil war" and calling upon the ICRC to seek the application of existing principles of international humanitarian law to such situations. The other and perhaps key driver was the horror and loss of faith caused by the Second World War. The ICRC's activism had not been met with an enthusiastic response from states. The draft convention on the role of the Red Cross in civil wars initially presented in 1912 was not even discussed. See J. Pictet (ed.), *Commentary, I Geneva Convention* (ICRC, Geneva, 1952) pp. 39 *et seq.*

As well as wider questions about legitimacy which the post-Cold War expansion of this international executive authority has provoked,¹⁶⁵ its engagement with rebel movements has raised particular challenges of its own. We have already noted how states initially objected to the ICRC's involvement in civil war. The activities of international actors with respect to rebel movements continue to be met with suspicion by states. The Security Council has rationalised its actions by reference to its responsibility to maintain (its ever widening conception of)¹⁶⁶ peace and security.¹⁶⁷ Nevertheless states often remain unconvinced by what is seen as the legitimisation, in contravention of Article 2(7) of the Charter, of the claims to authority of groups which they perceive to be domestic criminals.

Against this background, I argue that we might helpfully reconceptualise the responsibility of rebel movements as a rationalisation of the management practices being carried out in respect of such groups by international organisations. In the current mainstream approach rebel movements' violations of their international obligations are seen as the "evil to be eliminated" just as soon as we can establish a framework of international rules which will, going forward, guarantee their responsibility.¹⁶⁸ This approach therefore presents the establishment of such a framework imposing direct secondary obligations on rebel movements as urgent and essential. However, it fails to account for why the rhetoric in this respect has not been transformed into action. It cannot explain why we are led so inexorably towards a solution with seemingly little hope of implementation in the near future, given state unwillingness and the fundamental challenges it poses to some of international law's basic doctrines,¹⁶⁹ or of success as we shall see in the next section.

In contrast, I suggest that rebel movements' violations of international law are, rather than the "enemy", in fact the "support" for the sanctions, calls for compliance, fact-finding, monitoring, reporting and technical assistance being carried out by international organisations in respect of such groups.¹⁷⁰ Just as it did for Vitoria's Indians, the granting of a measure of international legal personality to rebel movements, through the acknowledgement of their capacity to incur international obligations, has served as a means of their management and control. For El Salvador's Farabundo Martí National Liberation Front (FMLN) and Angola's National Union for the Total Independence of Angola (UNITA), for example, it was the respective 'internationalisation' of the San José Agreement on Human Rights and Lusaka

¹⁶⁵ Particularly after its disastrous involvement in the Srebrenica and Rwandan genocides. See Orford, *supra* note 141, pp. 9–10.

¹⁶⁶ See, e.g., a series of resolutions in which the concept of a threat to international peace and security was expanded so as to include "massive and systematic breaches of human rights law and international humanitarian law" even if occurring entirely within the borders of a single state. Resolution 688 (UN Doc S/RES/688); Resolution 941 (UN Doc S/RES/941); Resolution 955 (UN Doc S/RES/955); Resolution 1203 (UN Doc S/RES/1203); Resolution 1244 (UN Doc S/RES/1244).

¹⁶⁷ See, e.g., UN Security Council Presidential Statement (UN Doc S/PRST/1999/6) para. 4 of the speech on p. 1; *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict* (UN Doc S/1999/957) para. 29.

¹⁶⁸ Foucault, *supra* note 125, p. 42.

¹⁶⁹ See *supra* last para. of section 4.2.

¹⁷⁰ Foucault, *supra* note 125, p. 42.

