

## Chapter 3

### Spanish *De Jure* Myths (1493–1573)

Based on the general findings on European colonial law and appropriation practices, this chapter provides a systematic examination of the valid Spanish colonial law of appropriation during the initial stage of Spanish colonization in the Americas between 1493 and 1573. In particular concentrated on the series of papal bulls, granted by Pope Alexander VI in 1493 in the context of Columbus' first voyage to the "Indies", namely *Inter Caetera I* and *II*, *Eximiae devotionis* (formal dates of 3 and 4 May 1493),<sup>1</sup> the chapter is also providing an examination of the surprisingly overlooked papal bull *Dudum siquidem* (formal date of 25 September 1493), which sounded the bell for the significant change of Iberia's legal means on lawful colonial appropriation and was, thus, paving the way to the Treaty of Tordesillas. The chapter argues that discovery alone has already in 1493 *not* presented a sufficient means for lawfully appropriating the Americas, before turning to the changing legal provisions of Spain's subsequent legal debate on enslavement. After tracing the royal and ecclesiastical practices for the cursorily documented period of 1503–1530, the chapter, finally, investigates the famous legal writings of Francisco de Vitoria, which presented the first conclusive account on the emerging Spanish colonial law of appropriation practices in the Americas.

### The Discovery Myth and the Papal Bulls of 1493

Excavated in 1797 in the archives of Simancas,<sup>2</sup> historians and international law scholars unanimously agree that the papal bull *Inter Caetera I* (expedited in Rome in April 1493, formal date of 3 May 1493) was the first papal bull granted to the Spanish Crown by Pope Alexander VI in 1493,<sup>3</sup> after Christopher Colón

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<sup>1</sup> Williams, *Western Legal Thought*, p. 80–81. See also Doyle, *Title to Territory*, p. 22; Gilbert, *Indigenous Peoples' Land Rights*, p. 5–6; Anaya, *Indigenous Peoples in International Law*, p. 28, footnote 20; Muldoon, "Colonial Charters", p. 365.

<sup>2</sup> This *Simancas* version of the papal bull *Inter Caetera I* was discovered by Juan Baptista Munoz in the Archivo General de Simancas in 1797 (S. E. Dawson [ed.], *The Lines of Demarcation of Pope Alexander VI and the Treaty of Tordesillas*, Toronto: Transactions of The Royal Society of Canada, 1899, p. 485).

<sup>3</sup> H. Vander Linden, "Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal 1493–1494", *The American Historical Review* 2 (October 1916) 1, pp. 1–20, at 7.

had returned from his first voyage to the Bahamas (Guanahani<sup>4</sup>), Cuba (Juana), and Hispaniola on 15 March 1493.<sup>5</sup> Thereupon Spain requested an ex post facto papal authorization, as the expedition was until then without any “basis under the existing Church doctrine”,<sup>6</sup> which resulted in *Inter Caetera I* and granted the Spanish monarchs King Ferdinand and Queen Isabella I “all and singular, the said lands [sic!] and islands unknown and up to this time discovered”, situated in this cardinal direction, but also those “to be discovered in the future by your messengers [. . .] with all the rights and jurisdictions belonging thereto, to you, your heirs and successors, Kings of Castile and Leon”. Moreover, the papal bull aimed to grant the Spanish monarchs “full, free and absolute power, authority and jurisdiction”, which was based on the claim that Columbus by “navigating in the Ocean-sea in the western regions as it is said toward the Indies”<sup>7</sup> would have had “found [there] certain most remote islands and also continental lands [sic!]”.<sup>8</sup> Nonetheless, the papal bull had also inserted the overlooked prior requirement of possession taking, since Pope Alexander VI had indicated that “the said islands and lands [. . .] shall be found and possessed [sic!] by your

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4 Robert Williams claims that Guanahani is believed to equate with the contemporary Bahamas and was named “San Salvador” by Columbus (R. Williams, *Western Legal Thought*, p. 78), while Anthony Pagden indicates that it is still not known, which island “Guanahani” represents (Pagden, *The Burden of Empire*, p. 45).

5 C. Colón (Columbus), “On the recently discovered Islands of India beyond the Ganges”, Lisbon, 14 March 1493, Gilder Lehrman Collection (hereafter GLC) 01427, p. 1, New York. In this letter, Columbus also reports to have received information from Indigenous Peoples about “two more provinces, which I did not visit”, which were situated beyond western Cuba (Juana), one of them named Anan (*ibid.*).

6 Doyle, Title to Territory, p. 23.

7 Pope Alexander VI, “Inter Caetera I (Vatican version)”, in: J. B. Thacher (ed.), *Christopher Columbus. His Life, His Work, His Remains. Vol. II*, New York: Putnam’s Sons, 1904, p. 127. In contrast, the Simancas version includes the passage that Columbus would be “a man every way worthy and deserving of great praise, and capable of so great an affair, with vessels and men accustomed to such undertakings, with very great labour, danger and expense, in order that he might diligently seek out those main-lands and remote and unknown islands, in a sea where no person had navigated until now, who with extreme diligence” and also reads “in navigating through the ocean, discovered certain very remote islands, and also main-lands that nobody had as yet found out; the inhabitants of which are numerous, live peacefully, and, as it is affirmed, go naked, and feed not upon flesh; and as far as your aforesaid messengers can opine, the people who inhabit the aforesaid islands and lands, believe that there is in heaven a God Creator” (Pope Alexander VI, “Inter Caetera II [Simancas version]”, in Dawson [ed.], *The Lines of Demarcation*, p. 532).

8 By contrast, Vander Linden erroneously indicates that the addition of “mainlands” in *Inter Caetera II* would present a significant difference to *Inter Caetera I* (Vander Linden, “Alexander VI”, p. 9), but overlooks that “mainlands” was already inserted in *Inter Caetera I*.

messengers”,<sup>9</sup> wherefore discovery had, already at that point of time, to be perfected by possession taking in order to establish a legal title.

This was confirmed by the previous royal orders of the Spanish Crown, granted to Christopher Colón prior to his first voyage by the “*Capitulación* of Santa Fe” (emphasis added) of 17 April 1492 and the “Privileges and Prerogatives” of 30 April 1492, which were until then the only basis for his voyages and had instructed Columbus to “discover and subdue some Islands and Continent in the ocean” and “discover and conquer [. . .] some Islands in the Ocean”<sup>10</sup> and, thus, connected discovery with the legal appropriation means of conquest, whereas Columbus’ narrative of March 1493 likewise confirms the requirement of possession taking. In result, Colón had not carried out the order of conquest,<sup>11</sup> but had just offered Indigenous Peoples “whatever [he] had, cloth and many other things, to whomsoever I approached, or with whom I could get speech, without any return being made to me”, and also not “inflicted [. . .] any loss or injury”, as they “took to flight [. . .] when they saw our men approaching”.<sup>12</sup>

At the same time, Columbus has declared to have made symbolic proclamations in the Bahamas, Cuba, and Hispaniola in order to take “possession of all of them for our most fortunate [Spanish] King”, which was assertively accepted by the Indigenous Peoples of the three islands without “any resistance”.<sup>13</sup> However, this claim raises some scepticism, since Columbus had only one interpreter for “Hebrew, Aramaic and some Arabic on board”, wherefore it appears unlikely that his intent was clearly communicated to the respective Indigenous Peoples,<sup>14</sup> who had later on destroyed the sole Spanish abode in the Caribbean

9 Pope Alexander VI, “*Inter Caetera I* (Vatican version)”, p. 131.

10 Archivo General de Indias (hereafter AGI), Queen Isabella I and King Ferdinand II, “*Las Capitulaciones de Santa Fe para Cristóbal Colón*” (The Capitulations of Santa Fe to Cristóbal Colón), Santa Fe, 17 April 1492, ES.41091.AGI/29.3.1.1/PATRONATO, 8, R.1, p. 1, Seville.

11 This might explain the insertion of *Inter Caetera I* that those discoveries are serving the purpose of spreading the “Catholic faith and Christian religion”, while “the salvation of souls may [sic!] be secured and barbarous nations subjugated [sic!]” (Pope Alexander VI, “*Inter Caetera I* [Vatican version]”, p. 125).

12 C. Colón (Columbus), “On the Recently Discovered Islands of India beyond the Ganges”, Lisbon, 14 March 1493, GLC 01427, pp. 1–8, at 5.

13 *Ibid.*, p. 4.

14 The lack of Columbus’ capacity to understand the Indigenous Peoples in the Caribbean is, according to Peter Hulme, also demonstrated with regard to the word “bohio”, which means “house”, but was interpreted by Columbus as “the name of an island” (*ibid.*). In addition, Columbus himself admitted in his journal entry of 11 December 1492, which reads that “many times, there has been misunderstanding”, despite that “every day we understand these Indians better and they us”. Thereupon, Peter Hulme concludes that a “fairly straightforward communication with the natives” was “hardly the case”, see P. Hulme, *Colonial Encounters*, p. 20.

(La Navidad), established by Columbus during his first voyage in November 1493.<sup>15</sup> Meanwhile, the papal bull *Inter Caetera I* has reached Spain somewhere before 24 May 1493,<sup>16</sup> whereupon Queen Isabella changed Columbus' previous official designation from "our Admiral of the Ocean, Viceroy and Governor of the islands [sic!] which have been discovered in the Indies"<sup>17</sup> into the *Inter Caetera I* expression of "our Admiral of our islands and mainland, which by our command have been discovered and are to be discovered in the Ocean, in the region of the Indies",<sup>18</sup> and, thus, adopted the error of *Inter Caetera I* that Columbus would have had "found [there] certain most remote islands and also continental lands [sic!]",<sup>19</sup> although Columbus had de facto just sighted the *islands* of the Bahamas, Cuba, and Hispaniola, but not any continental land.<sup>20</sup> Most likely resulting from Columbus' erroneous assumption that the island of Cuba (Juana) "was really continental land",<sup>21</sup> the "mainland" error was kept in all subsequent papal bulls until Columbus corrected the mistake during his second voyage,<sup>22</sup> which departed in Cadiz on 25 September 1493.<sup>23</sup>

Hence, Pope Alexander VI between May and September 1493 promulgated three additional papal bulls, namely *Inter Caetera II*, *Eximiae*, and *Dudum*, while Spain entered into negotiations with Portugal for the conclusion of the Treaty of

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15 Chanca, "Letter (c. February 1494)", in: Thacher (ed.), *Columbus*, p. 276.

