

Studies in the History of Law and Justice 21  
Series Editors: Mortimer Sellers · Georges Martyn

José María Beneyto *Editor*

# Empire, Humanism and Rights

Collected Essays on Francisco de Vitoria



Springer

# **Studies in the History of Law and Justice**

## **Volume 21**

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José María Beneyto

Editor

# Empire, Humanism and Rights

Collected Essays on Francisco de Vitoria



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*Editor*

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# Contents

<b>Conquest, Empire, and Peace: Vitoria, Charles V, Erasmus and the Foundations of the Law of Nations . . . . .</b>	<b>1</b>
José María Beneyto	
<b>“The Affair of the Indies”: International Law Before and After Vitoria . . . . .</b>	<b>49</b>
Brett Bowden	
<b>The Three Revivals of Francisco de Vitoria in the History of International Law . . . . .</b>	<b>73</b>
Ignacio de la Rasilla	
<b>The Elements of Sovereignty in Francisco de Vitoria’s Political Thought . . . . .</b>	<b>95</b>
Luis Valenzuela-Vermehren	
<b>Francisco de Vitoria on the Theology of Dominion and Secular Natural Rights . . . . .</b>	<b>119</b>
Mónica García-Salmones	
<b>The Possibility of the New World. Social Cohesion, Legal Order and the Invention of Rights in Iberian Scholastic Thought . . . . .</b>	<b>145</b>
Massimo Meccarelli	
<b>On War and Peace in the First Modernity: From Erasmus’ Irenic Discourse to the Just War Theory of the Founder of the School of Salamanca . . . . .</b>	<b>157</b>
Simona Langella	
<b>Vitoria and Erasmus on the Justice of War . . . . .</b>	<b>171</b>
Leonor Durão Barroso and André Azevedo Alves	

<b>Theorizing on the Institution of War in Erasmus and Vitoria During the <i>Universalmonarchie</i> of Charles V . . . . .</b>	<b>189</b>
Yolanda Gamarra	
<b>Vitoria and Erasmus, Together for a New Order of the <i>Universo Mundo</i> . . . . .</b>	<b>209</b>
Pablo Antonio Fernández Sánchez	

# Conquest, Empire, and Peace: Vitoria, Charles V, Erasmus and the Foundations of the Law of Nations



José María Beneyto

**Abstract** A new insight into the works and theories of Francisco de Vitoria taking into account his relations with the Emperor Charles V and with Erasmus van Rotterdam can contribute to a further understanding of the specific intellectual and personal ‘situation’ of this founder of international law. The fact that Vitoria has bequeathed to international lawyers up to our time not only a language but also a specific conceptual structure ridden with dualisms may be traced back to the dilemmas that he confronted in his times and life. He reinterpreted *ius gentium*, established a new theory of rights in which free movement and the free exchange of goods played a crucial role, grounded the idea of a world community and revisited the classical doctrines on just war. He also spoke truth to imperial power while at the same time exhaustively analysing the possible justifications for the Spanish conquests in the Americas. By looking into his relations with Erasmus and with Charles V, this article throws light on the *utopian* and the *apologetic* dimensions of Vitoria’s thought and identifies this tension as foundational for international law.

## 1 Introduction

To this day, the thinking of the Spanish Dominican friar and theologian Francisco de Vitoria continues to be at the centre of the controversy surrounding the origins of international law: at the crossroads of the polemic between colonialism and imperialism on the one hand and the ethical foundation of war and rational justice on the other. Was he apologetically justifying the conquest of the New World or, on the contrary, defending the rights of the Indians and promoting the utopia of peace and order based on law and universal justice? Did he develop the idea of the law of nations in order to sustain the rights of the natives of the New World or did he

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re-construct *ius gentium* as a powerful tool for legitimising empire through the Spanish conquest of the Americas?

Vitoria's reflections on the legitimacy of power, on the legal universal authority (or rather lack of it) of the Pope and the Emperor, on the justice of the alleged justifications for the conquest and acquisition of the newly discovered lands in the New World, on free trade and private property as groundings of the modern global era and on the existence of a universal community of individuals and peoples vested with human dignity and rights set the language and the structural narrative which have governed, through different patterns of continuity, change and transformation, the theory and practice of international law since the sixteenth century. The renewed contemporary interest in Vitoria shows that his intellectual and historical situation has some striking similarities with our own age of transition, in which the Western conception of international relations is clashing with different visions of order and the search for a pluralist global structure.

The tensions between pluralism and universality, coupled with legal justifications of state power and of conquest and war, lie at the heart of Vitoria's reflections. In his own time, Vitoria's thinking was deeply concerned with providing advice to Emperor Charles V on how to act morally and, linked to this, with the ethical legitimization of the expansion of the Spanish empire. In the first half of the European sixteenth century, for the *apologists* of Spanish Empire, like Matías de Paz, Palacios Rubios and Ginés de Sepúlveda, political authority and war went hand in hand.<sup>1</sup> In this respect, as regarding other related issues such as reinterpretation of the medieval 'just war' doctrine, an innovative theory of rights and the departure from traditional 'just price' religious limitations in commerce, the School of Salamanca blazed a new path.<sup>2</sup> Vitoria found in *ius gentium* and in the principle of just war the cement capable of keeping two antithetical elements together: a universal society the formulation of which had been made mandatory by the discovery of the New World; and a concept of the state based on the common good and on the crucial distinction between public and private enemies.

