

The “Doctrine of Discovery” and *Terra Nullius*: A Catholic Response

The following text considers and repudiates illegitimate concepts and principles used by Europeans to justify the seizure of land previously held by Indigenous Peoples and often identified by the terms Doctrine of Discovery and terra nullius. An appendix provides an historical overview of the development of these concepts vis-a-vis Catholic teaching and of their repudiation. The presuppositions behind these concepts also undergirded the deeply regrettable policy of the removal of Indigenous children from their families and cultures in order to place them in residential schools. The text includes commitments which are recommended as a better way of walking together with Indigenous Peoples.

Preamble

The Truth and Reconciliation process of recent years has helped us to recognize anew the historical abuses perpetrated against Indigenous peoples in our land. We have also listened to and been humbled by courageous testimonies detailing abuse, inhuman treatment, and cultural denigration committed through the residential school system. In this brief note, which is an expression of our determination to collaborate with First Nations, Inuit and Métis in moving forward, and also in part a response to the Calls to Action of the Truth and Reconciliation Commission, we would like to reflect in particular on how land was often seized from its Indigenous inhabitants without their consent or any legal justification. The Canadian Conference of Catholic Bishops (CCCB), the Canadian Catholic Aboriginal Council and other Catholic organizations have been reflecting on the concepts of the Doctrine of Discovery and *terra nullius* for some time (a more detailed historical analysis is included in the attached Appendix).

Statement

We believe that now is an appropriate time to issue a public statement in response to the errors and falsehoods perpetuated, often by Christians, during and following the so-called Age of Discovery. In light of all this, as Catholics:

1. We firmly assert that Indigenous people, created in the image and likeness of God our Creator, ought to have had their fundamental human rights recognized and respected in the past, and that any failure to recognize and respect their humanity and fundamental human rights past or present is to be rejected and resisted in the strongest possible way;
2. We firmly assert that there is no basis in the Church’s Scriptures, tradition, or theology, for the European seizure of land already inhabited by Indigenous Peoples;
3. We reject the assertion that the principle of the first taker or discoverer, often described today by the terms Doctrine of Discovery and *terra nullius*, could be applied to lands already inhabited by Indigenous Peoples;
4. We reject the assertion that the mere absence of European agricultural practices, technologies, or other aspects common to European culture, could justify the claiming of land as if it had no owner;
5. We reject the assertion that Europeans could determine whether land was used or occupied by Indigenous people without consulting those people.

Rationale

We have read the Truth and Reconciliation Report's treatment of the Doctrine of Discovery, and understand the connection made by the Report between the injustices committed in relation to land and resources and those committed through the residential school system. The attitudes and policies which deprived Indigenous people of their way of living on the land were closely related to those which assumed that it was good and appropriate to remove Indigenous children from their families and their own cultural system of education and place them in residential schools. We are mindful that Catholics were complicit in these systems. While many of the priests, brothers, sisters and laypeople who worked in the residential schools served with generosity, faithfulness and care, the deeply flawed policies behind the schools, and the abusive actions of some of the personnel among them, left a legacy of suffering.

In addressing this legacy, we echo the words of Pope Francis, pronounced in Bolivia on July 9, 2015: "I say this to you with regret: many grave sins were committed against the native peoples of America in the name of God. . . . Like St. John Paul II, I ask that the Church 'kneel before God and implore forgiveness for the past and present sins of her sons and daughters'." We are well aware that the flawed policy of assimilation has deeply scarred many Indigenous people and has wounded the original relationship of welcome offered by so many of the first peoples of this land to newcomers.

As we ask for mercy from the Father of us all, we pray that we might find appropriate ways to deal with the waves of hurt and pain caused by members of the Catholic community in the past. We also pray that we might be instilled with the courage which filled Indigenous Peoples as they sought to find a peaceful way forward, and the courage which inspired those prophetic voices in the Church who stood in solidarity with Indigenous Peoples and spoke out against historical injustices, from Bartholomé de Las Casas, who half a millennium ago proclaimed the dignity and rights of the Indigenous peoples of America, to Pope John Paul II, who recognized and celebrated the dignity and beauty of Indigenous Peoples and cultures. We acknowledge that many among the Catholic faithful ignored or did not speak out against the injustice, thereby enabling the violation of Indigenous dignity and rights. It is our hope and prayer that by naming and rejecting those erroneous ideas that lie behind what is commonly called the "Doctrine of Discovery" and *terra nullius*, we may better recognize the challenges we face today so that we may overcome them together.