16 Prior, the papal bull was sent to the "nuncio at the court of Spain" [in Rome] on 17 May 1493 by the Pope's personal secretary Ludovicus "Podocatharus" (Vander Linden, "Alexander VI", pp. 4; 7–8).

17 Queen Isabella I and King Ferdinand II, "Letter to Cristóbal Colón (24 May 1493)", in: B. F. Stevens (ed.), *Christopher Columbus – His Own Book of Privileges (Facsimile of Manuscript, 1502)*, London: Chiswick Press, 1893, pp. 170–177), which refines the suggestion of Alexander Vander Linden that the papal bull returned to Spain "till in the last third of that month" (Vander Linden, "Alexander VI", pp. 7–8).

18 By contrast, Columbus was on 30 March solely designated as Admiralty of islands "discovered in the Indies" (Queen Isabella I, "Letter to Cristóbal Colón [30 March 1493]", in: Stevens (ed.), *Christopher Columbus*, pp. 160–162).

19 Vander Linden, "Alexander VI", p. 9.

20 GLC 01427, C. Colón (Columbus), "On the Recently Discovered Islands of India beyond the Ganges", Lisbon, 14 March 1493, pp. 1–8, at 5. In addition, Columbus also reported that he had received information from Indigenous Peoples about "two more provinces, which I did not visit", situated beyond western Juana, one of them named Anan (*ibid.*, pp. 6–7).

21 Thacher (ed.), *Columbus*, p. 321.

22 *Ibid.* By contrast, "the papal bull *Inter Caetera I* has negated [sic!] Columbus' cannibalism claims" (Pope Alexander VI, "Inter Caetera I [Vatican version]"), in Thacher (ed.), *Columbus*, p. 127, while the statement as a whole was erased in the last papal bull of this series, namely *Dudum* (Pope Alexander VI, "Dudum", in Dawson [ed.], *The Lines of Demarcation*, p. 539).

23 Thacher (ed.), *Columbus*, p. 213; Syllacio-Coma, "Letter, 13 December 1494", quoted *ibid.*, p. 245; Chanca, "Letter (c. February 1494)", *ibid.*, p. 263.

Tordesillas in the last part of May 1493.<sup>24</sup> However, the chronological order of those bulls remains contested. Accepted by the majority of historians,<sup>25</sup> Herman Vander Linden had, therefore, already in 1916 challenged the accuracy of the formal dates of *Inter Caetera II* and *Eximiae* (4 May), as the papal chancery had expedited the papal bulls only afterwards, namely in June (*Inter Caetera II*) and July (*Eximiae*), wherefore the historian suggests that *Inter Caetera II* and *Eximiae* were “ante-dated”.<sup>26</sup> Furthermore, an analysis of the spatial markers inserted in the four papal bulls of 1493 indicates a reversed chronological order and strongly suggests that *Eximiae* was produced before *Inter Caetera II*, although the preamble of *Inter Caetera II* is “identical” with *Inter Caetera I*, while both differ significantly by the insertion of the well-known demarcation line in *Inter Caetera II*.<sup>27</sup> Accordingly, both *Inter Caetera I* and *Eximiae* comprise the spatial marker of “continental lands and islands remote and unknown, toward the Western regions and lying in the Ocean-sea discovered or to be discovered hereafter”,<sup>28</sup> and incorporate the “regions of Africa, Guinea and the Mine of Gold”,<sup>29</sup> which is also referenced in

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<sup>24</sup> Vander Linden, “Alexander VI”, p. 16.

<sup>25</sup> For example, the commentators of the British Guiana-Venezuela Boundary Arbitration at the end of the nineteenth century (Dawson [ed.], *The Lines of Demarcation*, pp. 485–488), early twentieth-century historians (Thacher [ed.], *Columbus*, pp. 86–89), and contemporary international law scholars (Anaya, *Indigenous Peoples in International Law*, p. 36, footnote 19; Doyle, *Title to Territory*, p. 22; Gilbert, *Indigenous Peoples’ Land Rights*, p. 4). Only intellectual legal scholar Robert Williams mentions that one of the bulls was “predated”, but does not elaborate this matter further (Williams, *Western Legal Thought*, p. 80).

<sup>26</sup> Vander Linden, “Alexander VI”, p. 8; 18.

<sup>27</sup> Pope Alexander VI, “Inter Caetera II (Vatican version)”, in Thacher (ed.), *Columbus*, pp. 139–153; Pope Alexander VI, “Inter Caetera II (Barcelona version)”, in Stevens (ed.), *Christopher Columbus*, pp. 189–193. For the first time, the demarcation line emerged in a letter of Queen Isabella I and King Ferdinand II to Columbus on 28 May 1493, wherein the Spanish Crown indicated a line, which runs “(f)rom the Azores TO the Cape Verde Islands, from North to South, from Pole to Pole, so that all which is beyond the said line to the west, is ours and belongs to us” (Queen Isabella I and King Ferdinand II, “Letter to Columbus”, 28 May 1493, in Thacher [ed.], *Columbus*, p. 109), while the origin of the “100 leagues” remains unknown. Arguably, they were resulting of further negotiations between Spain and Portugal, especially since Portugal was concerned about a “broad reading” of *Inter Caetera I* (Williams, *Western Legal Thought*, p. 80). Other scholars are instead suggesting that Columbus was involved in the creation of this spatial marker (Vander Linden, “Alexander VI”, p. 17).

<sup>28</sup> Pope Alexander VI, “Eximiae Devotionis”, pp. 156–161 in comparison to both *Inter Caetera I* (Simancas version) (Pope Alexander VI, “Inter Caetera I [Simancas version]”, pp. 529–534), and *Inter Caetera I* [Vatican version] (Pope Alexander VI, “Inter Caetera I [Vatican version]”, pp. 125–137).

<sup>29</sup> Pope Alexander VI, “Eximiae”, p. 157.

Queen Isabella's letter to Columbus on 28 May 1493.<sup>30</sup> Finally, *Eximiae* contains the text passage to have "extend and enlarge the grant",<sup>31</sup> which only applies when related to *Inter Caetera I*, wherefore *Eximiae* was most likely created after *Inter Caetera I*. In turn, *Inter Caetera II* nears *Dudum* by the insertion of "India",<sup>32</sup> since *Dudum* determines the "extend[ed] and enlarge[d] [. . .] donation, grant, [and] assignment [. . .] to all and singular islands and continental lands found and to be found, discovered and to be discovered, which in navigating or journeying toward the west or south in this way may be or shall be or shall appear to be existing either in the western regions or in the southern and eastern regions or in India",<sup>33</sup> while the chronological order of *Inter Caetera I*, *Eximiae*, *Inter Caetera II*, and *Dudum* in general reflects a gradually spatial expansion of the area granted by Pope Alexander VI.<sup>34</sup>

Despite, the papal bull *Dudum siquidem*, dated 25<sup>35</sup> respectively 26 September 1493,<sup>36</sup> contains a completely overlooked surprise, since it declared all previous claims to lands and islands as null and void [sic!], which "have not come into effect by means of actual and real possession"<sup>37</sup> respectively "bodily possession".<sup>38</sup> Thus, *Dudum* in the most explicit manner confirms that discovery alone had already in 1493 *not* presented a sufficient legal means of colonial appropriation, but was required to be perfected by possession taking. In result, this "curious fact" had with the stroke of a pen erased all previous Spanish claims to the "Indies",<sup>39</sup> except for Columbus' sole abode La Navidad, which

30 Queen Isabella I and King Ferdinand II, "Letter to Cristóbal Colón (28 May 1493)", in Stevens (ed.), *Christopher Columbus*, p. 145. In this letter, the Spanish Crown had emphatically prohibited him to "go to the mine which is held by the most serene King of Portugal, our brother" (Queen Isabella, "Letter to Cristóbal Colón [28 May 1493]", *ibid.*).

31 Pope Alexander VI, "Eximiae", p. 161.

32 Pope Alexander VI, "Inter Caetera II (Barcelona version)", pp. 190–193; Pope Alexander VI, "Inter Caetera II (Vatican version)", pp. 149–153.

33 Pope Alexander VI, "Dudum", p. 163.

34 Pope Alexander VI, "Inter Caetera I (Simancas version)", pp. 529–534; Pope Alexander VI, "Inter Caetera I (Vatican version)", pp. 125–137; Pope Alexander VI, "Inter Caetera II (Barcelona version)", pp. 190–193. The same is valid for *Inter Caetera II (Vatican version)* (Pope Alexander VI, "Inter Caetera II [Vatican version]", pp. 149–153, *Eximiae* (Pope Alexander VI, "Eximiae", p. 161), and *Dudum* (Pope Alexander VI, "Dudum", p. 539).

35 Pope Alexander VI, "Dudum", p. 538.

36 *Ibid.*, p. 164. See also Vander Linden, "Alexander VI", p. 1–20. The 25 September appears to be more plausible, considering that Columbus left Spain for his second voyage on that day.

37 Pope Alexander VI, "Dudum", p. 539. This passage is alternatively translated as "actual and positive possession" (*ibid.*, pp. 163–164).

38 *Ibid.*, p. 539.

39 Vander Linden, "Alexander VI", p. 10.

was, however, destroyed by several Caciques of Hispaniola just two months after the formal date of *Dudum*,<sup>40</sup> which was issued by Pope Alexander VI in “express” manner<sup>41</sup> after *Inter Caetera II* arrived in Spain from the Vatican on 4 August 1493.<sup>42</sup> At the same time, the “secret” matter “in the affair with Portugal” was still without “no determination” on 5 September 1493<sup>43</sup> and Columbus had requested “whether it was not necessary to modify the ‘bull’”.<sup>44</sup> Just before Columbus had left Cadiz for his second voyage on 25 September 1493<sup>45</sup> to the “Indies” in order “to maintain the lordship and occupation of the said island and mainland, whereof possession has been taken in our name, as to discover others”,<sup>46</sup> the papal bull had likewise erased the spread of Christianity as legitimate purpose of possession taking.<sup>47</sup>

Meanwhile, the legal provisions of *Dudum* were specified during the negotiations of the Treaty of Tordesillas, in particular in the “Contract of *Capitulación* of the Division of the Ocean-Sea” of 5 September 1494, which was concluded between Spain and Portugal to resolve “the difference which exists between [the Spanish monarchs] and the said Lord, the King of Portugal [. . .] as to what part belong to us and what part belongs to him of that which up to the present [sic!] is to be discovered in the Ocean-sea”.<sup>48</sup> Authorized by the papal bull *Ea Quae* of Julius II of 24 January 1506,<sup>49</sup> the contract had inserted a “limitation of the Ocean-

40 Syllacio-Coma, “Letter (13 December 1494)”, p. 283.

41 Pope Alexander VI, “Dudum”, p. 539.

42 Vander Linden, “Alexander VI”, p. 18. This date is coherent with Vander Linden’s earlier indication that *Inter Caetera II* arrived in Seville before 19 July (ibid., p. 8).