Spain was the first of the modern empires. In its combination of a land and a worldwide overseas empire it added a dimension lacking in all the ancient empires. In its wrestling with the problems of governance of such a huge and diverse territorial mass, in the sophisticated reflections on the foundations of empire that took place in the first century of imperial rule, Charles V and his counsellors, theologians and jurists laid down, as it were, the ground rules for the analysis of modern empires, the challenges facing them and the contradictions inherent in them.<sup>3</sup> In the New World, the Spaniards had to deal with peoples and customs that were outside the experience and even the comprehension of Europeans. This was an uncharted territory which, incidentally, not only led to the creation of modern geography and anthropology but also ushered in philosophical musings on 'the

<sup>1</sup> Fernández-Santamaría (1977/2008), pp. 35–57, 163–236.

<sup>2</sup> Belda-Plans (2000), Pereña (1986), Skinner (1978).

<sup>3</sup> Kumar (2017), p. 161; Pagden (2015), pp. 45–74.

other' and 'the good savage' which would frame the course of European thought in the centuries to come.<sup>4</sup> In this perspective, religion and law, rather than being solely instruments of empire, also served to protect the rights of individuals and the inauguration of a modern understanding of the law of nations.

As has been frequently remarked, and taking into account the post-colonial critique of Vitoria,<sup>5</sup> the unprecedented energy and subtlety with which the debate over the rights of the American natives and the responsibilities of the Crown absorbed some of the best minds of sixteenth-century Spain are surprising.<sup>6</sup> The 'affair of the Indies'—meaning primarily the justification for the conquest—became the 'duda indiana,' i.e. deep moral doubts about the excesses and atrocities committed by the settlers and the eventual immorality of the entire enterprise. For some of his more down-to-earth counsellors, the Emperor was plaguing his conscience with a burden that was too heavy, thus putting at risk the further seizure of American territories and the material fortunes associated with it.<sup>7</sup> Vitoria's reflections made a significant contribution to the Crown's deliberations about whether the conquest of the New World was morally and legally just. Equally far-reaching, Vitoria and his pupils who loosely pertained to the School of Salamanca had a profound enduring theological and cultural influence, first within the Spanish Church and then in the discussions at the Council of Trent, thus significantly affecting the course of European intellectual history.<sup>8</sup> As a consequence of these developments, since its inception international law has shared the destinies of European and Western ideas and continues to be dependent—even after secularisation—on their theological-political substrata.<sup>9</sup>

After the interpretations of Vitoria in the historical re-appropriations that his works experienced after the sixteenth century<sup>10</sup> were mostly encomiastic, if not openly hagiographic, in recent decades the post-colonial literature has put the accent on alleged dark sides of his thought. In a new 'grand narrative' contrasting with the 'old narrative' about Vitoria and the ideological origins of Western

<sup>4</sup>Pagden (1986); Pagden (2015), pp. 97–119; Todescan (2017). On the development of cartography and geography as a consequence of the discovery, see Duve (2017), pp. 418–423.

<sup>5</sup>Williams (1983, 1990), Anghie (2005), Orford (2012), Hunter (2010); critically, Fitzmaurice (2014), Brett (2011), Cavallar (2008), Zapatero (2017); favouring a 'new' discussion on imperialism, Muthu (2003), Pitts (2005, 2010); trying to move beyond a certain *impasse* in the scholarship, Koskenniemi (2011a, 2014). An overview of the ongoing controversy can be found in Fitzmaurice (2017).

<sup>6</sup>For the sincere moral preoccupations and the intensity of the debates, see Hanke (1949); Lupher (2006); Elliot (2006), pp. 69–78. Fernández-Armesto (1987), pp. 232–233, has referred to "[t]he juridical passion of the Castilian monarchs and their advisers," which resulted in "an obsessive desire to justify in theory . . . all their doings and especially all their wars".

<sup>7</sup>Parker (2019), pp. 454–458.

<sup>8</sup>Bunge (2017), pp. 38–52; Abellán (1992), pp. 629–716.

<sup>9</sup>Schmitt (2006), pp. 57–66; Koskenniemi (2011b), pp. 90–112; Beneyto (1983).

<sup>10</sup>De la Rasilla (2013), pp. 287–318, and see his contribution to this volume.

international law,<sup>11</sup> Vitoria's doubts, hesitations, 'might' clauses and cautionary and sometimes ambiguous vernacular have led to suspicions of double-morality and him being an imperial apologetic. A broader historical-intellectual perspective on Vitoria which especially considers his relations with the Emperor Charles V and with Erasmus van Rotterdam may shed further light on the complexities of Vitoria's thought and his lasting influence on the language *and* structure of international law.<sup>12</sup> However, neither religion, morality or law were able to prevent the atrocities that were committed in contravention of moral and legal norms by a number of the conquerors and settlers, although those prescriptions certainly acted as a containment.

## 2 A New Utopian Space and the Transformation of *ius gentium*

The fact that Erasmus's intimate friend and fellow humanist Thomas More set his utopian world in the Americas is not casual. It reflected an idea deeply engrained since the origins of the conquest that the New World was a utopian territory, or rather that America was the actual land of Utopia, of the dreamed new Arcadia of Renaissance thinkers.<sup>13</sup> The sheer uniqueness and extravagance of the discovery of an unexpected wholly new world and its peoples were therefore originally associated not only with modernity but also with the idea that this new place could be the subject of a new reflection on law and legal questions. Europeans saw the Indies both as a potential space for expanding their legal order and as a different spatial framework in which to re-conceive it. In a sense, it was not so much the discovery in itself or the conquest or colonising that defines the 'encounter' between Europe and America in early modernity, but the *making* of a New World.<sup>14</sup>

What propelled the new thinking of early modern theologians and jurists, particularly in Spain, was the question of how to solve the problematic relation between

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<sup>11</sup>This is discussed by: Cavallar (2008), p. 207; Hunter (2010), pp. 11–2; Zapatero (2017), pp. 178–80; and Fitzmaurice (2017), pp. 86–91, who overemphasises contextualisation.