Protocol which formed the basis for the former being subject to UN supervision and the latter to UN sanctions.¹⁷¹

We saw that despite being presented as a series of universal and reciprocal limits regulating warfare, Vitoria's law of war in fact functioned so as to confer right and title to govern the colonised world on the Spanish. I propose that the international regulation of rebel movements is functioning similarly, despite also being presented in such a way. The responsibility of rebel movements for their violations of international law is not operating so as to create new obligations. It serves instead to confer legal authority and legitimacy on the international executive practices being carried out in respect of such groups, on international intervention in 'Third World' conflict, and, in turn, on the international executive's administration of the decolonised world. The responsibility of rebel movements looks backwards rather than forwards, giving normative structure and coherent expression to *pre-existing* international executive action and practice.¹⁷² The exercise of violence by rebel movements, rather than being intended to disappear, is instead required to persevere; for why else the "extraordinary effort that went into the task that was bound to fail".¹⁷³ Rather than rebel movements' inclusion in international law representing an inevitable humanisation, they have been accommodated not so as to eradicate their violence but to manage them for the purposes of 21st century imperialism.

4.3.3. A "Readily Identifiable" Yet "Paradoxically Impossible" Solution

For Vitoria colonialism was simply a reality and the task of international law to humanise it. The same could be said for the current mainstream approach to the responsibility of rebel movements when it comes to warfare. Today, reading Vitoria's unquestioning acceptance of the colonial project strikes us as, at best, "infuriating naivety"¹⁷⁴ and, at worst, "outrageous hypocrisy".¹⁷⁵ Perhaps this might lead us to think again about the unquestioning acceptance of armed conflict which we see currently. One leading international humanitarian lawyer has written that:

[Rebel movements] are simply a reality, just as armed conflicts are a reality. Those who developed international humanitarian law did not like armed conflicts, but they did not simply state that armed conflicts should not exist. They also accepted that armed conflicts exist and tried to design rules applicable to these situations, accepted by those involved in this sad reality.¹⁷⁶

I propose that my reading of Vitoria prompts a reconsideration of whether the laws of war, and international law more generally, might not in fact have "a more complex relationship

¹⁷¹ Regarding the former, *see*, Zegveld, *supra* note 99, pp. 16–17; A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2006) pp. 272–273. Regarding the latter, *see* Kooijmans, *supra* note 156, pp. 336–337.

¹⁷² I am, of course, extrapolating here arguments developed by Orford in the context of the Responsibility to Protect. Orford, *supra* note 141, pp. 25–26.

¹⁷³ Foucault, *supra* note 125, p. 42.

¹⁷⁴ Niemelä, *supra* note 15, p. 336.

¹⁷⁵ Koskenniemi, *supra* note 8, p. 239.

¹⁷⁶ Sassòli, *supra* note 102, p. 50.

with violence than this simple image suggests”.¹⁷⁷ I have already suggested one way in which rebel movements, as a normative concept, do not exist simply as a reality (sad or otherwise). Here we see another. Just as colonialism was, rebel movements, and for that matter armed conflict, are a matter of human action and decision, often taken within the framework of international law.

By situating itself uncritically within the liberal cosmopolitan narrative of progressive development, whose plausibility or desirability it fails to question, the current mainstream approach, just as Vitoria did, takes the status quo too much for granted.¹⁷⁸ It prevents us from asking who wins from international law’s current approach to rebel movements: who benefits from the insistence on the necessity of a system of universal rules for the direct responsibility of rebel movements. This is especially pertinent given that its emergence in practice looks remote. The current mainstream approach excludes the possibility of responding to any harm caused by rebel movements through the mechanism of state responsibility by widening either the scope of attributable conduct or the extent of the duty to prevent. It also discounts individual criminal responsibility as a sufficient mechanism, even though when it comes to violations of international humanitarian law by states this is by far the favoured answer.

This denial of responsibility, rather than protecting individuals, seems instead to favour the state and powerful private interests which remain outside the bounds of control as a result.¹⁷⁹ While state responsibility and individual criminal responsibility have their weaknesses,¹⁸⁰ they also have some clear advantages. For one thing, both are well established in international law in theory and in practice. These responses would therefore allow international law to remain firmly within its comfort zone and as such seem to offer much more immediate possibilities for action. We have seen that having ruled out these traditional mechanisms, the majority of the scholarship jumps straight to a set of codified rules imposing secondary obligations directly on rebel movements for violations of primary obligations as the appropriate solution. In so doing, it overlooks other possibilities.¹⁸¹ For example, in a number of countries, rebel movements have participated in *ad hoc* reparations programmes.¹⁸² In addition, we have seen that the Security Council has imposed sanctions on rebel movements in certain cases.¹⁸³ However, such solutions do not appear on the radar of the current mainstream approach even though, again, they seem to offer a much more immediate response and, particularly in the case of local reparations mechanisms, perhaps even a more effective one.¹⁸⁴

¹⁷⁷ Mégret, *supra* note 150, p. 266.