43 Queen Isabella I and King Ferdinand II, “Letter to Cristóbal Colón”, 5 September 1493, in Stevens (ed.), *Christopher Columbus*, pp. 162–164.

44 Vander Linden, “Alexander VI”, p. 19. Similarly, Gómez points out that the Spanish Crown on 26 August 1493 had asked for the opinion of cosmographer Jaume Ferrer de Blanes, who “later hastened Columbus to plunge south” (N. W. Gómez, *Tropics of Empire. Why Columbus Sailed South to the Indies*, Cambridge: MIT, 2008, p. 328).

45 Thacher (ed.), *Columbus*, p. 213. That Columbus had left Cadiz on this day is confirmed by both the Letters of Syllacio-Coma (Syllacio-Coma, “Letter [13 December 1494]”, p. 245) and Chanca (Chanca, “Letter [c. February 1494]”, p. 263).

46 This second voyage was granted to Colón on 28 May 1493 (Queen Isabella I and King Ferdinand II, “Letter to Columbus [24 May 1493]”, in Stevens [ed.], *Christopher Columbus*, p. 173), while the “Indies” remained in Columbus official title throughout 1493 and 1494 (for example, Queen Isabella I and King Ferdinand II, “Letter to Columbus [5 September 1493]”, ibid., pp. 162–165), although the spatial marker disappeared in the subsequent papal bulls.

47 Pope Alexander VI, “Dudum”, pp. 163–164.

48 King of Portugal and Algarve, “Letter, 8 March 1494,” in Thacher (ed.), *Columbus*, p. 177.

49 H. Avalos, “Pope Alexander VI, Slavery and Voluntary Subjection: ‘Ineffabilis et Summi Patris’ in Context”, *The Journal of Ecclesiastical History* 65 (October 2014) 4, pp. 738–760, at

sea” to determine the prior claim about two mutually recognized spaces for each of the contracting parties by a line running “straight from pole to pole, from the Arctic Pole to the Antarctic Pole, which is from North to South, which mark or line and indication may be drawn and must be drawn straight, as is said, at 370 leagues from the islands of Cape Verde to the West, by degrees or by another manner, as it can be best and most quickly drawn, so that it will not include a greater distance”,<sup>50</sup> but on the other hand had also determined the modes of appropriation “within their [respective] limit and boundary”, which were indicated as “discoveries and conquests and contracts”.<sup>51</sup> This passage again confirms that it was already at that point of time that discovery alone had not constituted a sufficient legal means of lawfully appropriating the Americas.

For his second (1493–1496), third (1498), and fourth voyage (1502–1504) to the “Indies”, Columbus had than reported that the Spanish agent in southern Hispaniola had on 24 March 1495, in alliance with the Arawak Cacique Guacanaagari, attacked “all nations which refused him obedience”, namely the Caciques Guarionex, Behechio, and Higuanama and taken the Cacique Caonabo

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748. Consequently, Alexander VI never authorized the bilateral treaty before his poisoning on 20 July 1502 (Vander Linden, “Alexander VI”, p. 5).

50 The line itself was designated in the “Contract of Capitulación of the Division of the Ocean-Sea” of 5 September 1494, which transferred the line of the papal bull *Inter Caetera II* 270 leagues further westwards (King and Queen of Castile and of Leon, etc., “Capitulation of the Division of the Ocean-Sea”, 5 September 1494, in Thacher [ed.], *Columbus*, p. 183). Hence, all of the islands and mainland that “up to the present may be found and discovered, and which from now henceforward shall be found and discovered by the said King of Portugal, or by his vessels, islands as well as mainland, from the said line above, drawn in the form aforesaid, going by the said Eastern side within the said line to the East or North or South from it, so long as the said line is not crossed, that this may be and remain and belong to the said Lord, the King of Portugal and to his successors for ever after”, while the islands and mainlands in the cardinal directions west, south, and north “after having passed the said line [. . .] all may be and remain and belong to the said Lords, the King and Queen of Castile and of Leon, etc., and to their successors for ever after” (ibid.). In this context, Robert Williams more general concluded that the Tordesillas line would have had “adjusted” the line of *Inter Caetera II*, by which “Spain took title to all territory west of this line” and effected that “Spain secured virtually all of North and South America, leaving Portugal a fraction of the South American continent now constituting Brazil” (Williams, *Western Legal Thought*, p. 80). However, he overlooks that the partitioning of the bilateral treaty in itself had not constituted a valid title, but merely determined areas, in which Portugal and Spain let each other exclusively undertake lawful appropriation attempts.

51 Ibid., p. 183. This is confirmed by Mark Lindley, who suggested that “claims over [Indigenous Peoples’] territories were either legitimized through conquest, or consent to cession, as opposed to treating their lands as *terra nullius*” (Lindley, *Backward Territory*, pp. 10–45, emphasis added).



hostage by a trick, after he was “destroying their unwelcome [Spanish] visitors [. . .] [and] casting them out of the islands” in response to the Spanish attempts in “robbing and despoiling the Indians”,<sup>52</sup> and in December 1493 replaced the destroyed settlement La Natividad by La Isabella, which was again abandoned for Santo Domingo in 1496.<sup>53</sup> Furthermore, Columbus has sighted and visited some of the Leeward and Windward islands, namely Dominica, Marie Galante, Guadeloupe, Santa Cruz (Saint Croix), and Puerto Rico (Burenquen; John the Baptist) during his second voyage to Hispaniola since September 1494,<sup>54</sup> whereupon he claimed to have them “annexed [. . .] to the kingdom of Spain”,<sup>55</sup> although the Spanish agent had just symbolically taken Guadeloupe and Marie Galante into possession “with the usual ceremonies”.<sup>56</sup>

In addition, Cristóbal Colón had forcefully captured indigenous women and boys in Guadeloupe (Saint Mary of Guadalupe)<sup>57</sup> and Saint Croix (Santa Cruz), who were claimed to be captives of so-called “cannibals”, and had attacked a canoe with six Indigenous Peoples, brutally killing at least one, before asserting that the island of Saint Croix would belong “to the Caribs” and present another “Cannibal island”,<sup>58</sup> same as Dominica and Marie Galante (Marievolente), whose rulers had been determined as “Cannibals”,<sup>59</sup> while Puerto Rico was determined as an island, where “(t)he people of the Caribs [. . .] make conquests and [. . .] take many people away”.<sup>60</sup> Moreover, Columbus had sighted the islands of Cuba

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<sup>52</sup> Thacher (ed.), *Columbus*, pp. 346–349.

<sup>53</sup> Syllacio-Coma, “Letter (13 December 1494)”, pp. 283; 266–267; 351.

<sup>54</sup> Chanca, “Letter (c. February 1494)”, pp. 264–270; Syllacio-Coma, “Letter (13 December 1494)”, pp. 248–253.

<sup>55</sup> Syllacio-Coma, “Letter (13 December 1494)”, pp. 248–251.

<sup>56</sup> Chanca, “Letter (c. February 1494)”, pp. 264–270; Syllacio-Coma, “Letter (13 December 1494)”, pp. 248–253. For Marie Galante it was also reported that “the cross of the Saviour” was erected, before the Spaniards had left the islands a couple of hours later without having encountered any Indigenous Peoples, establishing any settlements or leaving any Spaniard behind (*ibid.*).

<sup>57</sup> Chanca, “Letter (c. February 1494)”, pp. 264–265.

<sup>58</sup> *Ibid.*, pp. 268–269; Syllacio-Coma, “Letter (13 December 1494)”, in: Thacher (ed.), *Columbus*, pp. 252–253.

<sup>59</sup> While Columbus on Dominica had also spotted “houses had peoples”, Marievolente was described as being inhabited by “Cannibals”, who “(i)n their battles use very strong bows, with which they shoot arrows as long as a walking staff, and pointed with a sharp bone formed with barbs to prevent the head of the arrow from being easily extracted from a wound”, and would be “skillful archers” (Syllacio-Coma, “Letter [13 December 1494]”, p. 250).

<sup>60</sup> Chanca, “Letter (c. February 1494)”, p. 270; Syllacio-Coma, “Letter (13 December 1494)”, p. 253. Furthermore, it was indicated for Puerto Rico that the island was settled with “certain fishermen’s houses” and “well populated”, although Columbus had not talked to anyone, since “they all fled away” (*ibid.*).

(Juana, April-June 1494), L'Evangelista (Islas de Pintos, June 1494), Jamaica (May and July 1494), and Santa Maria (May 1494),<sup>61</sup> before he returned to Spain on 20 April 1494.<sup>62</sup>

Columbus had then shortly visited Trinidad (Cairi) during his third voyage in 1498, where he had sighted canoes about Galea Point and Sandy Ground,<sup>63</sup> before landing about Erin Point, which left him with “no doubt that the island was populated”.<sup>64</sup> In addition, Columbus landed on mainland Paria, where the Spanish agent exercised a symbolic act of possession taking on 5 August 1498 “with the usual ceremonies”, which he had erroneously perceived as “island of Gracia”.<sup>65</sup> Moreover, the Spaniard had traded with Indigenous Peoples in “wares of barter” between 6 and 8 August 1498, sighted “an infinite number of houses and people” about the point of Aguja (Jardines) and encountered peoples, who were “wearing gold ornaments”, among them “two principal persons with all the village”,<sup>66</sup> who had taken Columbus to their “large house, built near two streams and not round like a camp-tent, in the manner of the houses of the islands”, where they “received them very well and made them a feast” and also informed him that the name of the area is “Paria”, where Columbus had “taken [. . .] people who were clothed”. He then continued his voyage, spotted Tobago on 13 August, which he named “Belaforma”, passed “Madame Beata” on 19 August and reached Santo Domingo (Hispaniola) on 30 August 1498.<sup>67</sup>

Nowadays, the logbook of Columbus of 1493, which accuses the “Caribs” (in fact Arawak) of Hispaniola of being “cannibals” and “man-eating savages”,<sup>68</sup> is considered as “the first fable of [the] European beginning in America” and does, therefore, not present “an accurate ethnographic record” or “privileged eye-

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<sup>61</sup> Thacher (ed.), *Columbus*, pp. 315–319; 333;335; 624, footnote 1.