<sup>12</sup>Pagden (2017), pp. 1–2, seems to limit the legacy of Vitoria to "a language" that, however, "would eventually become an entire philosophical-legal genre, summed up in [the] phrase 'the law of nature and of nations,' in which to recast what had really become a new global order."

<sup>13</sup>Hanke (1949), pp. 39–82; Abellán (1979), pp. 415–46; Pérez (1999), pp. 216–17. Vasco de Quiroga, Bishop of Michoacán, in his *Ordenanzas* took inspiration from More's *Utopia* when imagining the city of the future, free from all the vices and bad habits of Old Europe, an asylum of peace and innocence. Others, like Bartolomé de la Casas and Juan de Zumárraga, Bishops in Mexico, saw the Indies as the place where to build a new Golden Age and a new Christianity, a new "city under the Sun" (Campanella) where all things could be in common and everybody might live in peace. See Hanke (1949) for some of the new social experiments that were tried in the New World.

<sup>14</sup>Meccarelli (2009), pp. 299–302; Meccarelli (2017), pp. 591–94. And see Meccarelli's contribution to this volume.

rights and the political community that the discovery of the New World had made possible, a relation which was no longer based on a given territorial frame. As the same time as a new anthropocentric view of reality was being asserted, the (European) *respublica christiana* was no longer the space within which the legal order was taking shape.

Humanism and late scholasticism (not wholly free of influences by nominalism and its gradually more individualistic theory of rights), together with the unique experience of the opening up of the new space of the New World, made possible the discovery of the natural person as the general type of legal personality. A key issue in this context was the recognition of personal rights and its linking to the generating of social and political communities.<sup>15</sup> For early modern theologians like Vitoria, a member of a religious order (the *Ordo Predicatorum*, or Dominicans) the mission of which was to expand the Christian faith, imagining a new political space, one that would enable forms of coexistence to develop between peoples of different origins and cultures and at the same time preserve the universality of the Christian faith, was a key objective. In a historical context which no longer reflected the medieval ideas of universality, Vitoria had to integrate formerly unknown foreign cultures and peoples into a new vision of the world, i.e. into a new thinking of order which for him could only be a politico-theological order based on *ius naturale* and *ius gentium*. In this sense, it is true that he could not conceive of 'rights' or of 'the law of nations' other than as moral and legal unity,<sup>16</sup> as the late-scholastic and early-modern thinker than he was. However, even if his thought was inherently bound up with the re-enactment of a spiritual unity through evangelisation, he created a theoretical frame which allowed for a progressive secular perspective, one which would link the recognition of rights with their universality.

The main concern for Vitoria was re-imagining a *just* order (the 'common good,' *bonum communis*) which was responsive to the new pluralism of different peoples, and in which the ideas of commutative justice and reciprocity in an unprecedented new context were more important than individual liberty in a purely modern sense. He justified individual rights from this perspective. They were conceived by Vitoria as the engine of social cohesion, of the political just order, and at the same time for them to be such they had to be embodied in historical reality, in the sense that they could only take shape *within the dynamic of* a social, cultural and political context, and to the extent that they contributed to the *making* of this historical reality. This is the structure that defines *ius communicationis* as the specific embodiment of *ius gentium*. *Ius communicationis* was devised by Vitoria as a right that construes social, political and economic relations, and therefore also legal ones; it is an operative instrument through which human beings form the society where they live together. Modelled following the ultimate spiritual goal of the propagation of the faith, it continues to be an instrument for achieving it, but it has also acquired a full temporal and autonomous existence.

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<sup>15</sup> *Ibid.*

<sup>16</sup> Kennedy (1986), p. 15.

For Vitoria, in contrast to the later modern contractarian thinking, ‘rights’ and ‘justice’ belong to each other, given that the rights of free communication, free circulation, free trade and individual property are not abstractly conceived as “an emergency exit from an original state of nature” but as the motors of social cohesion.<sup>17</sup> Property in particular was not originally thought to be exclusionary of other rights. In this respect, these rights were not conceived as opposing or limiting each other but rather as a web that makes the other rights possible, as an ‘interrelated network’ through which ‘rights’ together contribute to the cohesion of the political community.

This is also the understanding that permeates Vitoria’s very much discussed notion of *dominium*, which cannot be separated from his idea of *ius gentium* as ideally embodying the just order and being at the same time the dynamic concretisation of that order. As Massimo Meccarelli writes in his contribution to this volume: “*Ius dominium* is used by Vitoria to distinguish the position of humans from that of the rest of creation, yet it does not serve to align the position of individuals within the legal order. The legal order continues to be determined by *real* differences, e.g. social, cultural and anthropological ones”. According to Vitoria in *De Indis*, the Indians could have *dominion* and not be deprived by the Spaniards of their possessions of land and goods since this was a natural right based on human rationality, and this right—which was conceived as a *dominium utile*, not as an absolute right<sup>18</sup>—was interrelated with the exercise by the Spaniards of *ius communicationis*, its twin, *ius peregrinandi*, and the right to free trade, constituting by themselves pillars of the new pluralist order. As I will describe further later, the rights to communication and free exchange were understood by Vitoria as expressions of the conflation between divine law (*ius divinum*), natural law (*ius naturale*) and positive law (*ius gentium*), i.e. as reflecting the correlated duties of propagation of the faith, respect for human rational rights and the making of a pluralist *international* order. Both sides—the divine-natural and the positive—were inherent in Vitoria’s theological and legal thought.<sup>19</sup>

The originality of Vitoria—and one of the main reasons for the lasting effects of his thought and that of the ‘divines of Salamanca’ on the future of international law—was the concomitant *utopian* dimension that *ius gentium* inherently acquired through the transformation of its content. An originalist vision of common enjoyment of land and goods, and of peace, were inserted in Vitoria’s new formulation of the medieval and Roman *ius gentium*.<sup>20</sup> At the beginning of ‘On the American Indians,’ he clearly stated the precedence of *ius communicationis* over property:

<sup>17</sup> Meccarelli (2017), p. 592.

