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of the Indies.
Judgments on American
Indians and the Doctrine
of Just War**

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ABSTRACT

The Spanish conquest of the Indies was a war attended by a nightmare of cruelty lasting for decades with its massacres and enslavement, all of which led to the extermination of millions of Indians. It was a war without any noble pitched battles or skilful troop movements, and certainly not a just war.

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The Spanish conquest of the Indies was a war attended by a nightmare of cruelty lasting for decades with its massacres and enslavement, all of which led to the extermination of millions of Indians.¹ It was a war without any noble pitched battles or skilful troop movements, a war of what blind and senseless Ares bears in his flanks – as Homer put it –, the very ancient aptitude of civilised man to readily behave in the most abject of ways. In one of his works published in 1552, the *Brevissima Relación de la Destrucción de las Indias*, the Dominican Bartolomé de Las Casas – for whom 'the wars waged by the Indians against the Christians have been justifiable wars and [...] all the wars waged by the Christians against the Indians have been unjust wars'² – testified:

And the Christians, with their horses and swords and pikes began to carry out massacres and strange cruelties against them. They attacked the towns and spared neither the children nor the aged nor pregnant women nor women in childbed, not only stabbing them and dismembering them but cutting them to pieces [...] They laid bets as to who, with one stroke of the sword, could split a man in two or could cut off his head or spill out his entrails with a single stroke of the pike. They took infants from their mothers' breasts, snatching them by the legs and pitching them headfirst against the crags [...] Other infants they put to the sword along with their mothers and anyone else who happened to be nearby. [...] I once saw this, when there were four or five nobles lashed on grids and burning [...] and because they uttered such

1. The exact count of the victims has given rise to debate that is as plethoric as it is sordid, which is not the first nor the last of its kind. Let us accord it the attention it deserves.

2. B. de Las Casas, *The Devastation of the Indies: A Brief Account*, Trans. Herma Briffault (Baltimore, Johns Hopkins UP, 1974). https://www.asdk12.org/staff/bivins_rick/HOMEWORK/216236_LasCasas_TheDevast.pdf. See also the very useful collection by M. Bataillon and A. Saint-Lu, *Las Casas et la défense des indiens* (Paris, Julliard, 1971).

loud screams that they disturbed the captain's sleep, he ordered them to be strangled. And the constable, who was worse than an executioner, did not want to obey that order (and I know the name of that constable and know his relatives in Seville), but instead put a stick over the victim's tongues, so they could not make a sound, and he stirred up the fire, but not too much, so that they roasted slowly, as he liked. I saw all these things I have described, and countless others.³

To recollect these facts, these events that were illuminated by the same sun that continues to illuminate the present, may accredit what some do not shy from calling the Spanish 'black legend',⁴ but it is above all a moral and intellectual priority bound up with the doctrinal side of the Spanish conquest. It is indeed what led the contemporaries of that war to question whether or not it could be considered a just war. Now, it is a matter of fact, too, that there was substantial debate about this.

There is nothing anecdotal about wondering why there was for so long a question of whether or not to legitimise the Spanish venture. Plenty of massacres and conquests have been perpetrated in history without those who committed them ever wishing to question the legitimacy of their actions. In this light, the Spanish conquest of the Indies displays some uncommon features. Indeed, Ferdinand and Isabella, Charles V and Philip II not only allowed but by their orders prompted and encouraged a detailed, in-depth and open debate.⁵ As early as 14 August 1509, King Ferdinand ordered that 'no officials should prevent anyone from sending, to the King or anyone else letters and other information which concern the welfare of the Indies' and in 1521 the following general instruction was promulgated:

We order and emphatically maintain that now and henceforth at all times when each and every Royal Official and all other persons who are citizens, residents and inhabitants of the Indies, Islands and Tierra Firme of the Ocean Sea wish to write and give an account of everything that appears to them to be convenient to our service or if they wish to send messengers or come themselves, they shall be allowed to do these things and no one (including Captains, pilots and sailors) is to be permitted to place any restriction or hindrance or obstacle, whether directly or indirectly, under penalty of losing all favors, privileges and positions granted by Us and loss of all property and under pain of Our displeasure.⁶

And so thousands of reports, letters, books, memorials and so on were drawn up by individuals, officials and missionaries, many of which were printed. To this must, of course, be added the role of the universities – the *relecciones* of Salamanca playing a leading role and the organisation of *juntas* some of which

3. B. de Las Casas, *The Devastation of the Indies* Trans. Herma Briffault. This is just one of many examples. Further on, Las Casas writes of the kingdom of Guatemala, 'This butchery lasted for close to seven years, from the year twenty-four to the year thirty or thirty-one [1524 to 1531]. You can judge what would be the number of the victims that were swallowed up in the holocaust', https://www.asdk12.org/staff/bivins_rick/HOMEWORK/216236_LasCasas_TheDevast.pdf

4. The expression 'black legend' alone indicates the objective (to discredit those who denounce Spanish exactions, to cavil over a few facts and figures, to minimise the 'exaggerations' and so on). It is striking to observe the endurance of this 'Spanish black legend' nearly five centuries after. See for example the edifying course at The Hague Academy of International Law in 1954 by César G.F. Castanon, 'Les problèmes coloniaux et les classiques espagnols du droit des gens' (1954-II) 86 *Recueil des Cours*, p. 557.

5. The freedom of speech at the time seems to have been particularly extensive. Some commentators point out it was not unlimited: the historical interpretations of the episode of the 'remontrance' of Charles V further to the *relectio* of Vitoria (M. Bataillon, 'Charles Quint, Las Casas et Vitoria', *Charles Quint et son temps* (CNRS, 1957), p. 77, reprinted in M. Bataillon, *Etudes sur Bartolomé de Las Casas* (Centre de recherches de l'Institut d'études hispaniques, 1966) p. 291 are an example of divergence on this point, but that is a matter of nuance and the freedom of tone and criticism remain striking. See also L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia, University of Pennsylvania Press, 1949) which emphasises that the bounds of the freedom of discussion pertained to the dogma of religion and to the printing authorisations (but on this point, it is noteworthy that several books attacking Las Casas – including of course Sepulveda's *Democrates* which is discussed below – were never printed, while the works of Las Casas, even the most critical and virulent of them, were).