<sup>62</sup> *Ibid.*, p. 359.

<sup>63</sup> Morales Padrón, *Spanish Trinidad*, pp. 3–4; Boomert, *Indigenous Peoples of Trinidad and Tobago*, pp. 83–84.

<sup>64</sup> In this context, Francisco Morales Padrón refers to “plenty evidence of human presence”, such as “fishing gears and deer tracks [. . .] seen on the ground [. . .] also plants and tall palm trees towered over the land [. . .], and] wide fields farmed by the indigenous inhabitants” (Morales Padrón, *Spanish Trinidad*, p. 2).

<sup>65</sup> *Ibid.*, pp. 371–372; 388; 390–395; Morales Padrón, *Spanish Trinidad*, pp. 2–7; Boomert, *Indigenous Peoples of Trinidad and Tobago*, pp. 83–84.

<sup>66</sup> Those two peoples were specified as being “the cacique and lord, and the other [. . .] his son” (Thacher [ed.], *Columbus*, pp. 392–395).

<sup>67</sup> *Ibid.*, pp. 390; 408.

<sup>68</sup> Hulme, *Colonial Encounters*, p. 50; 33.

witness document”.<sup>69</sup> Nevertheless, the cannibalism claims of Colón shaped the practices of Queen Isabella in 1503 and the subsequent century long debate about the lawfulness of the Spanish appropriation practices in the “Indies”, although Pope Alexander VI in *Inter Caetera I* had negated the cannibalism claims by stating that in the islands sighted by Columbus would “dwell many nations, living peacefully, going naked and *not* [sic!] eating flesh”.<sup>70</sup> The debate between ecclesiastical legal provisions and royal practices in Spain continued until 1532 and was focused on the lawfulness of enslavement, but had likewise touched the more general question about the lawfulness of Spain’s appropriation practices in the “Indies”.

### Spain’s Persistent Legal Debate (1503–1573)

After Columbus’ return from his first voyage, the Spanish Queen had issued a general prohibition for the enslavement of Indigenous Peoples in March 1493,<sup>71</sup> in line with the papal bull of the same year. This led in April 1495, upon the engagement of the Bishop of Bajadoz,<sup>72</sup> to the ordered return of the captured slaves and in 1500 to the revocation of Christopher Colón’s governorship in Hispaniola due to his “continued shipment” of indigenous slaves to Spain, which was based on the fear “that such practices were not compliant with the papal bulls and could potentially lead to a revocation of Spain’s privileges”.<sup>73</sup> In response, the Spanish Queen, “in accord with the papal confirmation”, instructed the succeeding governor of Hispaniola, Nicolás de Ovando, in March 1503 that

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<sup>69</sup> Ibid., p. 10. For the first time, Colón’s cannibalism claim emerged in an entry of 23 November 1492, in which he cites the narrative of an Arawak about another Indigenous People, who would “ate them” and were “very warlike” (ibid., pp. 16–17); W. Arens, *The Man-Eating Myth*, p. 44.

<sup>70</sup> Pope Alexander VI, “*Inter Caetera I* (Vatican version)”, p. 127. For rejections of the colonial cannibalism claim, see Arens, *The Man-Eating Myth*, p. 181; Myers, “Island Carib Cannibalism”, pp. 147–184, while Neil Whitehead advances a more modest version of the argument (Whitehead, “Carib Cannibalism”, p. 81; Id., *Lords of the Tiger Spirit*, pp. 172–173; Id., *The Conquest of the Caribs*, p. ii).

<sup>71</sup> Whitehead, “Carib Cannibalism”, p. 70.

<sup>72</sup> Seed, *American Pentimento*, p. 251, footnote 8. In particular, on 13 April 1495, the Bishop had also “rejected the sale of Indian slaves”. The abolition is confirmed by King Ferdinand II in his Royal Cedula of 23 December 1511 (King Ferdinand II, “Royal Cedula [23 December 1511]”, in C. Jesse, “The Spanish Cedula of December 23, 1511. On The Subject of the Caribs”, *Caribbean Quarterly* 9 (September 1963) 3, pp. 22–32, at 29.

<sup>73</sup> Doyle, *Title to Territory*, p. 23. See also Whitehead, *Lords of the Tiger Spirit*, p. 173; Whitehead, “Carib Cannibalism”, p. 70.

Indigenous Peoples are to “be made to serve us through work” under the condition that they are “paid a just salary, nor should they live outside of villages”<sup>74</sup> and therefore *not* to be treated as “slaves”.<sup>75</sup>

On 30 October 1503, Queen Isabella I emphatically repeated the enslavement prohibition in her well-known and often cited royal order,<sup>76</sup> by stating

that no person or persons [. . .] dare to arrest or capture any [. . .] Indians [. . .]. To bring them to these my kingdoms or to any other places, or to do any harm or evil to their persons or possessions, under certain penalties prescribed in our decree, and [. . .] since certain persons had brought some Indians from the islands to Spain, we commanded them to be taken and liberated, and they were liberated.<sup>77</sup>

Although contemporary anthropologist impressively agree that cannibalism practices by Caribs were either exacerbated or a complete European invention,<sup>78</sup> the Queen in the same royal order of 1503 also inserted contradictorily an exception to the general enslavement prohibition, which was based on a report about an unsuccessful encounter of the Spaniards with Indigenous Peoples in Carthagera and the adjacent islands of Saint Bernard and Isla Fuerte, as the Indigenous Peoples there had “defended themselves with their weapons, and resisted them so that they [the Spaniards] could not enter these islands”, while the report also claimed that “[d]uring this resistance they killed some Christians [. . .] and thereafter they have [. . .] waged war on the Indians who are my vassals, capturing them to eat them as is their custom”.<sup>79</sup> As a “punishment” for the “crimes” of

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<sup>74</sup> Queen Isabella I, “Instructions to Hispaniola Governor Nicolas de Ovando (March 1503)”, in: P. Liss, *Isabel the Queen: Life and Times*, Philadelphia: University of Pennsylvania Press, 2004 p. 342; Queen Isabella I, “Letter to Nicolas de Ovando”, 20 December 1503, in: Williams (ed.), *Documents of West Indian History*, Vol. 1, No. 58, p. 58.

<sup>75</sup> Liss, *Isabel the Queen: Life and Times*, pp. 341–342.

<sup>76</sup> Whitehead, “Carib Cannibalism”, p. 70; Seed, *American Pentimento*, p. 104; Hulme, *Colonial Encounters*, p. 70.

<sup>77</sup> Queen Isabella I, “Proclamation”, 30 October 1503, in: Williams (ed.), *Documents of West Indian History*, Vol. 1, No. 62, p. 62–63. See also C. Colón, “Memorandum (Proposal for an Aboriginal Indian Slave Trade to Europe)”, 30 January 1495, quoted *ibid.*, No. 54, p. 55–56; C. Colón, “Letter (On the Enslavement of Caribs to Queen Isabella I and King Ferdinand II)”, 1494, *ibid.*, No. 53, pp. 54–55.

<sup>78</sup> Whitehead, “Carib Cannibalism”, p. 78; Boomert, *Indigenous Peoples of Trinidad and Tobago*, pp. 85–86; Hulme, *Colonial Encounters*, p. 71; Myers, “Island Carib Cannibalism”, pp. 177–178; Arens, *The Man-Eating Myth*, p. 49.

<sup>79</sup> Williams (ed.), *Documents of West Indian History*, Vol. 1, Queen Isabella I, “Proclamation”, 30 October 1503, No. 62, p. 62–63. See also Seed, *American Pentimento*, p. 104; Whitehead, *Conquest of the Caribs*, p. 310; Sauer, *Early Spanish Main*, pp. 161–162; Whitehead, “Carib Cannibalism”, p. 70; *Id.*, *Lords of the Tiger Spirit*, pp. 171–172; Hulme, *Colonial Encounters*, p. 70.

“those Cannibals”, Queen Isabella, therefore, allowed royally authorized persons in cases

the Cannibals still resists, and refuse to receive and welcome in their lands the captains and people who at my command go on the said voyages, and to listen to them to be taught the doctrines of our Holy Catholic Faith, and become my vassals owning allegiance to me, they are authorised to capture them to take them to the lands and islands where they live, and to bring them to these my kingdoms and dominions, and to any other parts and places they wish, paying us the share that belongs to us, and to sell them and utilise their services, without incurring any penalty thereby, because if the Christians bring them to these lands and make use of their services, they will be more easily converted and attracted to our Holy Faith.<sup>80</sup>

In general, the royal decree mentions the Holy Faith for three reasons, namely

- (1) by indicating the *rejection* of the Holy Faith by Indigenous Peoples as legitimate cause for the enslavement (of “cannibals”),
- (2) perceiving the enslavement and transfer of Indigenous Peoples as means of facilitating the conversion of Indigenous Peoples to the Holy Faith, but within the overall prohibition of enslavement and harmful behaviour towards Indigenous Peoples also
- (3) as means to achieve the general goal to make all persons of the “islands and mainland of the Ocean sea” Christians.<sup>81</sup>

Most notably, all three reasons of Queen Isabella were either rejected or qualified by the contemporary European colonial law. Accordingly, (3) was refused as legal means in the papal bull *Dudum* of 1493, which likewise negated cannibalism claims, and also by Pope Julius II in 1510 and Francisco de Vitoria in 1532, who determined the spread of Christianity only in its limited version as “just” cause for commencing a war and taking war captives, namely if Indigenous Peoples are hindering the preaching and conversion, but not for enslavement *per se*. In contrast, Hugo Grotius (1625) dismissed it completely. Moreover, Vitoria emphatically rejected (1), with the exception of cannibalism. Finally, (2) was never declared as lawful, but already clearly rejected by the ecclesiastical practices in 1495, whereas slavery for economical work purpose was prohibited in 1500. At the same time, the cited incidence in the Carthagen area indicates that the Spaniards expected that Indigenous Peoples give them access, which

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<sup>80</sup> Williams (ed.), *Documents of West Indian History*, Vol. 1, Queen Isabella I, “Proclamation”, 30 October 1503, No. 62, p. 62–63.