<sup>18</sup> ‘On the American Indians,’ Vitoria (2017), p. 555: “*dominium nihil aliud est quam ius utendi re in usum suum*” (dominion is nothing else than the right to use a thing in one’s use).

<sup>19</sup> Kennedy (1986), p. 17: “Vitoria suggests different subjects and institutions with which human and divine law are concerned, but he affirms that their binding quality in these divergent spheres is identical.”

<sup>20</sup> On the different notions of *ius gentium* in Rome and in the Middle Ages, see Nys (1894); Neff (2014), pp. 63–74, 86–91.

“( . . . ) at the beginning of the world, when all things were common, everyone was allowed to visit and travel through any land he wished. This right was clearly not taken away by the division of property (*divisio rerum*); it was never the intention of nations to prevent men’s free mutual intercourse with one another by this division.”<sup>21</sup>

Vitoria’s objective was to avoid “the dangers implicit in individualistic and voluntaristic theories [of natural law] . . . by setting up a *ius gentium* that would allow sovereign states to go beyond their contractual ties and form an organic community that would come together naturally.”<sup>22</sup> His universalist vision sought to pluralistically integrate individuals and peoples. Vitoria’s restricted approval of territorial expansion was thus grounded on a re-interpretation of *ius gentium* as a universal *ius inter gentes*. What Vitoria was in effect attempting to do was to transform a law of peoples which subjects human beings to its provisions into a *ius inter gentes* which makes nations its main actors (but certainly not the only ones). In Vitoria’s account, this global *respublica* takes the form of a single legal person, with *de iure* at least, full powers of enactment. The *respublica totius orbis* has *vim legis*, i.e. the force of a universal law.

For Vitoria, the law of nations was a law created by a worldwide pact which granted it a power so far beyond that of its origin that it became a “force of law” which “is or derives from natural law.” The passage in *De potestate civili* in which Vitoria describes the law of nations as not having merely the force of pacts or agreements between men but the force of law (*vim legis*) became a classic affirmation of the autonomous validity of international law: “The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations . . . No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.”<sup>23</sup>

Even if the consent of republics is the basis of the rules underlying the international order and therefore the dependence of the law of nations on republics cannot be denied, there is, however,—as Francisco Castillo Urbano phrases it—an *ontological and juridical priority* of the global pact forming the *respublica totius orbis* over particular nations. The hypothesised “consent of the greater part of the world” has a stronger position than the particular laws of each nation because its goal is “to protect that totality which, in so far as it is composed of moral beings, constituted humanity before any nations came into being.”<sup>24</sup>

The Vitorian re-formulation of the law of nations has clearly both a global and a dual scope. One of the Dominican’s innovations with respect to the traditional understanding of *ius gentium* as part of natural law would lie in this very transformation of a law of peoples which subjects human beings to its provisions into a *ius*

<sup>21</sup> ‘On the American Indians,’ Vitoria (1991), p. 278.

<sup>22</sup> Todescan (2017), p. 33.

<sup>23</sup> ‘On Civil Power,’ Vitoria (1991), p. 40. For a detailed explanation of this point, see Deckers (1991), pp. 345–394.

<sup>24</sup> Castilla (2017), p. 143.

*inter gentes* which makes nations and state sovereignty central players. If the consent of republics is the basis of the rules underlying the international order, there is no question about the original dependence of *ius gentium* on nations. However, before any nations came into being, there existed the bond among humanity from which specific rights of individuals are derived. Conversely, these rights belong to the historical realisation of universal justice; they are common goods and the manifestation of the common good. Thus, Vitoria's account of the law of nations is two-sided: it covers relations between individuals and among nations as concrete realisations of the universal pact.

If it was no longer possible in the context of the expansion of early modern European states to resort to papal or imperial authority as 'lords of the world,' it did not mean the abandonment of all order. *Ius gentium*, was reactivated as a tool for the establishment of a foundation for the new reality of (different) individuals bestowed with the same rationality, different interrelated rights and different peoples.

It was the interplay between the incredible experience of the new space of the New World and the expansion of the legal imagination that it produced which prompted the appropriation of *ius gentium* in a way which made possible what Carl Schmitt called the new "nomos of the earth" after the discovery.<sup>25</sup>

There are several reasons for the success of Vitoria's reformulation of *ius gentium* as regards the further development of international law. It not only transformed what had hitherto been a body of normative moral arguments into a set of interrelated legal rights but he also made the law of nations a positive law established by human statute grounded in reason. This new body of law had a mixed nature, as it operated as the historical concretisation of natural law. As an embodiment of natural law, *ius gentium* is common to all mankind and can be recognised by reason even though it was not created through the deliberate will of any human legislator.

As a consequence of the universality of the law of nations, it follows that, if it really constitutes the rule of the world *respublica*, it must then apply to all peoples everywhere. The Indians could not be deprived of their goods, their land (their private *dominium*) or their sovereignty (public *dominium*) merely because they were unbelievers, for *dominium* was a faculty which conferred upon its bearers "the capacity to use things."<sup>26</sup> *Dominium* therefore constitutes an inalienable right which derives from natural law, not grace, and consequently applies to all peoples everywhere no matter what their religious beliefs. Human nature and the rights and duties which derive from it are the same in all parts of the world. What Vitoria therefore outlined is that there exists a legal authority among peoples (*inter gentes*) and it is this *vim legis* which also grounds individual rights and governs over all of the common goods of the world.<sup>27</sup>

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<sup>25</sup> Schmitt (2006).