Walking Forward Together

Here our concern moves beyond specific references to the Doctrine of Discovery and *terra nullius*, to address other areas which are part of the legacy of colonialism and the residential school system. The Truth and Reconciliation Report stressed that a recognition of past wrongs ought to be accompanied by a practical commitment to heal enduring injustices.

As representatives of the Catholic faithful in Canada, and counting on the full collaboration of the Canadian Catholic Aboriginal Council, we appeal to all our Catholic brothers and sisters -- laity, members of institutes of consecrated life and of societies of apostolic life, deacons, priests, and Bishops -- to make their own the following commitments, as recommended by the Commission for Justice and Peace of the Canadian Conference of Catholic Bishops, in order to continue to walk together with Indigenous Peoples in building a more just society where their gifts and those of all people are nurtured and honoured:

1. Continue to work with Catholic educational institutions and programs of formation in learning to tell the history of Canada in a way that is truthful, ensuring proper treatment of the history and experience of Indigenous Peoples, including the experience of oppression and marginalization which resulted from the Indian Act, the Residential School system, and frequent ignoring or undermining of signed treaties.
2. Work with centres of pastoral and clergy formation to promote a culture of encounter by including the study of the history of Canadian missions, with both their weaknesses and strengths, which encompasses the history of the Indian Residential Schools. In doing this, it will be important to be attentive to Indigenous versions of Canadian history, and for these centres to welcome and engage Indigenous teachers in the education of clergy and pastoral workers, assuring that each student has the opportunity to encounter Indigenous cultures as part of their formation.
3. Call upon theological centres to promote and continue to support Indigenous reflection within the Catholic community, and include this as part of the national ecumenical and interreligious dialogues in which the CCCB is involved.
4. Encourage partnerships between Indigenous groups and existing health care facilities to provide holistic health care, especially in areas where there are significant health needs.
5. Encourage initiatives that would establish and strengthen a restorative justice model within the criminal justice system. Incarceration rates among Indigenous people are many times higher than among the general population, and prisons are not sufficiently places of reconciliation and rehabilitation. Such initiatives include the renewal of the criminal justice system through sentencing and healing circles and other traditional Indigenous ways of dealing with offenders where appropriate and desired by Indigenous peoples.
6. Support the current national inquiry into missing and murdered Indigenous women and

girls and work with others towards a healthier society where just relations flourish in families and communities, and where those most vulnerable are protected and valued.

7. Support Bishops and their dioceses and eparchies, as well as superiors of institutes of consecrated life and societies of apostolic life, together with lay Catholic organizations, in deepening and broadening their relationships, dialogue and collaboration with Indigenous Peoples; in developing programs of education on Indigenous experience and culture; and in their efforts to follow up on the Truth and Reconciliation Commission's Calls to Action, especially those that address faith communities.

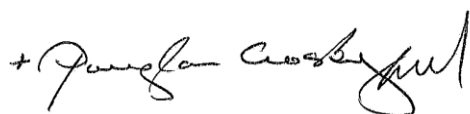
8. Encourage Bishops, as well as the superiors of institutes of consecrated life and societies of apostolic life, together with lay Catholic organizations, to invite a greater acquaintance with the *United Nations Declaration on the Rights of Indigenous Peoples* in their dioceses and eparchies, in their parishes and educational institutions, and in their communities and pastoral work, thus fostering continuing reflection in local contexts on how various aspects of the Declaration can be implemented or supported.

March 19, 2016

Solemnity of Saint Joseph, husband of the Blessed Virgin Mary

Principal patron of Canada

Catholic Signatories



Most Rev. Douglas Crosby, O.M.I.
Bishop of Hamilton and President,
Canadian Conference of Catholic Bishops



Most. Rev. Donald Bolen
Bishop of Saskatoon and Chairman,
CCCB Commission for Justice and Peace



Deacon Rennie Nahanee
Chair, Canadian Catholic Aboriginal Council



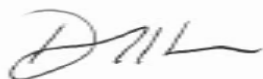
Sister Rita Larrivée, S.S.A.
President, Canadian Religious Conference