6. Hanke, *The Spanish Struggle for Justice*, p. 9.

remain famous to this day.⁷ The existence and, once again, the scale of debate, was remarkable,⁸ as was the role played by churchmen without whom the questions would probably never even have been raised.⁹ It is true that knowing this does not offset the sorrow and disappointment felt when one thinks that all these debates and conclusions – invariably unfavourable to Spanish practices – were unable to amend the situation on the ground, remote as it was, and to call into question the huge economic interests engendered by large-scale plunder.

It is in considering the characteristics of the debate about the Spanish conquest of the Indies that it is possible to understand some of the basic orientations it was able to take – principally everything that turned on the nature of the Indians and their behaviour – with regard to the doctrine of just war.

1.

The characteristics peculiar to these debates and controversies stem as much from the circumstances surrounding their birth as from the theological direction they took.

1.1. Birth of the Debate on the Legitimacy of the Spanish War in the Indies

The controversy has a date of birth; it illustrated from the outset what was to be largely true throughout history: the beneficial role of churchmen even if, as just recalled, they were unable to curb the practices.

It was only close to ten years after the start of the conquest, on the Sunday before Christmas in the year 1511, in the church of Hispaniola – the ‘little Spain’ now known as the Dominican Republic – that Antonio de Montesinos, a courageous Dominican friar, gave a sermon before the elite of the first Spanish town founded in the New World. Commenting on the *vox clamans in deserto* (I am a voice crying in the wilderness), he declared:

It is in order to make your sins against the Indians known to you I have come up on this pulpit, I who am a voice of Christ crying in the wilderness of this island, and therefore it behooves you to listen, not with careless attention, but with all your heart and senses, so that you may hear it; for this is going to be the strangest voice that ever you heard, the harshest and hardest and most awful and most dangerous that ever you expected to hear [...] This voice says that you are in mortal sin, that you live and die in it, for

7. This, of course, is the case of one of the controversies of Valladolid (1550–1551) – recently turned into a novel and filmed (J.-C. Carrière, *La controverse de Valladolid*, (Paris, Belfond, 1992)) – which remained unfinished, led to no written conclusion (despite repeated requests from the Crown) and was not followed – unlike others – by any concrete measure (L. Hanke, *Aristotle and the American Indians. A Study in Race Prejudice in the Modern World* (Chicago, Henry Regnery Cy, 1959) p. 60 ff). However, one should not give the impression these *juntas* were organised solely for discussion questions about the Indies; from the end of the *reconquista* in 1492, there were very many of them on varied subjects involving religion (e.g. another conference in Valladolid in 1527, in which Vitoria took part, about the writings of Erasmus, M. Bataillon, *Erasme et l’Espagne* (Paris, Droz, (1937) 1998) p. 243 or the consultations on marriage from a letter from Isabella, read in 1530 at the council of the University of Salamanca. The response from the university appearing very harsh, the imperial curia asked for another draft. The canon lawyer Antonio de Montemayor and the theologian Francisco de Vitoria were tasked with this. Vitoria took up the theme for his magisterial lecture of 25 January 1531, applying it to the case of Henry VIII of England. See R. Hernandez Martin, *Francisco de Vitoria et la ‘Leçon sur les indiens’* (Paris, Cerf, 1997).

8. Another example, given by Hanke, *The Spanish Struggle for Justice*: when the bishop of Manila, the Dominican Domingo de Salazar asked that the converted Chinese of the Philippines cut off their pigtaails as a sign of their emancipation from paganism, numerous protests were made to Philip II and won the day.

9. This role of churchmen was obviously not uniform since there were theologians supporting the Spanish conquest of the Indies (e.g. Bernardo de Mesa, the King’s preacher legitimising the servitude of Indians to the committee which was to give rise to the Laws of Burgos, or the theologian Juan Ginés de Sepúlveda, as we shall see) and a majority of defenders of the cause of the Indians, opposing all departures for the Americas pending decrees prohibiting any unjust war against the Indians. Ferdinand convened a commission of the theologians and deferred the departure of the armada of the Pedrarias expedition and from which the *requerimiento* emanated (see below). A member of that expedition, Martin Fernandez de Enciso, presented to the commission an argument from the Bible. God gave the Indies to Spain as he gave the Promised Land to the Jews, as Joshua slew the inhabitants of Jericho, the first city of the Promised Land which refused to evacuate the city, God is just because they worshipped idols (which the Spanish particularly detested). Spain could do the same to the Indians who refused to hand over their lands. In 1513 this dubious interpretation was barely discussed and accepted provisional upon the *requerimiento*. In the *De Indis*, Francisco de Vitoria was to refuse to liken the Spanish conquest to divine wars (wars undertaken by the Israelites on God’s orders against the peoples who lived in the Promised Land and against the Amalekites), those wars were just because directly ordered by God (those who waged them were the instruments of God said Aquinas, *Sum. Th. II, Iae, Q. 105, 3 ad 4*). Vitoria emphasises that what was true for them could not be transposed as a solution in ordinary law (*‘Ipse autem est Dominus omnium, nec dedit hanc licentiam ex lege communi’*, ‘He, however, is Lord of all and has not given this licence as a common law’, *De Iure Belli*, 38).

the cruelty and tyranny you use in dealing with these innocent people. Tell me, by what right or justice do you keep these Indians in cruel servitude? On what authority have you waged a detestable war against these people, who dwelt quietly and peacefully on their own land? [...] And what care do you take that they should be instructed in religion? [...] Are these not men? Have they not rational souls? Are you not bound to love them as you love yourselves? [...] Be certain that in such a state as this, you can no more be saved than Moors or Turks.¹⁰

The affair caused a scandal and triggered sharp protests, especially from the governor, and a delegation was sent to the monastery to demand excuses and a disavowal. But the superior, Pedro de Cordoba, replied only that Montesinos had spoken in the name of the Dominicans and would return to the question the following Sunday. Naturally enough, the laconic promise drew an even larger crowd and in the packed church Montesinos commented on the text 'Suffer me a little, and I will show thee that I have yet to speak on God's behalf'.¹¹ Far from toning down his earlier sermon as expected, he continued his criticism and warned – a serious matter – that the monks would henceforth refuse confession and absolution for Spanish colonists. The matter found its way back to the Court of Spain and Ferdinand ordered the Dominican community not to maintain this scandalous doctrine. As Lewis Hanke wrote, Montesinos had about as much chance of persuading his contemporaries as a theology student lambasting the crowd in Wall Street today on the theme 'sell what you have and give to the poor, and you will have treasure in heaven'. Yet this was the starting point of a debate that was to run for several decades.¹²