<sup>81</sup> *Ibid.*

was, as outlined by Vitoria, only thirty years later and under certain conditions declared as a lawful cause for commencing a war and taking war captives.

After Queen Isabella I died in 1504, King Ferdinand II summoned theologians and lawyers to again determine the lawfulness of the enslavement practice.<sup>82</sup> According to the cursorily documentation, the participants of the convened meeting disagreed on the matter,<sup>83</sup> but finally concluded that the “Indians should be given [to the Spaniards]”.<sup>84</sup> This decision had significant consequences for the Indigenous Peoples of the Caribbean, as King Ferdinand II then acceded extensive Spanish slave raids from Hispaniola to neighbouring islands, but also to Veragua, Lucaya, and *Terra Firme*. They were granted for economic reasons between 1508 and 1510, which prompted significant responses from both Indigenous Peoples and the Church.

Accordingly, Pope Julius II in 1510, in line with the papal bull *Dudum* of 1493, legally nullified the punishment of cannibalism (claims) as cause for enslavement and commencing a war, since although “acts [such] as cannibalism, sodomy and idolatry, being *contra naturam* [and] were held to be more criminal than, say, simple homicide or blasphemy”, the pope emphasized that “this did not automatically mean that such sins could be punished by man, through force of arms”, which would instead only be the case when “the ‘death of innocents’ were involved.”<sup>85</sup> At the same time, the Indigenous Peoples in San Juan (Sant Xoan) responded to the Spanish slave raids with a massive “rebellion” in 1510/11 in which many Spaniards – including Lieutenant Cristóbal de Sotomayor and his nephew –, were killed, two Spanish villages were burnt down and several Spaniards were taken prisoner. According to the Spanish king, the “rebellion” in Puerto Rico was assertively undertaken by “a great number of [. . .] Cariba”, who “came to the aforesaid Island of Sant Xoan”, would have caused “all the other Indians in the aforesaid Island in Sant Xoan rebelled”, and would

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<sup>82</sup> Pagden, *Spanish Imperialism*, p. 14.

<sup>83</sup> D. Brunstetter, *Tensions of Modernity: Las Casas and His Legacy in the French Enlightenment*, New York: Routledge, 2012, p. 26.

<sup>84</sup> Pagden, *Spanish Imperialism*, p. 14.

<sup>85</sup> Whitehead, “Carib Cannibalism”, p. 72. The name of the Pope is erroneously given with “Innocent IV”, although Julius II was pope between 1503 and 1513 (M. Ott, “Pope Julius II” in: *The Catholic Encyclopedia* Vol. 8, New York: Robert Appleton Company, 1910, <http://www.newadvent.org/cathen/08562a.htm> [accessed 30 September 2018]). In an earlier publication, Whitehead also claimed that the Catholic Church “underwrote” the Spanish Queen’s royal decree of 30 October 1503 (Whitehead, *Lords of the Tiger Spirit*, p. 173), which appears not plausible in the light of the Church’s previous and subsequent practices of prohibiting enslavement and declaring the punishment for cannibalism by humans as unlawful.

have even incited “the aforesaid Indians to commit many evils and abuses”.<sup>86</sup> King Ferdinand II, in June 1511 and November 1511, then ordered that the “rebellious Indians” are to be transferred from San Juan to Hispaniola.<sup>87</sup> Finally, King Ferdinand on 23 December 1511 issued a royal order, which permitted all authorized persons

to make war on the Caribs of the Islands of *Trynidad*, *Varis*, *Domynica*, and *Mantenino* [Martinique], and *Sancta Lucia*, and *Sant Vicente*, and *Concepcion*, and *Barbudos*, and *Cabaço* [Tobago] and *Mayo*,<sup>88</sup> and they may make prisoners of them, and taken them to the places and islands they so desire, and sell them [. . .] not [. . .] outside the aforesaid Indies.

Same as Queen Isabella I in 1503, the royal order of King Ferdinand II of 1511 likewise explained the “punishment” with (1) the rejection of Christianity (“they have not wanted to do [. . .], but rather have sought, and seek to keep themselves from being instructed and taught the matters of Our Holy Catholic Faith”), (2) cannibalism claims (“they are so set in their evil ways, dismembering and eating the aforesaid Indians”), and (3) self-defence claims (“they have continually made and make war on Our subjects and natives, and have killed many Christians”),<sup>89</sup> which were clearly violating the legal annulation of Pope Julius II of 1510 and *Dudum* of 1493 (negation of cannibalism) and the subsequent legal provisions of Francisco de Vitoria (rejection of the Holy Faith) of 1532.

Again, the royal order was based on reports about unsuccessful military encounters of the Spaniards with Indigenous Peoples, who were described with the term “*cariba*”, which had replaced the previous term “cannibals” of Queen Isabella’s I royal order of 1503, but not removed the cannibalism claims itself. Again spatially emphasizing the Indigenous Peoples of Carthagera and adjacent islands (San Bernado; Isla Fuerte), the term of the royal order of 1511 also included the Indigenous Peoples of Varis Island, Domynica, Mantenino, Sancta Lucia, Sant Vicente, Concepcion, Barbudos, Cabaço (Tobago) and Mayo, whereas the *caribas* were defined as “people known as the Caribs” and people, who “never wanted nor have wanted nor want to listen to them [Spanish Captains and ‘certain friars’] nor receive them”, but instead

<sup>86</sup> King Ferdinand II, “Royal Cedula (23 December 1511)”, in C. Jesse, “The Spanish Cedula of December 23, 1511”, p. 27.

<sup>87</sup> K. Anderson-Córdova, *Surviving Spanish Conquest: Indian Fight, Flight, and Cultural Transformation in Hispaniola and Puerto Rico*, Tuscaloosa: University of Alabama Press, 2017, p. 131–132.

<sup>88</sup> While Concepcion was the early Spanish name for Grenada, Mayo presents the Italian version.

<sup>89</sup> King Ferdinand II, “Royal Cedula (23 December 1511)”, p. 29.

they have held them off with their arms and have resisted so they have not been able nor can they enter the aforesaid Island where they are, and in the aforesaid, resistance, they even killed certain Christians; and in this contumacy these aforesaid Indians of the aforesaid Islands have persisted, and many others of other Islands who have joined them, making war on the Indians who are in Our service, and taking them prisoners, they eat them, as they really do.<sup>90</sup>

One day after the royal order of 23 December 1511, Antonio de Montesinos delivered a staggering Dominican objection, which left the church-attenders of the Christmas sermon in Hispaniola in shock and was also in Spain perceived as a “furious attack” and “an assault upon precisely ‘the lordship and the rents [the king] has in these parts’”,<sup>91</sup> since the Dominican had not just denounced the cruel enslavement practices of the Spaniards in Hispaniola, but also challenged the legality of Spain’s colonial appropriation of the area by raising the question “(o)n what authority” the Spaniards have “waged a detestable war against these people, who dwelt quietly and peacefully”?<sup>92</sup> In response, King Ferdinand II convened the Council of Burgos in 1512 to determine “the basis of Spain’s legal rights in the Indies”,<sup>93</sup> which resulted in the 35 Laws of Burgos of 27 December 1512. Although those laws had just occasioned some legal adjustments to be made for improving the conditions for the enslaved Indigenous Peoples in Hispaniola,<sup>94</sup> Anthony Pagden argues, based on “fragmentary surviving evidence” of the Council’s proceedings, that the Council had “agreed that the Spanish crown did indeed have rights to both sovereignty and *dominium* in America”.<sup>95</sup>

However, the Spanish king in 1513 introduced the *requerimiento* (Spanish Requirement of 1513), which instead confirms that a prior legal acquisition was still required in practice, as the *requerimiento* had obliged Spanish explorers to publicly inform Indigenous Peoples about Spain’s right to wage “war against them” in case the Indigenous Peoples would reject “their natural law obligation to hear the gospel” to ensure that “warfare could legally ensue”.<sup>96</sup> In this context, Cathal

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<sup>90</sup> Ibid., p. 27.

<sup>91</sup> Pagden, *Spanish Imperialism*, p. 14–15.

<sup>92</sup> Friar A. Montesinos, “Sermon I am a voice crying in the wilderness”, Hispaniola, 1511, in: L. Hanke (ed.), *Spanish Struggle for Justice*, Boston: Little, Brown and Company, 1965, pp. 147–148.

<sup>93</sup> Doyle, *Title to Territory*, p. 24.

<sup>94</sup> King Ferdinand II, “Laws of Burgos”, 27 December 1512, <http://faculty.smu.edu/bakewell/BAKEWELL/texts/burgoslaws.html> (accessed 27 September 2018).

<sup>95</sup> Pagden, *Spanish Imperialism*, p. 15 (emphasis added).

<sup>96</sup> Miller, “International Law of Colonialism”, p. 918. For arguments about the Islamic roots of the *Requerimiento*, see L. Nuzzo, “Law, Religion and Power: Texts and Discourse of Conquest”, in: I. de la Rasilla del Moral and A. Shahid (eds.), *International Law and Islam. Historical Explorations*, Leiden: Brill, 2018, pp. 199–227. See also Seed, “Taking Possession and Reading Texts”, pp. 183–209. James Anaya points out that the *requerimiento* would have “expressly



Doyle, nevertheless, cites an Inca leader, who dismissed the *requerimento* on general legal grounds, since it would be “absurd [. . .] that the Pope had the power to give away territories which did not belong to him”.<sup>97</sup> This perspective was confirmed by the colonial law of Francisco de Vitoria of 1532, who declared the rejection of the Holy Faith as an “unjust” cause of commencing a war.