Deacon Jean-Denis Lampron
President, Canadian Catholic Organization
for Development and Peace



Rev. Timothy Scott, C.S.B.
Executive Director, Canadian Religious Conference



Mr. David Leduc
Executive Director, Canadian Catholic
Organization for Development and Peace

APPENDIX

The Doctrine of Discovery, *Terra Nullius*, and the Catholic Church: An Historical Overview

A Working Paper Developed by the Commission for Justice and Peace
of the Canadian Conference of Catholic Bishops

As we look closely at the specific concepts of the “Doctrine of Discovery” and “*terra nullius*,” it will become apparent that European colonists did not use these particular terms to justify their land claims. In fact there appears to be no clear, universally held set of beliefs about land rights held by all Europeans during the Age of Discovery. The reality is that in many cases, European nations and colonists simply took what they could and attempted to justify it afterwards. The concepts of the “Doctrine of Discovery” and *terra nullius* are among these justifications.

I. Understanding the Terminology

The concepts of the “Doctrine of Discovery” and *terra nullius* are foreign to many people. Yet even when people know the terms, they are often not understood in the same way. For this reason, we will begin by attempting to clarify, from our understanding and perspective, what these terms mean, beginning with the “Doctrine of Discovery.”

The Doctrine of Discovery

The “doctrine” of discovery is a legal convention or principle that was not codified until 1823 by a decision of the US Supreme Court,¹ thereby making its way into American common law. This particular ruling made frequent reference to the rights that accrued to European nations by virtue of “discovery,”² effectively establishing a new legal doctrine. This is why we speak of the “Doctrine of Discovery.” While this principle can be understood in various ways, today it is usually taken to mean that ownership of or sovereignty over land passed automatically to Europeans by virtue of their having “discovered” it, irrespective of the presence of previous Indigenous occupants. However, the actual discovery doctrine is more narrowly circumscribed than this. A later decision of the US Supreme Court summarizes the meaning of the doctrine clearly:

¹ The *Johnson v. M'Intosh* decision, written by Chief Justice John Marshall, ruled that private citizens could not purchase land from Native Americans. Such purchases could only be made by the United States, which had received this exclusive right of sovereignty from Great Britain, which had obtained it by discovery. The Native Americans were considered to hold a right of occupancy, but were not considered to have complete sovereignty over their land.

² For example, “The exclusion of all other Europeans necessarily gave to the nation making the *discovery* the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. . . . In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded . . . but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that *discovery* gave exclusive title to those who made it.” (emphasis added)

This principle, acknowledged by all Europeans because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it, not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.³

In other words, the legal “Doctrine of Discovery” is, in the strict sense, a constraint on European nations and individuals and does not legally affect the rights of Indigenous peoples. It does, however, negatively affect their ability to sell their land to Europeans since they could in theory sell only to whichever European nation had “discovered” their territory.⁴ We are well aware, however, that in reality lands belonging to Indigenous peoples were often simply taken and were not freely sold by their Indigenous owners. This brings us to the more dangerous but related concept of *terra nullius*.

Terra nullius

Terra nullius (literally: no one’s land) is a term that attempts to explain how Europeans often justified their seizure of Indigenous lands. In effect, Europeans often treated the territories of Indigenous Peoples in the New World (particularly in North America and Australia) as if they were unoccupied and belonging to no one, and therefore free to be taken by whoever discovered them. It seems that in recent years, this idea has become virtually synonymous with the “Doctrine of Discovery” even though the two are distinct issues.

The challenge, from a historical point of view, is that the term *terra nullius* is not as old as its Latin name suggests. While the “law of the first taker” existed in Roman Law, it generally applied to things like wild animals. The term *terra nullius*, however, was not used at all until the late 19th century and was at that time mainly confined to disputes over Antarctica and the North Pole.⁵ While we will discuss *terra nullius* more later in this paper, at this point we can say that the term *terra nullius* is of quite recent origin and we should be cautious about assuming that there is a single, common legal principle underlying European expansion in the New World. However, it cannot be doubted that the term *terra nullius* does point to a historical reality, namely that Europeans, because of their own limited understandings of agriculture, technology, property, and culture, often did see Indigenous land as being essentially unused and therefore free for the taking. That these same Europeans often seized these lands without the consent of the land’s rightful owners was a profound injustice.