The circumstances in which the debate about the war against the Indians first arose did, it is the least that can be said, work against them. At the time the great debates were beginning about the war in the New World, about the legitimacy and the circumstances of the Spanish conquest of the Indies, various factors came together. First of all, the existence of a substantial body of doctrine on war, and more particularly on just war, from which everyone was to draw to support their arguments, whatever they might be. Next, the new situation arising from the discovery of an inhabited world. Lastly and above all, the discrepancy between the debate over ideas and the actual situation on the ground that arose in part because serious discussion of the subject began belatedly, that is, well (almost twenty years) after the discovery of the Indies. Moreover, the various actors moved in very different spheres: protection of economic interests, prestige of the crown, while yet others – those which are the focus here – concentrated on spreading the faith, whether that led them to condemning the war against the Indians or on the contrary to justifying it. The combination of all of these circumstances explains the near total powerlessness of all the debates (which were to run dry before the end of the 16th century), conclusions, books and others, to significantly curb the course of things.

1.2. Nature of the Debate: Theology or Law?

The circumstances and figures who were at the origin of the questioning of the Spanish conquest of the Indies certainly explain the essentially theological direction it took. If therefore it is true that law and jurists do not seem to have taken the lead in the debate, perhaps a few nuances are called for on this point.

The first nuance comes, as might be expected of 'a legalistic' people,¹³ from the fact that law was indeed reintroduced into the matter at the stage of practices, by what one might call the liking for legal formalism. In the game of conquest, the king, monk, soldier and barbarian were the main actors of a story of faith, blood and gold. But while the history of the Spanish conquest of the Indies was made by soldiers and their dogs, told by men of arms, related and discussed by churchmen and theologians,

10. Many very useful texts – including this one – have been collected by L. Hanke and J.M. Rausch in *People and Issues in Latin American History. The Colonial Experience* (Princeton, Markus Wiener Publ., 1993).

11. Hanke, *The Spanish Struggle for Justice*, p. 18.

12. On all these events, see Hanke, *The Spanish Struggle for Justice*, chapter 1.

13. Hanke, *Aristotle and the American Indians*, p. 8.

one must not overlook the notary and more generally the role of law. Thus those same captains who embarked slaves promulgated and enforced rules against blasphemy and card playing. Pícaro Bernal Díaz del Castillo related the meeting between Cortés and the Cholula Indians: Cortés explained that he had been sent to tell them not to worship idols, not to sacrifice human beings or to eat their flesh, and so on, and exhorted them to swear obedience to the King of Spain. The Indians refused to abandon their idols, but accepted to take an oath to the King and gave their pledge, but, noted Bernal Díaz del Castillo, 'not before a notary'.¹⁴ Thus, again and above all, the farce of the *requerimiento* was put in place, a sort of acme of legal formalism. This text was the outcome of the work of a *junta* organised further to the scandal caused by Montesinos' sermon. Representing undeniable progress, it was inspired by rather 'generous' considerations for the Indians. It was handed over to the outgoing conquistadores who were required to read it out to the Indians before any hostile action. The text began with a brief history of the world since the creation, the establishment of the papacy and quite quickly reached the 'donation' of Alexander VI.¹⁵ Its purpose was to demand of the Indians (this was the *requerimiento*) that they consent: (1) to recognise the Church as the sovereign and ruler of the whole world, the great priest called the pope and the king as masters, lords and kings of the isles and *Tierra Firme*; (2) that the true religion be taught to them. The consequences of a refusal by the Indians so invited were clearly set out in the text:

If you do not do this [...] I certify to you that, with the help of God, we shall forcibly enter in your country and shall make war against you in all ways and manners that we can [...] we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them [...] and we shall take away your goods, and shall do all the harm and damage that we can, as to vassals who do not obey, and refuse to receive their lord, and resist and contradict him; and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their Highnesses, or ours, nor of these cavaliers who come with us. And that we have said this to you and made this Requirement, we request the notary here present to give us his testimony in writing, and we ask the rest who are present that they should be witnesses of this Requirement.¹⁶

The practice of the *requerimiento* became absurd: shouted – very often in Spanish – by notaries pursuing terrified Indians as they fled into the mountains, or notarially muttered to empty spaces or to trees miles from any Indian.¹⁷

Why this formalism? It is difficult to answer such a question without engaging in a historical sociology of the Spanish mind which would probably emphasise the fact that Spanish legislation was inherited in part from legalism proceeding from Visigoth institutions,¹⁸ under which the Church thrived – one is put in mind of course of the importance of the school of Seville and of Isidore, 'Teacher of the west'¹⁹ and author of the famous *Etymologiæ* which contributed greatly to the debate on the doctrine of just war²⁰ since 81 of its texts were included as canons in Gratian's decree – combined with the *derecho* (Roman law) and canon law.

A second nuance stems from legal scholars like Diego de Covarrubias, Martín de Azpilcueta, Fernández de Menchaca, Balthazar de Ayala and others²¹ who wrote on war, even if, as Professor Hagg-

14. *The Conquest of New Spain*, Trans. J.M. Cohen (London, Penguin Classics, 1963), p. 191.

15. Reference to the Papal bull *Inter caetera* of 1493.

16. Translation by Hanke and Rausch, *People and Issues in Latin American History*, p. 91.

17. On the *requerimientos* (it seems there were two, one in 1503 and that of 1513), see Ch. Vanderlinden, 'Le "requerimiento" et la "paix coloniale" dans l'empire espagnol d'Amérique', *Recueil de la Société Jean Bodin pour l'Histoire comparative des Institutions*, vol. XV, *La Paix* (deuxième partie), p. 397.

18. E. Nys, *Le droit des gens et les anciens jurisconsultes espagnols* (The Hague, Nijhoff, 1914) p. 15 ff.

19. J. Fontaine, *Isidore de Séville. Genèse et originalité de la culture hispanique au temps des Wisigoths* (Turnhout, Brepols, 2000).