<sup>26</sup> Langella (2017), p. 57.

<sup>27</sup> Pagden (2017), p. 6.



In Vitoria's formulation, *ius gentium* therefore fulfils different functions. It is not a simple metaphor but the actual regulatory instance of *totius orbis*, which implies that there can be no distinction *in law* between Christians and non-Christians. Vitoria's *respublica totius orbis* aimed to overcome the medieval distinction between Christian territory—and the dominion and jurisdiction exercised over it in pursuit of the common good by Christian princes (the *respublica Christiana*)—and the non-Christian territory of the 'barbarians.'

The conceptual instrument thought to link the different functions accroached to *ius gentium* was the utopian concept of a global 'commons' based on *ius communicationis*. What Vitoria called "the right of natural partnership and communication" (*ius naturalis societas et communicationis*) may be understood, as Johannes Thumfahrt phrases it, "as anthropological, customary (*communicatio*) and material (*commons*) underpinnings of international political collaboration."<sup>28</sup>

The link between all these different exigencies—the concrete realisation of rational justice based on natural law in the new political reality, the articulation between individual rights and the precedent global pact founded on the common good, and the justification for the expansion into the New World—was thought by Vitoria to be provided by *ius communicationis* and its twins *ius peregrinandi* and the right to free trade. Vitoria defines *ius communicationis* as the right of human beings to build social, economic, political and, therefore, juridical relationships. As noted earlier, it is therefore an operational tool with which people shape their society over time, and as such *ius communicationis* is different from the Thomistic concept of *appetitus societatis*. As a right founded on natural law and proper to human beings, it operates historically in existing social orders, renewing and transforming them according to the regulative idea of rational justice.

As Anthony Pagden<sup>29</sup> has noted, from the way Vitoria defines it *ius communicationis* seems to have been his own creation. Expressed as a right under both natural law and *ius gentium*, this was an original claim, and the Dominican construed it as the central argument for the legitimation of the conquest (and he considered its denial by the Indians as the most relevant justification for waging war against them). Of the eight justifications for conducting a war of conquest which might be held to be just that Vitoria discusses in Question 3 of *De Indis*, only justification 1 (*ius communicationis*) and justification 5 ("the defence of the innocent against tyranny", what we might today call 'the responsibility to protect') are given any credence by the Dominican.

<sup>28</sup>Thumfahrt (2017), p. 198. Among the common goods that Vitoria explicitly refers to are "running water, the open sea, rivers and ports." As he states immediately afterwards, "(...) these things are clearly public property from which no one may lawfully be barred, so that it follows that the barbarians would do wrong to the Spaniards if they were to bar them from their lands," Vitoria (1991), p. 279.

<sup>29</sup>Pagden (2017), p. 8. As Thumfahrt (2017, p. 208) remarks, Thomas von Aquin's '*civitas est quaedam communicatio*' is the basis for Vitoria's reflections, but he goes much beyond Thomas.



As in other crucial sections of his work, Vitoria was drawing here from ancient humanist concepts. He transformed the classical—he quotes Virgil<sup>30</sup>—tradition of ‘hospitality’ into a right under the law of nations and natural law. Anticipating—and reversing—the Hobbesian position, in *On the Indis* Vitoria stated that “nature . . . has decreed a certain kinship between men . . . Man is not ‘a wolf to his fellow men’—*homo hominis lupus*—as the comedian [Plautus] says, but a fellow.” This brings with it an obligation of friendship, since “amity between men is part of natural law.”<sup>31</sup>

This meant that the Indians could not, “lawfully bar them [the Spaniards] from their homeland without due cause.”<sup>32</sup> If they attempted to do so, then a just war might be waged against them. Of course, this would only apply if “these travels of the Spaniards are . . . neither harmful nor detrimental to the barbarians,” something about which Vitoria remained evasive saying only that he “supposed it to be” (*ut supponimus*). And as Anthony Pagden adds, “the fact that such communication was also perceived as a means of civilising the barbarian in no way altered its standing as a right.”<sup>33</sup>

It may be therefore too simplistic to interpret Vitoria’s stress on *ius communicationis* and *ius peregrinandi* as instruments to legitimise the imperial appropriation of territory and material goods from the natives. In fact, *ius communicationis* is so central to *De Indis* because it is at the core of Vitoria’s understanding of humanity as an entity in which sociability and communication are essential, with communication meaning many different things for Vitoria in addition to travel: exchange of ideas and trade, the right to innocent passage and the right to immigration.

For Vitoria, *ius communicationis* described a necessary condition for humanity. It is human interrelation that in a constitutive manner precedes property and the denial of *ius communicationis* by the natives to the Spaniards was a legitimate justification for war because it negated justice. This is exactly where its strong normative significance had its origin. The reason may well have been a self-evident connection for Vitoria between communication, the ontology of humanity and the commons which has become foreign to us.<sup>34</sup> The common goods and rights are so important to Vitoria because they are directly connected to the ‘hospitable nature’ of humans, although ‘hospitality’ is a weak term for the role that human interrelations play in Vitoria’s thought. “In this way, the commons are also the base of Vitoria’s strongest just title in favour of conquest, the *ius communicationis*.”<sup>35</sup> As always with the Dominican, this openness to the modern world went hand in hand with a religious goal: the universal conversion of non-Christians. The Dominican’s framing

<sup>30</sup> ‘On the American Indians,’ Vitoria (1991), p. 278. See the comments in Pagden (2017), p. 8.

<sup>31</sup> ‘On the American Indians,’ Vitoria (1991), p. 280.

<sup>32</sup> *Ibid.*, 279.

<sup>33</sup> Pagden (2017), p. 8.