³ US Supreme Court, *Worcester v. State of Georgia*, pg 31, US 544.

⁴ Cf. Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (New York: Oxford University Press, 2010), 5.

⁵ Andrew Fitzmaurice, “The Genealogy of *Terra Nullius*,” in *Australian Historical Studies* 129 (2007), 13.

II. Some Historical Background

Before examining the historical background, we would like to recall that tension between Church and State has existed from the foundations of Christian history. The notion sometimes put forward that missionaries and European conquerors all had the same goals is contradicted by the historical record, as Christian missionaries were in many instances in conflict with the governments and commercial interests of their own nations.⁶ It is true that horrific injustices were committed by nations that considered themselves Christian, and that many Christians during this period failed to witness to the dignity of the human person. Yet there were important voices within the Church as well who cried out in the name of the dignity of Indigenous peoples. To learn from history requires that we listen to the many and diverse voices from the past, some of which invite repentance, others which inspire and help us to discern what the Holy Spirit has been saying, and continues to say, to the Church concerning the Indigenous peoples of Canada and the world.

We turn now to an examination of several historical developments that will help us better understand the concepts of the “Doctrine of Discovery” and *terra nullius*. These include the medieval understanding of the rights of non-Christians to possess sovereignty or *dominium*, three Papal Bulls that are often associated with the “Doctrine of Discovery,” some later developments in European thought on Indigenous peoples and the rationalizations used to seize Indigenous land, and the early response of the Catholic Church to the abuses being committed against Indigenous peoples.

The Rights of Non-Christians

Within the Church in Europe, there had already been a lively debate during the Middle Ages on whether non-Christians could possess *dominium* or lordship (the ability to possess authority, property, land, etc.). Pope Innocent IV (1243-54) considered the conditions under which war could be waged against non-Christians, and concluded that these could not be deprived of their property or lordship simply because they were not Christian.⁷ However, if a nation violently prevented peaceful missionaries from entering that land, then Christian soldiers could be sent to ensure the security of the missionaries, even deposing the non-Christian ruler if he were intent on persecuting Christians within his borders.⁸ But it could never be licit to invade or seize the property of a peaceful non-Christian people.

⁶ Examples include the famous sermon of the Dominican Antonio de Montesinos, preached (after being approved by his whole community) on the 4th Sunday of Advent, 1511, to the Spanish colonists of Hispaniola (the island which today contains Haiti and the Dominican Republic), informing them that unless they recognized the humanity of the native people and ceased abusing them, they would continue to be in mortal sin and could not be saved. An example closer to home would be Saint François de Laval, the first Bishop of Quebec, who struggled continually to prevent the practice of trading in alcohol with the Indigenous peoples due to the intense social devastation it brought.

⁷ Innocent IV, Commentary on *Quod super his* [which was itself a commentary by Innocent III on the *Decretales* of Gregory IX] (1245).

⁸ Innocent IV also held that the Pope had authority to judge secular rulers who carried out or tolerated violations of the natural law against his own people. Although similar principles are used today by the United Nations when determining whether to intervene in a sovereign state to stop serious human rights abuses, this particular criterion was misappropriated by the Spanish to justify their conquest of Indigenous peoples.

In opposition was a canon lawyer known as Hostiensis, who declared that “with the coming of Christ every office and all governmental authority and all lordship and jurisdiction was taken from every infidel lawfully and with just cause and granted to the faithful through Him who has the supreme power and who cannot err.”⁹ His idea was that since non-believers are not in a state of grace, their sin prevents them from legitimately holding office. This ultimately derived from an old heresy which held that ministers in a state of sin could not validly dispense the Sacraments or hold authority in the Church.¹⁰ The view of Innocent IV prevailed, however, and in 1415 the Council of Constance condemned this idea.¹¹ It was now effectively heretical to hold that anyone could be deprived of land or possessions simply for not being a Christian. Yet while the position of Innocent IV held sway in the Church, in the world of geopolitics there was a lingering temptation to prefer Hostiensis’ position.¹²

The Papal Bulls and the Age of Discovery

Sometimes, a connection is drawn between the legal principle of the “Doctrine of Discovery” and certain papal statements issued during the 15th century, by which the Pope gave Spain and Portugal the right to claim new territory that fell within certain described boundaries.¹³ These statements, called “Bulls” to describe the seal that was affixed to them, predate the language of “Doctrine of Discovery” and *terra nullius*, but there are traces of

⁹ Hostiensis, *Lectura quinque Decretalium*, 2 vols (Paris, 1512), 3.34.8, fol. 124v.