20. See P. Haggmacker, *Grotius et la doctrine de la guerre juste* (Paris, PUF, 1983) esp. p. 320 ff.

21. See Nys, *Le droit des gens et les anciens jurisconsultes espagnols*, p. 15 ff.; P. Haggmacker, 'Guerre juste et guerre régulière dans la doctrine espagnole du XVI^e siècle' (1992) *Revue internationale de la Croix-Rouge*, p. 459; A. Truyol y Serra, 'La conception de la paix chez Vitoria', *Recueil de la Société Jean Bodin pour l'Histoire comparative des Institutions*, vol. XV, *La Paix* (deuxième partie), p. 241 repr. in *Vitoria et Grotius* (Paris, Vrin, 1987).

macher has shown, at bottom they turned away from the question of just cause and towards a bilateral view of the law of war.

Lastly, the distinction between law and theology is probably less sharp than that between jurist and theologian. Quite simply because, busying themselves with natural law and divine law, theologians were no strangers to legal considerations, far from it, unless law is (anachronously) reduced to civil or human law alone.²²

Even so, it was the theologians who occupied centre stage. In this respect, the remark by Francisco de Vitoria at the beginning of *De Indis* about *who* is entitled to think about these issues is typical.²³ It is not jurists, he says, or at any rate not them alone. Why? Because the barbarians are not subject to us by virtue of human law: matters concerning them should not be discussed from the point of view of human laws but of divine laws. However, Vitoria observes, jurists are not sufficiently conversant with divine laws. The opening lines of the *De Indis* shed light on this theological orientation, so much so that it can be said that, at first sight, they in no manner announce a reflection on war. It is the question of collective baptisms that is asked of Vitoria, particularly because of the turmoil caused by a book by Las Casas which came out in 1537 on *Del unico modo de atraer atodas las gentes a la religion verdadera*. The opening sentence of Vitoria's *relectio* is a quote from the Book of Matthew: 'Teach all nations, baptizing them in the name of the Father and Son and Holy Spirit'. Francisco de Vitoria ties this passage to the question 'whether the children of unbelievers may be baptized against the wishes of their parents'. Framed in this way, the question is more narrowly circumscribed than the one addressed by Aquinas in the *Summa Theologiae*,²⁴ because here it is simply the children of barbarians, but it is within the theologian's area of competence.

It may seem odd that Vitoria should broach such a broad question ('On the Indians lately discovered') from so specific a point which, moreover, hardly seems of the first order considering the scale of the massacre and destruction perpetrated by the Spanish in America. But in fact it is the specific point that is to lead to the wider issues, for the questions Vitoria says he must address in order to answer the initial enquiry broaden out his field of reflection all at once: (1) By what right have the Spanish imposed their sway over the barbarians? (2) What power do Spanish sovereigns have over them from a temporal and civil point of view? (3) What power do those sovereigns and the Church have with respect to spiritual and religious matters? The *De Indis* was to reply to just a part of these questions. It is understandable that the theologian is less obviously competent on these broader matters than on the relationship of faith and will – to use Augustine's terms – about baptism. It is for that reason that Vitoria, returning to the question of competence, wishes to meet a preliminary objection that he himself raises: Can a theologian concern himself with such matters, far beyond the issue of baptism? More broadly still, are these questions relevant even for 'those whose concern it is to attend to and administer these matters'?

By the method peculiar to scholasticism, Vitoria sets out the arguments against the thesis he was then to expound. He gives its due to the action of temporal rule, emphasises that Aristotle says one should not endlessly call things into question and that in addition Ferdinand and Isabella were most Christian rulers, the Emperor Charles V is just and scrupulous, and that they have therefore examined the question with great care. One must not look for iniquity in the house of the righteous. However, says Vitoria, even a thing that is certain like the Incarnation is disputed, and theological discussions are not always about solving a difficulty; they may demonstrate truths. Moreover, although Aristotle posits that things impossible, things necessary and things whose lawfulness and necessity are certain and notori-

22. *Reverendi patris, fratris Francisci A Victoria de Indis recenter inventis, Relectio prior* (1696 edn, hereafter *De Indis*), section I. The edition used is that of E. Nys, the Classics of International Law, Carnegie Institution of Washington, 1917 (Latin-English edn) and the translation of Alfred Vanderpol, *La doctrine scolastique du droit de guerre* (Paris, Pedone, 1919) p. 426 ff, and certain translations from Vitoria et Suarez. *Contribution des théologiens au droit international moderne* (Paris, Pedone, 1939).

23. *De Indis*, sect. I; see J.B. Scott, *Francisco de Vitoria and his Law of Nations* (Oxford, Clarendon Press, [1934] 1999), p. 104.

24. Aquinas, *Sum. Th., II, IIa, Q. X, art. 8*: 'Whether unbelievers ought to be compelled to the faith?'

ous are not matters to be questioned or deliberated upon, the same is not true when there is ground to doubt whether a thing is good or bad, fair or unfair. The question raised 'about the matter of the barbarians' is not so obviously unjust or just that no doubt is possible but 'it has a look of both according to the standpoint'.

But then, when we hear of so many massacres, so many plunderings of otherwise innocent men, so many princes evicted from their possessions and stripped of their rule, there is certainly ground for doubting whether this is rightly or wrongly done.²⁵

'*Whether this is rightly or wrongly done...*': in this, the theologian gets to the crux of the matter. Is the Spanish venture in the Indies lawful or not?

2.

It is impossible to answer this question, as can be understood, without using the intellectual tools that the doctrine of just war made available to contemporaries. However, such as it had been elaborated down the centuries, this doctrine had by definition never had to apply to a case like that which arose from the discovery of the Americas. That is why the theological discussion took a somewhat peculiar direction, through the way the discussion found itself dependent on a number of judgments about the Indians.

2.1. *The Legacy of the Traditional Doctrine of Just War*

Obviously there is no question of summarising here the content of this doctrine, even less of its development,²⁶ but merely of bringing out what is salient about it and able to enlighten the debate on the legitimacy of Spanish action in the Indies.