Again objected to by the Dominicans, this time by “an obscure, wandering friar” in 1517,<sup>98</sup> the Spaniards in the meantime continued in advancing cannibalism claims, as resulting from the report of Rodrigo de Figueroa in 1520, who continued in advancing a spatial definition of *caribas*. Notably, anthropologists unanimously agree that term does not equate with the historical Carib-speaking people,<sup>99</sup> although the report claims to having been based on “a series of declarations and testimonies from various witnesses, as to sodomy, cannibalism and general barbarity of carib groups”.<sup>100</sup> In result, the Figueroa report was in practice repeating the previous royal orders of 1503 and 1511 by determining the “*caribes*” as “a barbarous people and enemies of the Christians and who eat human flesh”, who had “never sought have always rejected all efforts at conversion to Our Holy Catholic Faith, by the Christians and their Preachers”, which clearly violated the papal bull *Dudum* of 1493 and Pope Julius’ II legal annulation of cannibalism as legal cause for waging war in 1510. At the same time, the Figueroa report spatially defined “all islands, not yet occupied by Christians, as being occupied” by “*caribes*” and also inserted several *exceptions*, namely the already depleted Lucayas (Bahamas) and Gigantes (ABC islands Aruba, Bonaire, and Curaçao), but also Barbados, Trinidad, and Margarita.<sup>101</sup> Whereas the exclusion of Margarita was arguably caused by the marriage of the female

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invoked the papal donation as it ordered the ‘idolatrous Indians’ to acknowledge ‘the Church as the Ruler and Superior of the whole world and the high priest called the Pope’” (Anaya, *Indigenous Peoples in International Law*, p. 36, footnote 20). Most clearly, this was rejected by colonial legal writer Francisco de Vitoria in 1532.

<sup>97</sup> Doyle, *Title to Territory*, pp. 24–25.

<sup>98</sup> Hanke, “Pope Paul III and the American Indians”, pp. 96–97.

<sup>99</sup> N. Whitehead, *Of Cannibals and Kings: Primal Anthropology in the Americas*, Pennsylvania: Pennsylvania State University Press, 2011, pp. 116–117; Whitehead, “Carib Cannibalism”, p. 71. While Neil Whitehead refers to the political and legal advantages for the Spaniards to raise cannibalism claims (*ibid.*), Arie Boomert crucially points out that the term “carib” has “no specific ethnic significance”, but had “just lumped all Amerindian groups who fiercely opposed the Spanish, justifying their enslavement by accusing them of eating human flesh” (Boomert, *Indigenous Peoples of Trinidad and Tobago*, p. 86). See also Hulme, *Colonial Encounters*, p. 10.

<sup>100</sup> Whitehead, *Lords of the Tiger Spirit*, p. 9.

<sup>101</sup> National Archives of Trinidad and Tobago, Port-of-Spain (hereafter NATT), R. de Figueroa, “Report upon the Peoples of the Islands Tierra Firme”, 1520, publication No. 671, pp. 1–2.

Guayquerí Cacique Isabel to the Spaniard Francisco Fajardo,<sup>102</sup> Trinidad was most likely exempted through the intervention of the Dominican Bartholomé las Casas.<sup>103</sup> In addition, Figueroa added one “*cariba*” area on the mainland, namely “the Coast up to the Gulf of Paria and before the Province of the Aruacs”, whereas those Indigenous Peoples “who come from behind the Coast, from a Province named Paracuya [Paraguay], are friendly”,<sup>104</sup> as are the Indigenous Peoples located “further on in the said Province of Aruac[a]s, [whom] I have to declare the Indians to be friends of the Christians who are well treated there”,<sup>105</sup> whereas the “coast below Unari” remained unclassified in 1520, due to a lack of sufficient information.<sup>106</sup> In contrast, King Ferdinand II had in 1511 declared the whole mainland as *non-caribas*, which was confirmed by the Audiencia of Santo Domingo in 1512.<sup>107</sup>

Finally, the spatial classification of “*cariba*” and “*non-cariba*” was rendered meaningless at the end of the 1520s, since the papal bull *Intra Arcana* of Pope Clement V of 8 May 1529 *in general* permitted the use of armed force to “compel and with all zeal cause the barbarian nations to come to the knowledge of God, the maker and founder of all things, not only by edicts and admonitions, but also by force and arms, if needful, in order that their souls may partake of the heavenly kingdom”,<sup>108</sup> while Charles V issued a royal order in 1530, which had abolished the enslavement of *all* Indigenous Peoples without any spatial limitation. Transmitted to the Spaniards in the “Indies” on 2 August 1530,<sup>109</sup> the

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**102** Alternative spellings are Waikerí oder Guaiquerí.

**103** M. Perri, “‘Ruined and Lost’: The Spanish Destruction of the Pearl Coast in the Early Sixteenth Century”, *Environment and History* 15 (May 2009) 2, pp. 129–161, at 141. More precisely, Trinidad was indicated as being “now [sic!] inhabited and held by kindly people”, who would be “friends of the Christians” (NATT, Figueroa, “Report upon the Peoples of the Islands Tierra Firme”, p. 1).

**104** This assumption had completely changed in response to the interference of the Secret Boundary Commission after 1764 (see chapter 7).

**105** Ibid. Those Indigenous Peoples, who were considered Spaniard-friendly, were also determined as “*guatiaos*”, which means “friend” in Taino (Hulme, *Colonial Encounters*, p. 17).

**106** Ibid., p. 72.

**107** Whitehead, *Lords of the Tiger Spirit*, p. 74. According to Neil Whitehead, this change was based on economic considerations of the mine owners of Puerto Rico and Santo Domingo, since the pearl coast became increasingly interesting for the Spaniards [in Margarita, Cubagua, and Coche], which had also brought the slave raiders southwards of the coastal mainland (Whitehead, “Carib Cannibalism”, p. 71).

**108** Pope Clement VII, “*Intra Arcana*”, 8 May 1529, in L. Hanke, “Pope Paul III and the American Indians”, *Harvard Theological Review* 30 (April 1937) 2, pp. 65–102, at 80.

**109** Anderson-Córdova, *Surviving Spanish Conquest*, p. 133; Whitehead, *Lords of the Tiger Spirit*, p. 75; Perri, “‘Ruined and Lost’”, p. 140.

general prohibition coincided with the first Spanish appropriation attempts in Trinidad and the coastal mainland.

However, Charles V again rescinded the abolition in 1534, whereupon Fray Hurtado summoned “thirteen other doctors of the University of Salamanca”,<sup>110</sup> which had prompted the famous argument of Hispaniola priest las Casas that the enslavement of all “Indians” was unjust<sup>111</sup> and brought the Dominican Tlaxcala Bishop Julián Garcés and Bernadino de Minaya of Peru to the scene, who significantly contributed to the promulgation of the famous papal bull *Sublimis Deus* of 2 June 1537,<sup>112</sup> which contains the momentous passage that

notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; *nor should they be in any way enslaved*; should the contrary happen it shall be null and of no effect.<sup>113</sup>

In sum, the legal debate in Spain about the lawfulness of the Spanish appropriation practices in the Americas, which ensued upon Columbus’ return from his first voyage in 1493, was until the late 1530s focused on the question about the legal validity of three causes for the enslavement of Indigenous Peoples and the commencement of a war against them, namely (1) the spread of Christianity, (2) the “rejection of the Holy Faith”, and (3) cannibalism claims. All three were highly contested and extensively elaborated in the first comprehensive European colonial law of Francisco de Vitoria.

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**110** Hanke, “Pope Paul III and the American Indians”, p. 67.

**111** Whitehead, “Carib Cannibalism”, p. 72. At that time, the argument of Las Casas was based on the reason that “they were not, in fact, cannibals” (Whitehead, *Lords of the Tiger Spirit*, pp. 72–73) or “antropofagus” (Morales Padrón, *Spanish Trinidad*, p. 6).

**112** Hanke, “Pope Paul III and the American Indians”, p. 89. Accordingly, the Dominican Bishop Garcés had indicated his serious concern about the enslavement practice and cruel treatment of Indigenous Peoples in mines and *encomiendas* in breach of the Laws of Burgos and thus requested Pope Paul III “to denounce these crimes in a bull that fines be levied on persons who persisted in such actions” (ibid., p. 67). Bernadino de Minaya then succeeded in personally presenting his objections to the Pope on 5 October 1536, which had “evidently convinced” Pope Paul III to promulgate *Sublimis Deus* (ibid.).

**113** Pope Paul III, “*Sublimis Deus*”, 2 June 1537, in L. Hanke, “Pope Paul III and the American Indians”, pp. 71–72 (emphasis added). According to Lewis Hanke, *Sublimis Deus* was reaffirmed by subsequent Popes, such as Urban VIII (1639), Benedict XIV (1741), and Gregory XVI (1839), Hanke, “Pope Paul III and the American Indians”, pp. 94–95.

## The Legal Writings of Francisco de Vitoria (1532)

In 1532, the Spaniard Francisco de Vitoria had tabled his famous legal writings “On the American Indians (De Indis)” (1532/1537) and the “Law of War” (1532/1539), which provided a significant challenge to Spain’s “just title in the New World”,<sup>114</sup> since Vitoria had clearly recognized Indigenous Peoples as “true masters”<sup>115</sup> and possessors of “true dominion”<sup>116</sup> and had also rejected several previous assumptions, such as that “the barbarians were slaves”,<sup>117</sup> which was later confirmed by *Sublimis Deus* in 1537. At the same time, Vitoria refused the claim that the pope has “jurisdiction over the barbarians” or was “empowered to inflict [. . .] penalties ordained to these sins”.<sup>118</sup> Hence, Indigenous Peoples were not bound to accept religious judgments, penalties or punishments, as “not Christians cannot accept the judgment of the pope”.<sup>119</sup> Furthermore, the Spaniard refuted plain claims that either the pope would be the “monarch of the whole world”<sup>120</sup> (but has “power in temporal things insofar as they concern spiritual things”)<sup>121</sup> or the Spanish monarchs would be the “master of the whole world”,<sup>122</sup>

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**114** Fitzmaurice, *Sovereignty, Property*, p. 49.