¹⁰ The heresy of Donatism arose in the fourth century and was opposed vigorously by Augustine and other Church Fathers.

¹¹ Council of Constance, Sentence concerning 260 articles of Wyclif, n. 29, 31: “Everyone habitually in mortal sin lacks dominion of any kind and the licit use of an action, even if it be good in its kind. . . . In order to have true secular dominion, the lord must be in a state of righteousness. Therefore nobody in mortal sin is lord of anything.” NB: these propositions were condemned by the Council, not supported by it.

¹² For example, one of the ten elements of the “Doctrine of Discovery,” as described by Robert J. Miller, is that “under Discovery, non-Christian peoples did not possess the same human and natural law rights to land, sovereignty, and self-determination as Christian peoples. Indigenous peoples were assumed to have lost many rights upon their discovery by Christians.” (Miller, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* [New York: Oxford University Press, 2010], 8) This is clearly the position of Hostiensis, which had been effectively condemned by the Church, precisely because it was seen that it could lead to widespread abuses of non-Christians.

¹³ While the *Johnson v. McIntosh* decision makes explicit mention of the charter given by Henry VII to John Cabot, it does not mention any Papal Bulls, except to make the point that “Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States all show that she placed it on the rights given by discovery.” In this way, the decision implies that “discovery” is more important in determining title than any papal grant.

Some see a connection between certain Papal Bulls and the Doctrine of Discovery in Joseph Story’s *Commentaries on the Constitution of the United States* (1833). Story, who had been a member of the court that issued the *McIntosh* decision, has an interesting discussion of the origin of title to territory in the colonies. He begins by remarking that the original native inhabitants claimed sovereignty and asserted this claim. He then declares that he will simply ignore “the question of the actual merits of the titles claimed by the respective parties upon principles of natural law” since natural law is not his purview – in other words, he is not concerned with whether what European nations did was just or not. He then states that “the European nations found little difficulty in reconciling themselves to the adoption of any principle, which gave ample scope to their ambition, and employed little reasoning to support it.” Then, after explaining how, in his opinion, the native peoples were religiously and culturally inferior to Europeans, he notes that “The Papal authority, too, was brought in aid of these great designs . . . Alexander the Sixth, by a Bull issued in 1493 [i.e., *Inter Caetera*, discussed below], granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince” (*Commentaries*, Book I, Chap 1, n. 5).

The *Johnson v. McIntosh* decision, however, is not based on any Papal Bulls.

those concepts present here, and it is worth looking in greater detail at three of these Papal Bulls.

Dum Diversas (1452)

This Bull, issued by Pope Nicholas V, granted the King of Portugal “full and free permission to invade, search out, capture, and subjugate the Saracens and pagans and any other unbelievers and enemies of Christ wherever they may be, as well as their kingdoms, duchies, counties, principalities, and other property . . . and to reduce their persons into perpetual servitude.” In effect, it offered Portugal exclusive trading rights in newly-discovered parts of West Africa in exchange for its ongoing military efforts against the Saracens. It followed a request from the Byzantine Emperor for military help from the Pope, although Constantinople would still fall less than a year later.

The practice of enslaving non-Christian prisoners captured in a just war was common practice at the time, and conquering people often made slaves of those they conquered. This practice was considered more merciful than execution and allowed the victor to extract some economic benefit for his losses.

Romanus Pontifex (1455)

Also issued by Nicholas V, this bull confirmed the dominion that the King of Portugal had by now attained along the coast of Africa and repeated *Dum Diversas*’ authorization to subdue and enslave Saracens, pagans and “any other unbelievers and enemies of Christ.” This authorization of course implies that Nicholas believed the Portuguese claims that the peoples they encountered really were violent and hostile to Christianity. The main point of this Bull was to forbid other nations from engaging in trade with the areas now under the sway of Portugal, a particular concern being the prevention of trade in war material with the Saracens.