The essential point here is that the doctrine of just war is in large part tied in with the idea that it is the consequence of a prior judgment or, as Suarez was to say, just war 'holds the place of a sentence of vindictive justice'. The ruler punishes by virtue of a right to punish that comes from God. According to what Saint Paul had to say about the ruler: 'for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil'.²⁷ Ever since Augustine, it has been repeated that the ruler or the people who declares war acts as a judge under the jurisdiction of whom falls a foreign nation, *ratione delicti* because of a very serious fault, a crime it has committed and has failed to repair. True, the ruler does not ordinarily judge foreigners: he does so momentarily, exceptionally, because foreigners have done some wrong which they refuse to right. It was after Aquinas – who devotes a specific question to war in his *Summa Theologiae*²⁸ – that this became a theological question that was addressed directly and no longer while examining other issues. As Professor Haggemacher has emphasised, the consecration of the *Summa Theologiae* in the 16th century as the basic textbook for teaching theology is a capital point, the mainspring behind the flourishing of the University of Salamanca, and it exerted a considerable influence on the doctrine of war.²⁹ Aquinas, taking up the formulas of Isidore of Seville and Augustine laid down three famous conditions for an offensive war to be just: (1) the authority of the ruler upon whose order the war is to be undertaken (the problem of private war, which is not at issue in the Spanish conquest of the Indies); (2) the war must have a just cause, that is, that those who are attacked deserve to be for having done something wrong (it is on this point that the

25. *De Indis*, Section I (313).

26. See primarily Haggemacher, *Grotius et la doctrine de la guerre juste*.

27. Letter to the Romans, 13, 4. '*Minister enim Dei, vindex in iram ei qui malum agit*'. *Minister Dei*, for the sovereign must only punish in instances in which God would himself punish, *vindex in iram*, for the sovereign only does so in cases of guilty actions liable to anger God, *ei qui malum agit*, for the sovereign uses this power to strike him who does evil.

28. *II, IIa*, Q.40.

29. 'For close on three centuries Pierre Lombard's *Livre des sentences* had held this role but it just so happens that it contained no passage bearing directly on war, which was usually only addressed incidentally to other problems (like the problem of restitution). The *Summa* including a question dealing specially with war, this subject was from then on to be examined mandatorily in education'. Haggemacher, 'Guerre juste et guerre régulière dans la doctrine espagnole du XVI^e siècle', p. 450.

dispute focused, probably too exclusively); (3) the intention of those who fight must be right, that is, they propose to do good and avert evil (the debate made little of this condition for the war of the Indies, which was not without consequences).

The parallel is constantly drawn between the ruler's power to punish wrongdoers within his jurisdiction and war as the power to punish external wrongdoers. Vitoria sets out that:

Also, a prince has no greater authority over foreigners than over his own subjects. But he may not draw his sword against his own subjects, unless they have done something wrong. Therefore not against foreigners either.³⁰

Suarez explained the ruler's jurisdiction in this way:

[M]ost of the time, it [offensive war] is undertaken against men who are not subjects; it is therefore necessary for there to be some fault on their part, for which they have become subjects; otherwise by what title would they be worthy of punishment and would they come under a foreign jurisdiction?³¹

2.2. Why Fault had to be Found with the Indians

This legacy of scholastic doctrine of just war made it absolutely necessary to determine whether there was some fault that could be ascribed to the Indians that might legitimise war. The general presentation of the problem by Vitoria in the *De Indis* is not exactly the same because he examines the titles (legitimate or otherwise) by which the Indians 'came into the power of the Spaniards' (instead of determining whether the Spanish have a just cause for war),³² but that does not change the fact that he too examines whether or not what the Indians are reproached for can legitimise the Spaniards' actions.

The first question that may be asked is who does the term 'Indians' designate. On this point, the views of those on the ground (missionaries) are often opposed to the views of thinkers far away. The former, of whom Bartolomé de Las Casas was the typical example because he lived in America for decades,³³ knew that it was meaningless to speak of 'the Indians': their skins, idioms, rites, gods saw all their diversity merged in this word 'Indians' which had no meaning for those it referred to. The thinkers, with feigned or genuine ignorance, used the general term encompassing 'the Indians' as one vast and homogeneous tribe which saved the trouble of having to make distinctions.³⁴ Vitoria, while observing

30. *De Iure Belli*, § 13 (Fourth proposition).

31. F. Suarez, *De Bello*, § 4, 'On just titles of war according to natural reason', First conclusion (our translation). Suarez's *De Bello* is in part III (*De Charitate*) of his treatise *De triplici virtute theologali*. His *De Legibus* also contains developments on war and the law of nations (Book II, chap. XVII to XX).

32. The exact expression is indeed 'to have' just cause of war (*habere*), because war cannot 'be' (*esse*) just when by definition only one of the belligerents 'has' a just cause of war. Obviously, in the course of his demonstrations, Vitoria uses the vocabulary 'just cause of war', 'just war' but, as can be seen, the general tenor of his argument is based on 'titles' of 'dominion' (*De Indis*, Sect. II).

33. For biographical questions, among a vast literature on Las Casas, see L. Hanke, *Bartolomé de Las Casas. An Interpretation of his Life and Writings* (The Hague, Nijhoff, 1951) and F. Orhant, *Bartholomé de Las Casas. De la colonisation à la défense des indiens* (Paris, Editions ouvrières, 1991). See also A. Castaldo, 'Les "Questions péruviennes" de Bartolomé de Las Casas (1564)' (1978) *Foi et vie*, p. 65 with the substantial literature cited.

34. A controversial question is how much did Vitoria know, given that he never went to America, and so depends on what is known of Vitoria's sources of information. (See L. G. Alonso Getino, *El maestro Fr. Francisco de Vitoria y el renacimiento filosófico teológico del siglo XVI* (Madrid, TIP de la Rev. de arch., bibl. y museos, 1914); C. McKenna, 'Vitoria and his time', in *Francisco de Vitoria. Addresses in Commemoration of the Fourth Centenary of his Lectures 'De Indis' and 'De Iure Belli' (1532–1932)* (Washington, Herbert Wright, 1932) p. 13; V. Beltran de Heredia, *Francisco de Vitoria* (Barcelona, Labor SA, 1939); Hernandez Martin, *Francisco de Vitoria et la 'Leçon sur les indiens'*: Vitoria heard and received direct testimony from missionaries, and notably the important evidence of Vicente de Valverde, Pizarro's chaplain during the conquest of Peru, who went to San Esteban to tell of the conquest, the scope for evangelisation and also the horrors of the conquest. Moreover, it seems that some Spaniards returning loaded with riches from the treasure of Atahualpa, having troubled consciences about having become so rich so quickly on other people's property, came to put their case to Vitoria so that he might propose justifications for their peaceful enjoyment of that property (on this point R. Hernandez Martin refers to a letter of 8 November 1534 from Francisco de Vitoria to Miguel de Arcos in which he claimed to be troubled by this eagerness to justify abuse and theft). In any event, as C. Schmitt points out in *Le Nomos de la terre* (Paris, PUF, [1950] 2001) p. 102 ff., the *relectiones* are an argumentative and conceptual edifice, made up of pros and cons, arguments and counter-arguments, distinctions and conclusions, forming a coherent conceptual unit, a whole that bears on the soundness of arguments and not on the material situation of the practical conclusions.