¹⁷⁸ Niemelä, *supra* note 15, p. 337.

¹⁷⁹ C. Chinkin, ‘A Critique of the Public/Private Dimension’, 10 *European Journal of International Law* (1999) p. 395.

¹⁸⁰ See *supra* note 108.

¹⁸¹ *C.f.* Constantinides, *supra* note 100; Moffett, *supra* note 102.

¹⁸² In, for example, Uganda, Northern Ireland and Colombia. These are discussed by Moffett, *ibid.*

¹⁸³ See *supra* note 156.

¹⁸⁴ I do not mean by this to condone in any way the UN sanctions regime.

The conventional narrative inevitably leads to a system of universal rules for the direct responsibility of rebel movements as the “readily identifiable” solution yet leaves the “paradoxically impossible” nature of this response hidden from sight.¹⁸⁵ This solution offers at best nothing more ambitious than the redress of discrete harm in individual cases and perhaps, if we were to be optimistic, some increased compliance with particular international law standards by rebel movements. However it leaves untouched wider structures and practices of international law which contribute to the creation of circumstances in which human security crises are doomed endlessly to recur.¹⁸⁶ Just as “the formal perfection of Vitoria’s system did not improve the social condition of the Amerindians” nor does today’s clamour for rebel movements to be internationally responsible for their conduct appear to be of any relevance for people living in 21st century conflict or post-conflict situations.¹⁸⁷

We have seen that the current mainstream approach to the responsibility of rebel movements shares with Vitoria a tendency to oversimplify the world. Vitoria’s Indians were entirely homogenous; they were simple, timid, child-like creatures in need of salvation from their barbaric way of life by the Spanish. In the same way, rebel movements are reduced to a uniform, easy to understand phenomenon. They are harmful and dangerous, and the liberal cosmopolitan international legal order must save the poor, helpless victims of armed conflict from the atrocities they wreak. In both cases the problems being faced will be overcome by a pre-fabricated solution embodied in a set of universal, abstract international law rules.

Both visions seem remarkably out of touch with the complexity of forces and rationale that engender violence and conflict between states and groups of humans as well as with the structural inequalities of social life and ordinary human experience ... While it is intellectually appealing to construct formal legal solutions ... such constructions fail to reflect the conditions of political life in which the suggested solution has to operate.¹⁸⁸

Arguing for an abstract set of rules regulating rebel movements is straightforward, as it was for Vitoria to argue for an abstract set of rules regulating Spanish colonial practices. More difficult is to comprehend and intervene upon the complex and rarely transparent structures, forces and relations in which armed conflict develops and takes place, to understand and respond to the unique nuances and complexities of particular conflict situations and individual rebel movements. More challenging still is to grasp the ways in which international law and lawyers are implicated in these structures, forces and relations.¹⁸⁹ Yet this would seem essential if international law is ever really going to fulfil those liberal cosmopolitan values in which we apparently so fervently believe and make a genuine improvement to actual human beings’ lives. For now it seems trapped somewhere between

¹⁸⁵ This idea of readily identifiable yet paradoxically impossible solutions is taken from A. Young, *Femininity in Dissent* (Routledge, London, 1990) p. 12, cited in Orford, *supra* note 135, p. 281.

¹⁸⁶ Orford, *ibid.*, pp. 287–288.

¹⁸⁷ Niemelä, *supra* note 15, p. 336.

¹⁸⁸ *Ibid.*, pp. 339, 342–343.