**115** Vitoria, *On American Indians*, p. 239, para. 4.

**116** *Ibid.*, pp. 251–252, para. 23.

**117** Vitoria, *On American Indians*, p. 246, para. 19. Moreover, Vitoria rejected related claims about “mortal sin” or the “sin of unbelief”, since Indigenous Peoples are neither “(1) sinners, (2) unbelievers, (3) madmen, or (4) insensate”. *Ibid.*, pp. 241–243, paras 6 (sinners); pp. 244–245, para. 7; 8 (unbelievers); p. 248, para. 20 (madmen); p. 250, para. 23 (insensate). Therefore, Christians could not advance any “of those arguments to support their title to dispossess the barbarians of their goods and lands” (*ibid.*, p. 246, para. 19). Nonetheless, Vitoria also inserted a particular limitation for the provision of “mental incapacity”, which “strictly speaking” had not [sic!] presented a “just cause” for waging war, but might present a justification that “the princes of Spain might take over their administration, and set up urban officers and governors on their behalf, or even given them new masters, so long as this could be proved to be in their interest” respectively “might be handed over to wiser men to govern”, provided that “everything is done for the benefit and good of the barbarians, and not merely for the profit of the Spaniards”. While Vitoria in this context also indicated that “[a]ll these barbarians appear to fall under this heading”, wherefore “they might be governed partly as slaves” (*ibid.*, pp. 290–291, para. 18), the exclusion of profit-making rules out the enslavement for all economical purposes and is significantly weakened by Vitoria’s general dismissal of the assumption that Indigenous Peoples would be slaves. Later, the enslavement of Indigenous Peoples was completely rejected by Hugo Grotius (see chapter 8).

**118** Vitoria, *On American Indians*, pp. 276–277.

**119** *Ibid.* In addition “the pope cannot condemn or punish them” (*ibid.*).

**120** *Ibid.*, pp. 258–264, para. 27–31.

**121** *Ibid.*, pp. 284–285, Question 3, Article 2, para 10.

**122** *Ibid.*, pp. 252–258, para. 25–26.

based on a “special gift from God”.<sup>123</sup> Finally, Vitoria declared every war for the purposes of “the enlargement of empire”, “the personal glory or convenience of the prince”, with the intention to “kill innocent persons” or on the basis of a “difference of religion”<sup>124</sup> as unlawful.<sup>125</sup>

In general, Francisco de Vitoria’s legal writings are, therefore, focused on the presentation of eight “just” and seven “unjust” causes of war to determine the lawfulness of both the Spanish appropriation practice and potentially resulting legal titles acquired by conquest.<sup>126</sup> Hence, the first “just” cause of waging war refers to “natural partnership and communication” and applies to cases of “offence” and “self-defence”.<sup>127</sup> Accordingly, Spaniards, who were encountering Indigenous Peoples *in peace* and “do no harm to the barbarians”, but were refused “to travel and dwell in those countries”,<sup>128</sup> to “trade among the barbarians”,<sup>129</sup> or were denied a share of those things “held in common both by their own people and by strangers”,<sup>130</sup> such as “if travellers are [not] allowed to dig for gold in common land or in rivers or to fish for pearls in the sea or in rivers”,<sup>131</sup> are acquiring the right of redress for those “offences”, wherefore “they may on the authority of their prince seek redress for it in war”.<sup>132</sup> However, the Spaniards are to be required to attempt to remove “any cause of provocation by reasoning and persuasion”, which has to be done “not merely in words, but with

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<sup>123</sup> Ibid., pp. 276–277.

<sup>124</sup> Vitoria, *Law of War*, p. 302–303, para. 10–12.

<sup>125</sup> Ibid., p. 314, para. 35.

<sup>126</sup> In this context, Sharon Korman assumes that Vitoria “on the suspicion that the Spanish conquest of America had lacked a just cause [. . .] appeared to reject the validity of Spain’s title to the Indies by conquest” would have “depart[ed] somewhat from his insistence that a just cause of war, defined in terms of transgressions against natural law of nations, was the only ground on which Spain’s conquests in the Americas might be justified” (Korman, *Right of Conquest*, p. 55).

<sup>127</sup> Vitoria, *On American Indians*, p. 278–279, Question 3, Article 1, para. 2.

<sup>128</sup> Ibid., p. 278, Question 3, Article 1, para. 2.

<sup>129</sup> Ibid., p. 279, Question 3, Article 1, para. 3. See also Vitoria, *Law of War*, p. 303, para. 3.

<sup>130</sup> Ibid., p. 280, Question 3, Article 1, para. 4.

<sup>131</sup> Ibid. (emphasis added). In this context, Vitoria continues in referencing to *ferae bestiae*, which the law of nations (*ius gentium*) defines as “a thing which does not belong to anyone (*res nullius*) becomes the property of the first taker”, provided the “thing”, such as gold in the grounds or rivers “has not been appropriated” beforehand (ibid., pp. 280–281, Question 3, Article 1, para 4). This, however, provides “no support for [a legal title to] possession of these lands”, as “the barbarians possessed true public and private dominion” (ibid., pp. 264–265, Question 2, Article 3).

<sup>132</sup> Ibid., p. 282, Question 3, Article 1, para. 6.

proof”<sup>133</sup> and “without trickery or fraud and [. . .] inventing excuses to make war on them”,<sup>134</sup> and have to have “demonstrate[d] with every argument at their disposal that they have not come to do harm”.<sup>135</sup> In addition, the requirement has to be fulfilled that the respective Indigenous Peoples “insist[ed] on replying with violence”, which gives the Spaniards the potential right to self-defence, because “[i]t is lawful to meet force with force”.<sup>136</sup> In turn, in case “the barbarians have done no wrong, there is no just cause for war”.<sup>137</sup> As this is declared as “a merely defensive war”, a successfully waged war based on this “just” cause does *not* imply to “exercise the other rights of war against the barbarians such as putting them to death or looting and occupying their communities”.<sup>138</sup> Nevertheless, in case the Indigenous Peoples would subsequently continue “to destroy the Spaniards”, Vitoria reasons that the Spaniards

may then treat them no longer as innocent enemies, but as treacherous foes against whom all rights of war can be exercised, including plunder, enslavement, deposition of their former masters, and the institution of new ones. All this must be done with moderation, in proportion to the actual offence. The conclusion is evident enough: if it is lawful to declare war on them, then it is lawful to exercise to the full the rights of war.<sup>139</sup>

Among the seven remaining “just” causes of war are the spread of Christianity,<sup>140</sup> the protection of converts,<sup>141</sup> and the defence of the innocent,<sup>142</sup> whereof the spread of Christianity had, arguably due to the numerous qualifiers, created the most confusion and requires clarification. Accordingly, the *only* “just” causes of war for spreading Christianity apply, when Indigenous Peoples are hindering the Spaniards in freely “preach[ing] and announc[ing] the Gospel in the lands of

<sup>133</sup> Ibid., pp. 280–281, Question 3, Article 1, para. 6.

<sup>134</sup> Ibid., pp. 283–284, para. 8.

<sup>135</sup> Ibid., pp. 280–282, Question 3, Article 1, paras. 6; 8.

<sup>136</sup> Ibid., para. 6.

<sup>137</sup> Ibid., p. 270, para. 35.

<sup>138</sup> Ibid., p. 282, Question 3, Article 1, para. 6.

<sup>139</sup> Ibid., p. 283, Question 3, Article 1, para. 8.

<sup>140</sup> Ibid., pp. 284–286, Question 3, Article 2, para. 9–12.

<sup>141</sup> Ibid., p. 286, Question 3, Article 3, para. 13.

<sup>142</sup> Ibid. pp. 287–288, Question 3, Article 5, para. 15. The other four just causes are (1) the already elaborated case of “mental incapacity”, apply to situations, where (2) a “good proportion” is converted (papal constitution, *ibid.*, p. 287, para. 14), (3) the majority is Christian (voluntary election; *ibid.*, pp. 288–289, para. 16), and when (4) Indigenous Peoples voluntarily requested the Spaniards for an alliance in war (pp. 289–290, para. 17), wherefore the Spaniards “by coming to the aid of their friends and allies”, would be also “profiting from the opportunity to declare just wars, thereby taking possession of new provinces by the laws of war” (*ibid.*, p. 289, Question 3, Article 7, para. 17).

the barbarians”,<sup>143</sup> “after first reasoning with them [Indigenous Peoples] to remove any cause of provocation [. . .] *even against their will*” and “if they permit the Spaniards to preach, but do not allow conversions, either by killing or punishing the converts to Christ, or by deterring them by threats or other means”, since those actions present “a wrong committed by the barbarians against the Spaniards [. . .] and the latter therefore have just cause for war”, whereupon the Spaniards “may lawful conquer the territories of these people”.<sup>144</sup> However, this applies only in the case of a successfully waged war and is significantly qualified, since in case “the resulting war, with its massacres and pillage, *obstructs* the conversion of the barbarians instead of encouraging it [. . .] this method of evangelization must be abandoned and some other sought”.<sup>145</sup>

In turn, Vitoria likewise clearly indicates that the Spaniards are having *no* “just” cause for waging war “if the barbarians permit the Spaniards to preach the Gospel freely and without hindrance, then *whether or not they accept the faith, it will not be lawful to attempt to impose anything on them by war, or otherwise conquer their lands*”.<sup>146</sup> In addition, the rejection of the faith by Indigenous Peoples “however probably and sufficiently the faith may have been announced” still presents “*no reason to declare war on them and despoil them of their goods*”. Hence, “this title to the conquest of the lands of the barbarians, too, is neither applicable nor legitimate”. Moreover, no “just” cause is given, if Indigenous Peoples allow free preaching, but refuse to listen “to peaceful persuasion about religion”, which would in general “incur unpardonable mortal sin”, but does *not* apply to Indigenous Peoples, as they “are not bound to believe from the first moment that the Christian faith is announced to them”. The same is the case for Indigenous Peoples’ refusal of believing the Holy faith, since Vitoria had

not heard of any miracles or signs, nor of any exemplary saintliness of life sufficient to convert them. On the contrary, I hear only of provocations, savage crimes, and multitudes of unholy acts [of the Spaniards]. From this, it does not appear that the Christian religion has been preached to them in a sufficiently pious way,

wherefore Vitoria concludes that “if the faith is proposed to the barbarians only in this way and they do not accept it, the Spaniards cannot use this pretext to attack them or conduct a just war against them”,<sup>147</sup> nor does it present a justification for

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<sup>143</sup> Ibid., p. 284, Question 3, Article 2, para 9.

<sup>144</sup> Ibid., p. 285, Question 3, Article 2, para 12 (emphasis added).

<sup>145</sup> Ibid., p. 286, para. 12 (emphasis added).

<sup>146</sup> Ibid., p. 285, Question 3, Article 2, para 11 (emphasis added).