that many of the rude peasants of Spain were less intelligent than some Indians,³⁵ wrote – although he does not want ‘to assert anything on this matter’ – that it had been argued that the Indians differed little from beings deprived of reason: incapable of forming or administering a true state, they had neither laws nor magistrates, nor literary culture, knew nothing of the arts, and so on. That shows that it was not the theoretical beauty of anthropology or the subtleties of comparative ethnography that were at issue, but indeed the theatre in which criticism of Spanish action was played out: the legitimacy of that action hung on what these Indians were, on their nature.

Indeed, a radical justification of the ‘war’ – if it can be so called – was to maintain that it was not a war, that the New World was *terra nullius* when it was ‘discovered’, an outcome that could be reached by denying that the Indians in these areas were human. The line of argument that the Indians were not humans was not pursued, however, and understandably so: true, it would have had the advantage of having the conquest not count as war and of characterising it as a simple process of discovery, but it would have had the drawback of eliminating any proselytism unless they were animals that were to be converted. In this respect, a *junta* of thirteen masters of theology from the University of Salamanca and the Convent of San Esteban convened in Salamanca in 1517 studied the proposal that the Indians were incapable of faith and concluded that it was an error, punishable by burning at the stake for anyone who persisted in it. It was understood then that the Indians were human enough to be converted, but was this sufficient for them to be lords and masters of the lands they occupied?

The argument of imperialist legal scholars, like that of Sepúlveda, was that the Indians were barbarians and slaves by nature having neither sovereignty nor property.³⁶ It was in this toned-down version of sub-humanity that the argument sought to prosper to legitimise war. Sepúlveda maintained it was lawful to subject the Indians because they were feeble-minded; they were a servile and barbaric people who owed obedience to the Spanish:

Compare then those blessing enjoyed by Spaniards of prudence, genius, magnanimity, temperance, humanity, and religion with those of the little men (*hombrecillos*) in whom you will scarcely find even vestiges of humanity, who not only possess no science but who also lack letters and preserve no monument of their history except certain vague and obscure reminiscences of some things on paintings. Neither do they have written laws, but barbaric institutions and customs. They do not even have private property [...] How can we doubt that these people – so uncivilized, so barbaric, contaminated with so many impieties and obscenities – have been justly conquered by such an excellent, pious, and most just king as was Ferdinand the Catholic as is now Emperor Charles, and by such a most humane nation and excellent in every kind of virtue?³⁷

It is understandable that from this perspective the Indians could not own the land they occupied or the resources upon it. Indians were natural slaves: book I of Aristotle’s *Politics*, a work that, for his greater glory the learned Sepúlveda translated, was particularly drawn upon. The diversity and ingenuity of the arguments developed in this respect prevents any summary of them, despite the great doctrinal interest of this exchange.³⁸ Sepúlveda’s argument was to derive consequences favourable for Spanish dominion from the lower, servile albeit human nature of the Indians (especially the impossibility for the Indians to own the lands they inhabited). Vitoria (while ultimately reaching a quite similar conclusion as to the

35. ‘*Cum etiam apud nos videamus multos rusticorum parum differentes a brutis animantibus*’, ‘for even among ourselves we find many peasants who differ little from brutes’, *De Indis*, Section I (334).

36. On this subject, see D. Alland, ‘L’esclave par nature d’Aristote au temps de la Seconde scolastique espagnole’, *Droits. Revue française de théorie, de philosophie et de culture juridiques*, 2009, n° 50, p. 59-87.

37. Cited by Hanke, *The Spanish Struggle*, p. 122-123.

38. For Sepúlveda’s arguments, it is best to refer directly to his *Democrates alter, sive de justis belli causis apud Indos* which can be found in a Latin-Spanish edition, J.G. de Sepúlveda, *Democrates Segundo o de las justas causas de la guerra contra los indios*, 2nd edn (Madrid, Instituto Francisco de Vitoria, Madrid [1951] 1984). For an overview of the debate, see the two authoritative books by L. Hanke, *Aristotle and the American Indians* and *All Mankind is One. A Study of the Disputation between Bartolomé de Las Casas and Juan Ginès Sepúlveda on the Religious and Intellectual Capacity of the American Indians* (DeKalb, Northern Illinois University Press, 1974).

incapacity of the Indians) had addressed the question years earlier and had shown on the contrary that the Indians were indeed the lawful masters of their public and private property before the arrival of the Spanish. Las Casas was long to refute all arguments that Indians were slaves by nature. He demonstrated notably that, if it is claimed that Indians are slavish barbarians by nature, it is because of their savage behaviour: in that case, even those who lived in an advanced state of civilisation like the Greeks or Romans could be called slavish barbarians by nature if it depends on their behaviour. Indeed, the Spanish had obviously excelled everyone in savagery. It was also said that the Indians were slavish barbarians by nature because they had no written language: for Las Casas, that made them barbarians in a narrow sense but not slaves by nature as Aristotle meant the term. In addition, we have proof of the beauty and the wealth of Indian languages and brother Domingo de Santo Tomàs published a grammar of Peruvian to prove how rational the language was. It is true, Las Casas argued again, that there were real barbarians in the narrow sense and akin to those referred to by Aristotle and slaves by nature, but they were quirks of nature and exceptions. Unless it was to be understood that God did not wish to save all men, to claim that the greater part of the world was inhabited by barbarians and slaves by nature in this sense would be to question God's scheme of things and the rationality of nature. There was no race, religion or whole region that was insane, weak-minded or incapable of self-government.