Inter Caetera (1493)

Issued immediately after the return of Christopher Columbus from the West Indies, this Bull, issued by Alexander VI, granted to Spain all lands discovered west of a meridian 100 leagues west of the Azores, provided they were not already in the possession of any Christian ruler, and therefore directly applied to the land now known as the Americas, even if at that time no European had any idea how vast and populated these lands would be. There was no mention of enslavement. However, it is clear from the introduction to the Bull that the chief intent is the spread of the Catholic faith to the natives, who were thought to be strongly disposed to accept Christianity. The purpose of the Bull was to establish ecclesiastical jurisdiction regarding missionary work. The monopoly on trade given to Spain was intended to compensate Spain for its investment in the evangelization of the newly-discovered lands. The question of the right of Indigenous peoples to their own lands was not raised at all in *Inter Caetera*.

Spain was prohibited by the Bull from claiming lands already possessed by any Christian prince. However, this was not because it was assumed that only Christians could possess *dominium* – rather, it was simply because the obligation to evangelize the Indigenous peoples would then rest with another Christian ruler.¹⁴ This, in fact, presents an argument for viewing this Bull more as a missionary document than as a political one, even if its major effects were political. It should not be surprising, however, that Spanish colonizers subsequently interpreted the Bull as broadly as possible, even if some in the Church argued against this.¹⁵

Considering the historical context of the above Papal Bulls provides a better picture of their actual intent. For example, the Popes during the age of Discovery knew that they lacked any military ability to enforce their will. The “grants” accorded to Portugal and Spain were one tool the Popes used to attempt to ensure that the European expansion, which they could not prevent, would be as peaceful as possible and at least include Christian missionaries to provide for the spiritual needs of the native inhabitants. Yet in spite of all this, we cannot ignore that these Bulls do appear manifestly unjust to us today: they make no mention of the rights of Indigenous Peoples, and they appear to transfer the ownership of land to European nations without the consent of those living on that land, even if Bulls like *Inter Caetera* admit of varying interpretations. We should therefore recall that such Papal Bulls do not enjoy any element of infallibility. Further, as they do not deal with theological themes, from a Church perspective they are rightly seen as political declarations, and therefore subject to retraction and revision. In the case of *Inter Caetera*, the Holy See, in response to questions from the international community, declared at the United Nations in 2010 that “*Inter Coetera* has already been abrogated” and is “without any legal or doctrinal value.”¹⁶ According to the Holy See, this abrogation occurred on several levels, starting the year after the Bull was issued.

Later Developments and the Question of the Human Rights of Indigenous Peoples

The Charter Given by Henry VII to John Cabot (1496)

Shortly after *Inter Caetera*, the King of England granted Letters Patent to Giovanni Caboto (John Cabot), giving him authority to conquer for England any lands he may discover as long as these were not known to any Christians. This charter made frequent reference to the goods and profits which could be reaped but made no mention of Christ or

¹⁴ James Muldoon, *Popes, Lawyers, and Infidels* (Philadelphia: University of Pennsylvania Press, 1979), 138. “The lawyers who actually drafted these bulls were careful to avoid a direct denial of infidel *dominium*.”

It should also be pointed out that by the end of the 16th century, explorers sailed with letters authorizing them to occupy lands not occupied by any other *European* ruler – i.e., the reference to Christianity was abandoned once papal approval was no longer seen as useful.

¹⁵ For example, the Bishop Bartholomé de las Casas, in his 1552 work *In Defense of the Indians* (Translated and edited by Stafford Poole, DeKalb, Illinois: Northern Illinois University Press, 1974), pp 349-60, argued that *Inter Caetera* did not permit war against native peoples or the removal of their rulers and was simply an authorization of missionary work, through which the native peoples, if they so chose, might come to freely subject themselves to Spain’s rule.

¹⁶ Statement by Holy See Permanent Observer to the United Nations (New York, April 27, 2010). The Holy See’s intervention lists multiple ways in which the varying aspects of the Bull have been abrogated.

Christianity whatsoever, leading one commentator to describe it as “licensed piracy.”¹⁷ While England was at this time a Catholic nation, this charter contains no justification, theological or otherwise, for the seizure of these lands save for the will of Henry VII.