<sup>147</sup> Ibid., pp. 268–272, Question 2, Article 4, para. 33–39.

enslavement.<sup>148</sup> Finally, waging war to force Indigenous Peoples to believe the Holy faith is likewise *not* a “just” cause, as “the barbarians cannot be moved by war to believe, but only to pretend that they believe and accept the Christian faith [. . .]. It is therefore clear that this title to the conquest of the lands of the barbarians, too, is neither applicable nor legitimate.”<sup>149</sup> In other words, in case Indigenous Peoples allowed the Spaniards to preach and convert (without the necessity to believe or listen), the Spaniards had *no* “just” cause in the name of spreading Christianity. Instead, Francisco de Vitoria even highlights the argument that “the barbarians may not be invaded at all, *because* of their unbelief or their refusal to accept the Christian faith”.<sup>150</sup>

Furthermore, the Spanish lawyer enshrined two more relevant “just causes” of waging war, namely the “protection of converts” and “the defence of the innocent against tyranny”. On the one hand, Vitoria declares the “protection” of already converted Indigenous Peoples as “just” cause of war,<sup>151</sup> if “their [indigenous] princes try to call them back to their idolatry by force or fear”, whereupon “the Spaniards may on these grounds, if no other means are possible, wage war on them and compel the barbarians to stop committing this wrong”,<sup>152</sup> whereas the “defence of the innocent” against “tyranny” refers to the particular case of “human sacrifice practised on innocent men or the killing of condemned criminals for cannibalism”, is considered as “just” basis of war under the condition “they refuse [. . .] to give up such rites altogether”.<sup>153</sup> Thus, Vitoria points out that *only* in cases of a “just war” (and not in an unjust or defensive war), the enslavement of war captives is lawful, since “when the war is such that it is lawful to plunder all the enemy population indiscriminately and seize all their goods, it must also be lawful to enslave them all, guilty and innocent alike”.<sup>154</sup>

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**148** Vitoria, *Law of War*, pp. 302–303, para. 10–12.

**149** *Ibid.*, p. 272, Question 2, Article 4, para 39.

**150** *Ibid.*, p. 272, Question 2, Article 5 (emphasis added).

**151** *Ibid.*

**152** *Ibid.*, p. 286, Question 3, Article 3, para 13.

**153** *Ibid.*, p. 287–288, para 15. Hereby, Vitoria refers to two options of application, namely “either on account of the personal tyranny of the barbarians’ masters towards their subjects, or because of their tyrannical and oppressive laws against the innocent”. If Indigenous Peoples refuse to “give up” those practices, Vitoria states that “the laws of war” apply and, in case “there is no other means of putting an end to sacrilegious rites, there masters may be changed and new princes set up” (*ibid.*).

**154** Vitoria, *Law of War*, p. 322, para. 51.



Despite Vitoria's focus on conquest, the Spanish legal writer, nonetheless, also inserted some marginal notes on the two other legal means of appropriation, namely the conclusion of treaties and occupation. Accordingly, Vitoria recognizes the necessity of "voluntary consent by the barbarians", but rejects the lawfulness of treaty making and consent in armed situations, since a "request [. . .] made by armed men, who surround a fearful and defenceless crowd" would "vitiate any freedom of election" and also points to the aspect that "the barbarians [. . .] do not even understand what it is the Spaniards are asking of them", before emphasizing that the "barbarians already had their own true masters and princes" and "a people cannot without reasonable cause seek new masters, which would be to the detriment of their previous lords".<sup>155</sup> Moreover, Vitoria mentions the legal means of occupation only for cases, when Spaniards are peacefully residing among Indigenous Peoples and indicates that "if they [the Spaniards] are their [Indigenous Peoples'] subjects, then the barbarians ought to treat them fairly",<sup>156</sup> which suggests, what Hugo Grotius had elaborated some decades later, namely that sovereignty and jurisdiction, in cases of European occupation, remains with Indigenous Peoples. In result, the legal writings of Francisco de Vitoria of the 1530s had significantly limited previous reasons for waging a just war against Indigenous Peoples by reducing the "just" war cause of spreading Christianity to the hindrance of preaching and conversion by Indigenous Peoples and ruling out the rejection to the Holy faith. Along with the "protection" of converts, revenges of offences (trade, travelling and shared resources) and self-defence, Francisco de Vitoria, nevertheless, confirmed cannibalism claims as "just" cause of waging war.

In effect, Vitoria's colonial law had a remarkable influence on the Spanish king Charles V, who had replaced "conquest" by "pacification" (preaching and conversion) in the royal letter patent for Trinidad in 1530. Until August 1552, "conquest" even vanished completely from the royal practices, after Charles V had on 16 April 1550 decreed "the immediate suspension of further conquests" until "the whole question of 'just wars' in the Indies was scrutinized more

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<sup>155</sup> Vitoria, *On American Indians*, p. 276 (emphasis added).

<sup>156</sup> *Ibid.*, p. 279, para. 2. Moreover, Vitoria with regard to trade indicates that "[i]n sum, it is certain that the barbarians can no more prohibit Spaniards from carrying on trade with them, than Christians can prohibit other Christians from doing the same" (*ibid.*, p. 280, para. 3), while in the context of peaceful occupation, Vitoria refers to the case of children "born in the Indies" to a Spanish father and an indigenous mother, those children shall become "citizens (civis) of that [indigenous!] community" and enjoy the advantages of "native citizens born of parents domiciled in that community" (*ibid.*, p. 281, para. 5).

formally”.<sup>157</sup> Prior, Charles V and Vitoria had held several consultations in March 1541,<sup>158</sup> before the Spanish monarch enacted the “New Laws of the Indies” in November 1542,<sup>159</sup> (again) ordered the abolition of Indigenous Peoples’ enslavement and the *encomienda*<sup>160</sup> in the present form,<sup>161</sup> which was lifted in 1552 and 1573,<sup>162</sup> and in 1550/51 convened the well-known Valladolid debate (Junta de Valladolid).

Hence, Charles V in August 1550 summoned the Crown’s historian Juan Ginés de Sepúlveda and the procurator of Indigenous Peoples at the Spanish Court and Dominican Bartholomé de las Casas to address this issue, which became known as the Valladolid debate. Thus, historian Sepúlveda presented the argument in favour for war based on the “radical thesis” that waging war against Indigenous Peoples “was justifiable on the basis that they lacked rationality, did not have dominion and were natural slaves”,<sup>163</sup> indicated that the *requerimiento* (Spanish Requirement of 1513) as “prior warning” would present “a useless hindrance to conquest” and claimed that instead “the use of force” (without prior notification) would be justified “to save Native souls even against their will” and also provide “the most expedient means to subdue people”,<sup>164</sup> in order to conclude that “war should precede practising of the faith” to place Indigenous Peoples under “‘tutelage, with or without their consent’ in order to facilitate their adoption of the faith”. At the same time, Sepúlveda concedes that prior to the Spaniards’ arrival, Indigenous Peoples had been “lords in their own lands” and had “*imperium* under the terms of the law of nations which grants rights of occupancy to the first settler”.<sup>165</sup>

In turn, the Dominican Bartholomé de las Casas countered Sepúlveda by arguing that the spread of Christianity is an “unjust” cause of waging war and

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**157** S. Collier, *From Cortés to Castro. An Introduction to the History of Latin America, 1492–1973*, New York: Macmillan, 1974, p. 125.

**158** E. Nys (ed.), *De Indis of Francisco Vitoria*, New York: Oceana Publications, 1964, pp. 9–53.

**159** A. Schulenburg, “Abolition of Slavery”, in: D. Head (ed.), *Encyclopedia of the Atlantic World, 1400–1900: Europe, Africa, and the Americas in an Age of Exploration, Trade, and Empires*, Santa Barbara: ABC-CLIO, 2018, pp. 5–9, at 5.

**160** Schulenburg, “Abolition of Slavery”, p. 5.

**161** W. Mader, *Indians in the Americas: The Untold Story*, San Diego: The Book Tree, 2005, p. 63.

**162** Collier, *From Cortés to Castro*, p. 125.

**163** Doyle, *Title to Territory*, p. 34; L. Hanke, *All Mankind is One: A Study of the Disputation between Bartolomé de las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians*, DeKalb: Northern Illinois University Press, 1974.

**164** A. DeLong, “Disrupting the Discourse of Conquest: The Suppression of Sepúlveda”, <http://digital.lib.lehigh.edu/trial/justification/newspain/essay/> (accessed 29 January 2017).

**165** Pagden, *Spanish Imperialism*, p. 19 (emphasis added).

that voluntary consent by Indigenous Peoples to both the conversion to Christianity and Spanish rule presents the only legitimate title, while the Church had no jurisdiction.<sup>166</sup> Moreover, las casas denied “any legitimacy of the Crown’s powers over the natives, on the basis that it had been acquired by force in the absence of consent”, which instead “would be forthcoming without the use of force” and by maintaining “existing native authorities”.<sup>167</sup> From 1560 to 1563, the argument of the Dominican was developed by the Salamanca school, most notably by Juan de la Peña, who confirmed that the Spaniards “have no authority over them” and even argued that Indigenous Peoples “could [also] fight just wars against Christians and be entitled to all the rights”. At the same time, the scholar of Salamanca confirmed Francisco de Vitoria’s “just war” cause of cannibalism in stating that “it was legitimate for the Spaniards to prevent such tribes as the Caribs from eating each other by force”.<sup>168</sup> In result, King Philipp II sided with the Dominican las Casas and the colonial law of Vitoria by issuing the royal decree *Ordenanzas de Descubrimiento, Nueva Población y Pacificación de las Indias* (Ordinances of Discovery, New Population and Pacification of the Indies) of 13 July 1573, which confirmed the replacement of “conquest” by “pacification” and completely prohibited the “conquest of the Indians ‘by fire and by sword’”.<sup>169</sup>

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**166** B. de las Casas, *A Brief Account of the Destruction of the Indies* (*Brevisima Relación de la Destrucción de las Indias*), Baltimore: Hopkins University Press, 1996 [1552].

**167** Doyle, *Title to Territory*, p. 34. Las Casas elaborated this position further in: B. de las Casas, *De Thesauris in Peru* (*Los Tesoros del Peru*), Madrid: Consejo Superior de Investigaciones Científicas, 1958 [1563].

**168** Pagden, *Spanish Imperialism*, pp. 30–31.

**169** King Philipp II, “Ordenanzas de Descubrimientos, Nueva Población y Pacificación de las Indias (1573)”, in: F. Morales Padrón (ed.), *Teoría y Leyes de la Conquista*, Madrid: Ediciones Cultura Hispánica del Centro Iberoamericano de Cooperación, 1979, pp. 489–518.