In short, for Las Casas as for Vitoria, the Indians had the use of reason, had cities, laws, magistrates, they lacked only education, like the peasants in Spain. They were therefore true landowners. Consequently, it was especially important to find cause to legitimise the action undertaken against them. This is what guided the search for wrongdoing that could be ascribed to the Indians; without some fault, the Spanish action was a straightforward war of conquest. Yet tradition made it impossible to justify a war of conquest as such. The point is clearly identified in Augustine who, of course, had taken up the celebrated anecdote about the band of robbers.³⁹ Vitoria concluded likewise, but by taking a quite different path, basing his demonstration on logical reasoning that was so characteristic of him:

Extension of empire is not a just cause of war.⁴⁰ This is too well known to need proof, for otherwise each of the two belligerents might have an equally just cause and so both would be innocent. This in its turn would involve the consequence that it would not be lawful to kill them and so imply a contradiction, because it would be a just war.⁴¹

2.3. Identification of Wrongdoing Ascribable to the Indians

From the foregoing it follows that the whole question came down to knowing what fault the Indians were guilty of that could legitimise their coming under the sway of the Spanish. A wealth of subtlety was employed in identifying such faults and refuting them: resistance to *ius communicationis*, the mistreatment Indians inflicted on converts, sins, unbelief, hostility to predication, and so on. Some of these can be discussed.

2.3.1. The Sins of the Indians, the Enormity of their Crimes

The 'most serious faults of barbarians': by committing mortal sins, the Indians supposedly gave a legitimate ground to undertake a just war against them. Some of those sins were against natural law (eating human flesh or copulating with one's mother or with other men). Some argued that unbelievers had no other law than natural law and that consequently there followed a natural right to punish them if they infringed it. But Domingo de Soto,⁴² reasoning in terms that suggest a question of conflict of jurisdiction,

39. 'But to make war on your neighbours, and thence to proceed to others, and through mere lust of dominion to crush and subdue people who do you no harm, what else is this to be called than great robbery?' *De civ. Dei*, IV, 6. <http://web.archive.org/web/20080914045227/http://etext.lib.virginia.edu/toc/modeng/public/AugCity.html>.

40. A little earlier Vitoria says the same about the difference in religion.

41. *De Iure Belli*, third question, proposition II.

42. See Beltran de Heredia, 'Domingo de Soto', *Dictionnaire de théologie catholique* (Paris, Letouzey & Ané, 1941).

objected that if God is the master and avenger of the whole universe, we (Christians) are not in the same position with regard to unbelievers, except to say that, in that a king has a right of sovereignty over all the wrongdoers in his kingdom, it would follow that each of the magistrates who have under their authority the right to judge might infringe upon the territory attributed to another and exercise his office there as if it were his own territory.⁴³ To the arguments drawn from the sins of the Indians, Vitoria had also opposed an impressive number of objections:

– Paul wrote, ‘ “I wrote to you in an epistle not to company with fornicators; [...] For what have I to do to judge them also that are without?” Whereon Saint Thomas says: “The prelates have received power over those only who have submitted themselves to the faith” ’.

– ‘[T]he Pope can not make war on Christians on the ground of their being fornicators or thieves [...] nor can he on that ground confiscate their land and give it to other princes; were that so, there would be daily changes of kingdoms, seeing that there are many sinners in every realm. And this is confirmed by the consideration that these sins are more heinous in Christians, who are aware that they are sins, than in barbarians, who have not that knowledge’.

– ‘Further, it would be a strange thing that the Pope, who can not make laws for unbelievers, can yet sit in judgment and visit punishment upon them’.

– ‘The aborigines in question are either bound to submit to the punishment awarded to the sins in question or they are not. If they are not bound, then the Pope can not award such punishment. If they are bound, then they are bound to recognize the Pope as lord and lawgiver. Therefore, if they refuse such recognition, this in itself furnishes a ground for making war on them, which, however, the writers in question deny’.

– ‘And it would indeed be strange that the barbarians could with impunity deny the authority and jurisdiction of the Pope, and yet that they should be bound to submit to his award’.⁴⁴

Suarez’s thinking runs along the same lines – and can be read again with interest today in the light of contemporary doctrine on the ‘duty to intervene’ – for whom God has not given the power to all men to avenge his own insults. Suarez recalls that God has the power to avenge the insults to him by himself and that giving this ability to all mankind would be a source of great disorder (Vitoria also thought that sins against God not reflected by evil against men could not be judged by men). Suarez concludes:

[T]here is no just title of war *peculiar to Christian princes* that does not have its foundation in natural law, or that does not have some relation to it, and which consequently is not suited also in some manner to infidel princes.⁴⁵

2.3.2. The Indians’ Unbelief

The unbelief of Indians as a cause of a just war was discussed from two complementary angles.

The first angle was to ask whether their faithlessness was a fault in itself. Some had argued in the past that the war between the faithful and the infidel was just for the faithful⁴⁶ but, invoking the authority of Aquinas, Soto (just as Vitoria had done shortly before) relied on a distinction between separate categories of unbelievers: those who live *de facto* or *de iure* under the sway of Christians (Saracens and Jews in Spain, Jews in other countries) whose property may be confiscated; those who had by violence acquired lands that were once Christian (they may be attacked to take back those lands); those who were not subject *de iure* or *de facto* to Christians and did them no wrong. For these, there was no legiti-

43. *De Iust. et iure*, 1. V, Q. III, art. 5, cited by A. Vanderpol, *La doctrine scolastique du droit de guerre* (Paris, Pedone, 1919).

44. *De Indis*, Sect. II, § 16.

45. Suarez, *De Bello*, § 5: ‘Are there for Christian princes just titles of war other than those natural reason indicates?’ [Our translation].

46. For Hostiensis (Henry of Segusio, archbishop of Florence, 1389–1459), war between believers and unbelievers is just with respect to the believers. This point of view prevailed against that of Innocent IV, *Apparatus in quinque libros decretalium*, that unbelievers had a right of jurisdiction and possession which they could not lawfully be denied. See C. Barcia Trelles, ‘Francisco de Vitoria et l’école moderne du droit international’ (1927-II) 17 *Recueil des Cours*, p. 113.

mate cause of war other than those that existed with regard to the faithful. In this case Soto considered it was a 'sort of negative unbelief, which is that of men never having heard speak of Christ, [it] is not a sin and deserves no punishment'.⁴⁷ As for Suarez later, he noted laconically that unbelief alone was a worthless ground. Much has been made of this point: the Indians never had the opportunity to hear the Gospel (which is different from rejecting it). In the *De Indis*, Vitoria showed that according to Paul (there is no sin before the law) the Indians could not sin before having heard the voice of Christ. One must therefore, as Soto did, make out separate categories of unbelievers and place the Indians in the category of those who were not subject either *de facto* or *de iure* to Christians and did them no harm. For them, there was no other legitimate cause of war than those causes that might be found with regard to the faithful.