¹⁸⁹ *Ibid.*, p. 338.

naivety and hypocrisy, “enriching [its own] moral capital ... at the expense of people who are suffering”.¹⁹⁰

Spivak has argued that, “as the North continues ostensibly to ‘aid’ the South – as formerly imperialism ‘civilized’ the New World – the South’s crucial assistance to the North in keeping up its resource-hungry lifestyle is forever foreclosed”.¹⁹¹ Likewise, I propose that while international law continues to be proposed as a means to ‘save’ the decolonised world from the brutality of rebel movements in armed conflict, the crucial role it plays in perpetuating such conflict, and displacing it from North to South, is forever excluded from view. Frédéric Mégret, writing about how the first codification of the laws of war took place at the height of the ‘Scramble for Africa’, suggests that:

[T]here does seem to be something to the simultaneous proclamation of grand but abstract humanitarian principles and the sowing of devastation on the African continent – something like the well-rehearsed hypocrisy of a European-centric universalism that coexisted happily with, and was oblivious to, profound exclusions in the international system.¹⁹²

This trap seems as present for those of us who, as international lawyers, write about the law applicable in war today, in the midst of the advance of a new scramble for control of the resources of the decolonised world, as it did for our counterparts in colonial times.

4.3.4. Narratives of Exclusion and Salvation

We saw how in *On the Indians and the Law of War* the Indian was constructed as the ‘other’ through which was constituted the Spanish subject via a number of exclusionary and legitimating practices, which do not “show” once Vitoria’s abstract and universal legal framework is established.¹⁹³ We saw how behind its language of universality and objectivity was a narrative of exclusion and salvation through which were (re)produced and reinforced a number of imperialist and masculinist assumptions.¹⁹⁴ In this respect, *On the Indians and the Law of War* and the current mainstream approach to the responsibility rebel movements share a “plot line”. In this story, the lawless savage must be brought under control and his wrongs redressed and revenged by the white masculinised hero. This heroic agent intervenes on behalf of the racialised/feminised and presumed-to-be-helpless victims “in order that a just, free and democratic legal order can take its rightful place”.¹⁹⁵ We might also call to mind

¹⁹⁰ A. de Waal, *Famine Crimes: Politics & the Disaster Relief Industry in Africa* (African Rights etc., London, 1997), p. xvi.

¹⁹¹ Spivak, *supra* note 20, p. 6.

¹⁹² Mégret, *supra* note 150, p. 270.

¹⁹³ J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, London, 1999) p. 5.

¹⁹⁴ See text to *supra* notes 95–96.

¹⁹⁵ Buchanan and Johnson, *supra* note 19, pp. 139, 156–157, drawing on arguments developed by Orford in the context of humanitarian intervention. See A. Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’, 10 *European Journal of International Law* (1999) p. 679.

here Spivak's "white men ... saving brown women from brown men" or Makau Mutua's "savages, victims and saviors" metaphors.¹⁹⁶

In the story we are currently told about the responsibility rebel movements, people caught up in armed violence are depicted as victims without agency, always situated in the 'developing' world (Western states have terrorists, of course, rather than rebels). Their salvation from the brutality of rebel movements will be ensured by the establishment of the liberal cosmopolitan international legal order which will guarantee the responsibility of such groups. Racialised and feminised, helpless victims of the savage chaos of 'Third World' violence, people living in conflict situations in the Global South become mere objects of the white, Western, masculinised agency of the representatives of the liberal cosmopolitan internationalist order. We like to think that international law left behind its civilising mission in the colonial era. However, the similarities which the liberal cosmopolitan vision of international law shares with that of Vitoria might show that its "moral and legal superiority" and decolonisation cannot be taken for granted.¹⁹⁷

Vitoria failed to question the justice or humanity of conquest because he had "already been positioned to identify with the heroic intervenors on behalf of the [racialised/]feminised and [apparently] helpless victims", in his case the Spanish on behalf of the Indians, in a narrative of exclusion and salvation.¹⁹⁸ I suggest that by unquestioningly adopting the liberal cosmopolitan vision of international law we are being similarly positioned. In our case, it is to identify with the representatives of this liberal cosmopolitan international legal order intervening on behalf of victims of armed conflict. As international lawyers living and working in the West, it is easy to become trapped in such narratives, enticing us as they do to experience, through our identification with the heroic saviour of the tale, feelings of power we would not otherwise enjoy in our own lives. However, our empowerment comes at a cost: it requires us to sacrifice racialised/feminised 'others' to the status of helpless victims, to participate in the erasure of any non-male, non-white, non-Western agency and identity.¹⁹⁹ In such a way, we are in danger of overlooking questions about the justice and humanity of the current project in respect of the responsibility of rebel movements and becoming complacent about international law's, and our own, complicity in the insecurity and suffering of others.²⁰⁰