<sup>34</sup> Thumfahrt (2017), p. 208.

<sup>35</sup> *Ibid.*, 203.

of *ius communicationis* as a universal right deriving from the common rationality of all human beings was as ambivalent as his entire thinking. It partakes of a 'primitive' conception in which law is still subdued to religious zeal<sup>36</sup> while at the same time it is also conceived as a secularised 'human right.'

Vitoria extended the same argument to commerce. Again here, it is *ius communicationis* (in its dual function of preaching according to divine law and of a secular right to free circulation and exchange of ideas under the law of nations) that precedes trade: "if travellers are allowed to dig for gold in common land or in rivers or to fish for pearls in the sea or in rivers, the barbarians may not prohibit the Spaniards from doing so."<sup>37</sup> The natural right to communication delivers a right under the law of nations for all travellers (*peregrini*) to engage in trade with whomever they please "as long as they do not harm the citizens" of the lands through which they are traveling. Therefore, he added, "the barbarians have a surplus of many things which the Spaniards might exchange for things which they lack."<sup>38</sup> Indeed, as Anthony Pagden remarks,<sup>39</sup> at the very end of his lecture Vitoria reminded his audience that the Portuguese had done just as well out of licit trade "with similar sorts of people" without conquering them as the Spaniards had done in a possibly illicit occupation. Something which, he tentatively suggested, the Spanish crown might think of emulating.<sup>40</sup>

This again shows the dilemma in which Vitoria found himself, the inherent dialectic in his thought between a specific *utopian* and an *apologetic* mode of perception.<sup>41</sup> As one of Vitoria's main disciples and close associates, Domingo de Soto, drily remarked on Vitoria's consideration of *ius communicationis*, although the Spaniards might have natural rights as travellers or even as ambassadors, they had gone to America as neither. They had gone as conquerors, in fact, "we would not be prepared to describe Alexander the Great as a *peregrinus*."<sup>42</sup>

Written in 1546, the year in which Vitoria died, this remark already belonged to a completely different 'situation' from that from which Vitoria's thought had departed. The imagining of America as a pseudo-historical place ('a non-place,' a *utopos*) and the sheer possibilities it opened for new political constructions like the law of nations was being severely limited by the political realities of the day. Nothing demonstrated this more strongly than the destruction of the 'imperial utopia of peace' among the European Christian Princes that Erasmus van Rotterdam had articulated, and that his pupil, the young Emperor Charles V, had tried to realise in the decades after he had become 'Lord of the World.'

<sup>36</sup>Kennedy (1986), pp. 13–26.

<sup>37</sup>'On the American Indians,' Vitoria (1991), p. 280.

<sup>38</sup>*Ibid.*, 291.

<sup>39</sup>Pagden (2017), p. 9.

<sup>40</sup>'On the American Indians,' Vitoria, p. 292.

<sup>41</sup>I am using the widely known title of Koskenniemi's (2005) book, although with a different purpose.

<sup>42</sup>Cited by Pagden (2017), p. 10.

### 3 Erasmus's Influence on the First Imperial Programme of Charles V and the Failure of the *Philosophia Christi*

Although there has been intense debate on the exact content and purposes of Charles V's imperial idea,<sup>43</sup> there is a certain consensus on the fact that at least until 1530 it pursued a new design which went beyond the classical precedent of the Roman Empire, the medieval Spanish attempt at re-appropriating the Roman model and the influence of the Flemish-Burgundian tradition, aimed at the innovative concept of a spiritual ruler of the *universitas christiana*.

Here is where Erasmus's humanism impinged on the idea of the new imperial ideology that Charles V and his counsellors were devising and that the Dutch reformer tried to orientate. In his *Institutio principis Christiani* (1516), which was dedicated to the young Charles who had just become Duke of Burgundy, was about to be crowned King of Spain and the New Territories in the Indies and would be crowned as Emperor in Bologna by the Pope, he promoted the idea of spiritual unity based on the *philosophia Christi*. The art of ruling, according to Erasmus, had to be based on the preservation of justice within the kingdom and on peace in relations with other kingdoms. *Concordia* between the Christian nations, and even in dealings with the Turks, who had to be subdued by the better morality of the Christian faith, not discord, ought to be the guide of a renewed politics inspired by evangelical Christianity and the internal reform of souls.

Concord and discord occupied a pivotal position for a number of seminal thinkers of the Renaissance.<sup>44</sup> Juan Luis Vives, the Spanish humanist who was one of Erasmus's confidants and who also entertained—particularly during the years of study that they both spent in Paris—a close relationship with Vitoria, exemplified in *De Concordia* the quest for a radically improved social order when he wrote “No greater need has the world, nowadays tottering at the edge of final prostration, than for concord. Only concord will reinstate the fallen, retain what is now fleeing from us and restore what has already been lost.”<sup>45</sup>

The early sixteenth century in Europe was ripe with feelings of apocalyptic decay and unsurmountable tensions which fed countless schemes to articulate the means of restoring society to the order and tranquillity which, it was believed, had prevailed in some remote original age. The anarchy of the fifteenth century and the intermittent states of warfare which plagued the early part of the sixteenth century formed the attitude of the age of Erasmus and Vitoria to the problems of war inasmuch as they fuelled political messianism, and this in turn nourished Charles V's imperial idea.

Erasmus and Vitoria have both been credited with a struggle for peace in the rather belligerent context of their time. Although in the thinking of both the idea of

<sup>43</sup> Brandi (1937), Rassow (1957), Menéndez Pidal (1958), Maravall (1960), Fernández-Álvarez (1966); and more recently, Pérez (1999), pp. 61–106; García-García (2000), Parker (2019), pp. 263–315.

<sup>44</sup> Castilla Urbano (2014).