A second angle was the resort to constraint to propagate the faith. At the heart of this discussion we find Luke, 14, 23, the famous *compelle intrare*, 'compel them to come in', which Sepúlveda construed as allowing infidels to be constrained to faith by force.⁴⁸ But this interpretation had Augustine and Aquinas against it: one can do everything without wanting to, but believe only if one wants to. For them, if Christians waged war on unbelievers, it was not to force them to believe because even if after vanquishing them they kept them prisoners, they would leave them the freedom to believe,⁴⁹ with Vitoria and Las Casas in turn.⁵⁰

2.3.3. The Refusal to Hear the Good Word

Another ground for war relates to the Indians' refusal to hear the Gospel. For some commentators, this refusal legitimised the resort to war. Vitoria expounded that this could only be so if the rejection of faith occurred in specific circumstances (violently) and after genuine predication which was not done in the case in hand. If faith had been announced reasonably, this would still not have been a ground for war and for stripping them of their property. It remains that for Vitoria, the fact that the Indians prevented preaching was a just cause of war. It is true that he added immediately ('Friend, I speak *only* of what is lawful') that one should not insist in the event of resistance, what was lawful not necessarily being what was expedient.

As can be seen, from the standpoint of the canons in force at the time, the Spaniards, unlike the Indians, could not be considered to have a just cause of war. This conclusion would have been further strengthened by greater consideration of the criterion of right intent (spreading the Gospel and not enrichment). This condition was so important in the eyes of Aquinas that even a war declared by a legitimate authority and for a just cause might be unjust because of the perverse intent of whoever made the declaration. Without challenging the point head on, Vitoria settled for an allusion to right intent in the form of advice and not of a stringent precept. No doubt, though, that this stringent precept would have led to even firmer condemnation of the Spanish conquest of the Indies.

In concentrating as done here on the sole point of the way in which the question of the Indians interfered with the issue of justifying the Spanish conquest of the Indies, many other arguments had to be left aside that might challenge it or legitimise it, which the *De Indis* recapitulates and discusses thoroughly:⁵¹

47. *De iusti. et iure*, book V, qu. III, art. 5.

48. This parable contains an invitation to the master's table in three stages: the initial guests, who all decline, for more or less futile reasons and do not come, then the poor, the maimed, the blind and the lame the servant brings, then, as there is still room and the master no longer wants any of those invited at the outset to come, the third wave when the servant must fetch whoever he finds and 'compel them to come in, that my house be filled'.

49. *Summa Theologiae*, II, II^{ae}, Q. 10, art. 8.

50. Vitoria writes that believing out of fear is not believing by operation of the will (*De Indis*, II, prop. VI) and Las Casas, quoting Saint Jean Chrysostom, thinks that the *compelle intrare* is not an outside constraint imposed by arms but an inner constraint inspired by the grace of God and the ministry of angels.

51. For an overview see J. Barthélémy, 'François de Vitoria', *Les fondateurs du droit international*, p. 1 ff.; Beltran de Heredia, 'Francisco de Vitoria', *Dictionnaire de théologie catholique*; Schmitt, *Le Nomos de la terre*, p. 102; A. Truyol y Serra, 'De la notion traditionnelle du droit des gens à la notion moderne de droit international public. Concepts-clefs de la pensée de Vitoria', *Revue d'éthique et de théologie morale. Las Casas et Vitoria* (Paris, Cerf, 1987) p. 84; J. Verhoeven, 'Vitoria ou la matrice du droit international', *Actualité de la pensée juridique de Francisco de Vitoria* (Brussels, Bruylant, 1988), p. 97; H. Méchoulan, 'Vitoria, père du droit international?', *Ibid.*, p. 11.

universal authority of the emperor, temporal universal authority of the pope,⁵² *ius inventionis*, voluntary submission of the Indians, right to commerce, non-discrimination, and so on. But it must be said that none of the contemporaries of the conquest (not even Bartolomé de Las Casas) dismissed the process of colonisation as such, in which the churchmen saw an opportunity for conversion, but they condemned rather the means employed, being critical of the enslavement of the Indians and of the shameful system of *encomienda*.⁵³ Yet this critical outlook pertains, in the perspective of the law of war, to *ius in bello* and not *ius ad bellum*, to the theory of just cause which concerned these theologians above all. Vitoria showed concern about having a just cause of war, but circumstances were such that just war was inevitable. For things to have been otherwise, would have meant the Indians being landowners, having rulers, a political power, culture, religion and civilisation, accepting unflinchingly to be treated as the incapable subjects of a foreign king and harkening to preaching of the faith.⁵⁴

52. A point that involves highly contradictory interpretations of the Papal bull *Inter Caetera* of Alexander VI of 1493, of which some commentators say it contains nothing more than a geographical division of competence for spreading the faith alone (and not an attribution of the land, on this see Barthélémy, 'François de Vitoria', a point that was to be reinforced by the conclusion of the Treaty of Tordesillas just after this Papal bull, whereas the bull provides that 'we give, concede and assign to you for ever, etc. with all the estates cited, castles, places, rights, jurisdictions and other appurtenances [...] we make, constitute and depute masters and lords, with free, full and complete power, authority and jurisdiction, you and your etc.>'; see E. Nys, 'La ligne de démarcation d'Alexandre VI' (1895) *RDILC*, p. 474.

53. The Spanish Crown 'recommended' Indians to Spaniards, who became *encomenderos* and could require work or a tribute of the Indians and had to protect and educate them. This form of concession, the bounds of which were composed of souls and space, put in place a radical form of slavery that none of the string of writings on the subject was able to change. The literature on this subject is plethoric, see Hanke, *The Spanish Struggle for Justice*, and my study 'L'esclave par nature d'Aristote au temps de la Seconde scolastique espagnole', n. 36 above.

54. Méchoulan, 'Vitoria, père du droit international ?', p. 24.