5. Conclusion

Just like Vitoria's work, the current mainstream approach to the responsibility of rebel movements appears to teeter between naivety and hypocrisy. On one hand it seems to reflect, as did the jurisprudence of the School of Salamanca, "the plight of intellectuals pressed by the demands of power, faith, and the wish for integrity".²⁰¹ On the other it can be read as an

¹⁹⁶ Spivak, *supra* note 20, p. 284; M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *Harvard International Law Journal* (2001) p. 201.

¹⁹⁷ Buchanan and Johnson, *supra* note 19, pp. 139–140.

¹⁹⁸ *Ibid.*, p. 157.

¹⁹⁹ Orford, *supra* note 135, p. 284.

²⁰⁰ Orford, *supra* note 195, pp. 708 *et seq.*

²⁰¹ Koskenniemi, *supra* note 8, p. 239.

especially insidious legitimisation of, on this occasion 21st rather than 16th century, imperialism exactly because of its presentation within the liberal cosmopolitan narrative of progress with its rule of law and individual rights rhetoric. I have used my reading of Vitoria to disrupt these stories which international law tells, which situate and justify it, and to try and make them read differently; to try and engage with the fictions in the space between the lines on international law's page of memories. Vitoria presented his system of primary and secondary rules for regulating Spanish-Indian relations as a matter of common humanity and reason aimed at guaranteeing peace, security and happiness for the whole world. Nevertheless, we have reinterpreted Vitoria to show how in practice his arguments were instrumentalised as a force for the legitimisation of the exploitation and exclusion of the inhabitants of the colonised world. In the same way, the current mainstream approach to the responsibility of rebel movements, with its liberal cosmopolitan narrative of progress, presents international law as a force for human emancipation. Likewise, by drawing further parallels between it and Vitoria's jurisprudence, I have argued that it too is being appropriated as a force for the exploitation and exclusion of the inhabitants of the now decolonised world.

In order to dismantle the legacy of international law's past, as international lawyers we must come to terms with "the assumptions, effects and limits of our own work and recognize the contingent nature of our forms of action".²⁰² Our challenge is to find a way in which international law can address conflict situations, and the role played in them by rebel movements, without disempowering the very people directly engaged in such situations. We must look for the means for international law to be a tool, rather than an obstacle, in the search for effective local solutions, which recognise, rather than erase, the agency, identity and experience of those whom it has traditionally marginalised. This will not be achieved by seeking solace in the simplicity of pre-fabricated abstract universal solutions for discrete and isolatable problems. Nor will it be achieved by legitimising international executive authority on the assumption that today's international institutions are the altruistic embodiment of the universal human values of a genuinely global community. Otherwise international law will remain a means of justifying power, at the disposition of the privileged, rather than becoming a true force for human freedom, a weapon for resisting power in the hands of the historically disenfranchised. Despite L. P. Hartley's famous assertion,²⁰³ for international law the past is not a foreign country where they do things differently. It is not a faraway land where imperialism was left behind. International law's past is much more immediate, permeating its present in ways that are not instantly apparent or, perhaps, that we would prefer not to see. As international lawyers we might do better to keep in mind the words of the great Maya Angelou, who died during my writing of this article: "History, despite its wrenching pain, cannot be unlived, but if faced with courage, need not be lived again."²⁰⁴

²⁰² Niemelä, *supra* note 15, p. 343.

²⁰³ The quote which appears at the beginning of this article is the opening line from his novel *The Go-Between* (Hamish Hamilton, London, 1953).

²⁰⁴ M. Angelou, *On the Pulse of Morning* (Random House, New York, 1993).