<sup>45</sup> Cited in Fernández-Santamaría (1977/2008), p. 120.

peace and conciliation (and a positioning in favour of a universal Council of the Church which should decide on theological controversies and restore harmony within troubled Christendom) played a leading role, Erasmus was hopeful that through interior conversion and the spiritual perfection of souls there would be no further need for an institutional or legal anchoring to preserve peace. Erasmus's utopianism was more radical, unwilling to accept what "the age (...) was suggesting with ever increasing imperiousness, the idea, old in practice but never doctrinally admitted until Machiavelli, that there exist two forms of ethical conduct: one for man and another, different, for the state."<sup>46</sup> Contrary to the Dutch Humanist, Vitoria's neo-Thomistic theology was based on the premise of a clear distinction between the natural (*ordo naturalis*) and the supernatural or spiritual realm (*ordo supernaturalis*). The question for Vitoria was how to respond to the challenge of grounding a new political and legal order on rational justice. War could be an exigence of justice. For Erasmus, it was not the law, as in the case of the Dominican, which should function as an instrument in the service of such contradictory goals as imperial expansion, justice and peace. Instead, for the Dutch Humanist, everything was dependent on bringing order to hearts and souls, something which could only be attained through a search for the authentic origins of Christianity. This new *logos* was not to be re-created through the political imagination of a new order based on rights, but rather by encountering the true evangelical Christ, and this was only possible if the biblical world was purified of all interpretation and scholastic commentary. Christianity was a religion of peace and concord among humans, a religion based on the personal encounter with Christ, the *Prince of Peace*, whose preaching centred on the practice of charity and love, on unity and harmony among Christian princes, and consequently on the rejection of war as the opposite to this *philosophia Christi*, the 'philosophy of Christ.'

When in 1516 on the recommendation of Charles's Burgundian Chancellor, Jean le Sauvage, Erasmus entered the service of the prince, who was just 16 years old, the new counsellor proposed to draft a political manual for the education of a Christian prince, the *Institutio Principis Christiani*. At this time, Erasmus was already a very famous erudite and the leading humanist in northern Europe. He had become the target of acerbic critiques because of the publication some years earlier of his 'In Praise of Folly' (1511) and was particularly hated by an increasing number of monks and friars, who he did not cease to revile. At the printing house of his friend Johann Froben in Basle, he had just published a translation of the New Testament, which, even though it could count on the official protection of Pope Leo X, had sparked great controversy within the Church.

The central idea of 'Education of a Christian Prince' is straightforward: a prince has to govern for the general interest and not for his own benefit, and this means in a first instance that he has to consecrate himself to the pursuit of the "arts of peace." Against the traditional aristocratic and chevaleresque ethic based on honour achieved on the battlefield and the classical exaltation of heroic warrior virtues,

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<sup>46</sup>*Ibid.*, 115.

Erasmus condemned without any possible appellation the waging of war. He expressed here some of the ideas which he further elaborated in his *Querela Pacis* (Complaint of Peace, 1516), a monologue spoken by Peace against all war, the scandalous and hilarious dialogue *Julius Exclusus* (Julius Excluded, 1517), in which Peter turns the warrior Pope Julius II away from heaven, his *Adages*, and his *De bello turcico* (On the War against the Turks, 1530). Throughout his life, Erasmus maintained that Christian teachings speak for peace and against war and the aim of a prudent and wise prince should be to pursue unity among Christian princes. Even against the Turks, war should not be waged too easily since the propagation of the Christian message knows other paths, like good examples and gentle reasoning.

Against the common understanding of his contemporaries, Erasmus sustained that war is an ultimate alternative only to be decided on in the case of extreme necessity and when every possible negotiation has failed, with arbitration always constituting a better option. A just Christian prince should fortify his soul against all critiques and even concede to the enemy in order to prevent the “monstrosity” and carnage of war (*depone potius ac cede tempori*).<sup>47</sup> Last—and here we find the core of Erasmus’s ‘Christian humanism’—“the words may be different, but really being a philosopher and being a Christian is the same thing.”<sup>48</sup>

In order to understand the consequences of Erasmus’s notion of ‘*philosophia Christi*’ it is necessary to consider that the core of this spiritual Christianity lies in the metaphor of the ‘mystical body.’ Following this teaching of Saint Paul, all Christians are members of a single spiritual body, the head of which is Christ himself. Although the doctrine was well known, it was Erasmus who was influential in bringing it back into discussion, particularly in Spain, a country where the doctrine of spiritual regeneration of the Dutch humanist would find a fertile breeding ground. Spain would be the country most culturally influenced by Erasmus, with three focal points: the University of Alcalá, the city of Seville and the Court of Charles V itself.<sup>49</sup>

The political implications of the image of the ‘mystical body’ were used by Erasmus and the group of convinced Erasmians who acted as close counsellors to Charles V—above all, Alfonso Valdés—and who were trying to shape Charles V’s imperial ideology with an ideology of peace, spiritual concord among Christians and non-hegemonic unity in Europe. As Alfonso Valdés, who advanced to the position of official latinist and later became the private secretary to the Emperor, would put it in his *Dialogues*, reform and harmony between Christian princes ought to be at the core of the politics of peace (mystical peace) and conciliation in the new Emperor’s programme. As he formulated it, concord among Christians should be an expression of the harmony existing between the members of a common body; it acted like divine grace, animating its members with the spirit of unity. Against a hierarchical vision, this idea integrates a sense of solidarity, together with individuality and liberty. It was also the expression of a new freedom with regard to reading and interpreting

<sup>47</sup> Erasmus (2016), p. 55.

<sup>48</sup> *Ibid.*, 47: “Vocabulis diversum est, caeterum re idem esse philosophum et esse christianum.”

<sup>49</sup> Bataillon (1966), pp. 103–65, 279–315, 364–431.

scripture, certainly in relation to old rituals and external religious obligations, but also with regard to the temporal powers of the Pope. Valdés made good use of this intellectual position in the confrontation between the Emperor and the Pope, as was exemplified in his justification of the sacking of Rome by imperial troops in 1527. Valdés explained it as a providential act of God because of the corruption of the Vatican and the lack of fidelity to the Christian peace doctrine of a warrior pope.<sup>50</sup>

Among many other suggestions, Valdés, who was considered by his contemporaries to be “more Erasmian than Erasmus himself” (*erasmicior Erasmo*), took from the Dutch humanist proposals for the abolition of ecclesiastical jurisdiction and a strengthening of civil jurisdiction. He was less interested in respecting property and acquired rights than in rewarding virtue, and in entrusting riches to those best able to use them, precepts which were also proposed by other Humanists like Vives and Erasmus himself.

The objective of the Erasmians within the Court was to articulate a politics of conciliation with Lutherans and other reformers in a desperate—and ultimately unsuccessful—attempt to prevent the final rupture of Christian unity in Europe at any cost. These were the ideals that inspired the search for a negotiated solution with the rebels in the Diet of Augsburg (1530). In the underlying tension between unity and pluralism, between a ‘confederal’ system of governance in which the different principalities and rulers of the vast territories under the authority of the head of the Sacred Roman German Empire were able to preserve their autonomy and a hierarchical process of centralisation of power more akin to the emerging sovereign national states, like the France of Francis I and the England of Henry VIII, the agenda to re-integrate European unity under the dynastical predominance of the Habsburgs was probably destined to be defeated.<sup>51</sup> Charles’ fragile patchwork of Erasmian irenism, universal ideas of empire and Habsburgian dynastic auto-affirmation was eventually not powerful or ‘modern’ enough to overcome confessional factionalism in Germany, sustain continual financially and militarily exhausting wars throughout the continent and face the strengthening of the European sovereign states.

For the classical and medieval traditional ideas of empire, the Emperor was essentially the *dominus mundi*, the Lord of the World. This was also the conception which, in the context of the novelty that the emergence of Charles as King of Spain and Roman Emperor represented, was being re-formulated by some other prestigious Spanish jurists, like Juan Ginés de Sepúlveda, and ultimately by the Emperor’s Chancellor and experienced politician Mercurino Gattinara. In contrast, Valdés and the Erasmians saw the Emperor as the mere head of the *universitas christiana*, considering him more like a spiritual than a political ruler. His function in this ‘Christian Empire’—a European Christian realm based on the premises of the Christ-myth of the Prince of Peace—was in a parallel with the spiritual mission of the pope but for the preservation of the temporal good of the entire community.

<sup>50</sup> Bataillon (1966), pp. 364–431.

<sup>51</sup> Villacañas (2017), pp. 139–66.

Hence, Charles could only be crowned emperor by the pope, the last in a long historical tradition, as Clemens VII did in Bologna in 1530, hence the nearly permanent confrontation between the Emperor and the Pope for the political hegemony of Christendom and the imperial justifications for the horrible sacking of the eternal city perpetrated by imperial troops in 1527. Paradoxically enough, as stated, it was precisely Alfonso de Valdés who was entrusted with the task of writing the main apologetic text on the sacking.<sup>52</sup> As a theologian, a vassal of the Emperor and a baptised Christian under the authority of the pope, Vitoria remained pulled in both directions in the confrontation between the two powers, and this explains many of his hesitations.

According to the conception of a 'European Christian Empire' under the unifying rule of the Emperor, Charles was never to look for political dominion over the other kings and neither was he to pursue the conquest of new territories. His goal was considered to be the search for *concordia* with the other Christian nations and the preservation of the Christian faith against the Turks. This policy of unity among Christian princes in order to establish a common front against the real enemy, the Ottomans, was followed by Charles in his dealings with Francis I, King of France, to whom he showed deference on various occasions in order to win him over for the alleged common cause of Christianity and in his policies in northern Italy. It also explains his strong positioning in favour of the convocation of a Church Council which should resolve theological controversies and regain Christian unity.<sup>53</sup>

The realities of power and the dynamics of the European political world would direct the reform proposals of the Erasmians and their pupil Emperor Charles in directions other than expected. The policy of concord with the Protestant camp was brought to a definitive failure in the follow-up to the 1548 *Interim* and the Augsburg Peace (1555). Christian unity in Europe was never recovered and the Emperor, exhausted by the many wars and the many burdens on his conscience, abdicated in 1557, secluding himself melancholically in the Hieronymite monastery of Yuste in Extremadura. Although a man of many wars, his quest for peace remained unremitted, as if the irenist Erasmian utopia were his most real purpose throughout the many years of his rule, if we take into consideration his conversations in his last days in Yuste. However, it is largely admitted by historians that it was the prevalence of the dynastic principle, the preservation of Habsburg power, which eventually made the ideal of imperial unity impossible.<sup>54</sup>

Pragmatically—or ambivalently enough—the private secretary Valdés, who had stylised himself as the intellectual promoter of Erasmian harmony and European concord, was in the end not foreign to the imperial policies which turned into extended and bloody conflicts against Francis I, the Pope and the German princes.

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<sup>52</sup> Valdés (1928).

<sup>53</sup> Bataillon (1966), p. 366.

<sup>54</sup> Brandi (1937), pp. 12, 15 (*Introduction*); Parker (2019), p. 619. Rodríguez Rivero (2000, p. 101) makes Chancellor Gattinara the embodiment of the policy of dynastic hegemony and patrimonial expansion against the anti-dynastic policies of the Erasmians at Court.