Bending the Rules: Inventing Justifications for the Seizure of Indigenous Territory

Despite the Papal Bulls mentioned above, European nations knew that they could not, on the basis of theology or canon law, simply claim sovereignty over land inhabited by non-Christians. For this reason, new justifications were invented. We have already spoken about the concept of *terra nullius* which, even if not actually employed during the Age of Discovery, seems to represent what became an all-too common assumption by many Europeans. This assumption derived from the ancient idea that an unowned land, object, or animal, could be claimed by whoever first discovered it. However, Europeans knew that the New World was well-inhabited. Thus, the claim was sometimes made, particularly by the English, that these lands could be considered empty or unowned because their inhabitants were not fully utilizing them – an argument that simply did not exist prior to the Age of Discovery.¹⁸ The idea was that if the land was not being put to “civilized” use – which generally meant widespread agriculture – then it could be considered unused and free to be claimed.¹⁹ This idea, of course, contained certain presuppositions about what constitutes use and ownership – presuppositions which certainly did not favour the Indigenous inhabitants.

It is clear that this argument had been employed very early on by the Spanish, because it was explicitly contradicted by the Dominican priest and theologian Francisco de Vitoria in his 1532 work *On the Indians*. After establishing that the native peoples possessed true *dominium* prior to the arrival of the Spanish, Vitoria notes that

This title by right of discovery . . . was the only title alleged in the beginning, and it was with this pretext alone that Columbus of Genoa set sail . . . But on the other hand, against this third title, we need not argue long; as I proved above . . . the barbarians possessed true public and private dominion. The law of nations, on the other hand, expressly states that goods which belong to no owner pass to the occupier. Since the goods in question here had an owner, they do not fall under this title.²⁰

Interestingly, Vitoria here uses the argument of the first taker – what is now often called *terra nullius* – to argue *against* the Spanish occupation. Since the Indigenous peoples were the first

¹⁷ L. C. Green and Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1993), 228.

¹⁸ *Law of Nations*, 234.

¹⁹ This idea is exemplified by John Locke’s essay “Of Property” in his *Two Treatises of Government* (1690), where he contends that only labour can provide ownership. For this reason, if land is not cultivated it cannot be claimed.

²⁰ Francisco de Vitoria, *Vitoria: Political Writings*, Translated by Anthony Pagden (Cambridge: Cambridge University Press, 1992), 264-65. It should be noted that the term “barbarians” was used to indicate non-Europeans and did not have the same connotations it does today. For additional context, the explicit argument Vitoria contradicts is the following: “All things which are unoccupied or deserted become the property of the occupier by natural law and the law of nations, according to the law *Ferae bestiae* [i.e., wild animals] (*Institutions* II.1.12). Hence it follows that the Spaniards, who were the first to discover and occupy these countries, must by right possess them, just as if they had discovered a hitherto uninhabited desert.”

takers of the land and sovereign over it, it belonged to them and could not be claimed by European “discovery.”

Most damaging of all, however, was the argument employed explicitly by Spanish colonists that the Indigenous peoples of the Americas were in effect subhuman, or created for natural servitude.²¹ In this case, they could not only be enslaved, but their land was seen as free for the taking since they were considered incapable of properly occupying it.

Spain and the Requerimiento

At the very beginning of the Spanish conquest of the Americas, there was still a concern to maintain a veneer of respect for canon law concerning the rights of non-Christians. A Spanish lawyer²² thus composed the “Requerimiento” (requirement), which was a proclamation read (in Spanish) to Indigenous Peoples upon initial contact with Spanish explorers.²³ It effectively informed the natives that they must accept Christianity and the authority of the Pope, as well as that of the Spanish monarchy (to whom the Pope had granted their land). They must also accept missionaries sent to preach to them, or they would be considered hostile. While the Requerimiento was clearly a farce, it was never intended to provide a real option to the native peoples but rather to serve as a legalistic justification for premeditated conquest disguised as a just war. In this sense, its proper audience was not the Indigenous inhabitants, but rather other European powers who might contest Spain’s claims on canonical grounds. By the 1540s, however, Spain’s domination of the Americas was so advanced and its power so consolidated that the Requerimiento was no longer bothered with.

Las Casas and the Humanity of Indigenous Peoples

Many Spanish colonists used specious arguments in order to justify the seizure of Indigenous lands, goods, and even people. As mentioned above, the most pernicious of these was based on an Aristotelian theory that some people were by nature fit for servitude. Among those who opposed this denial of the full humanity of Indigenous people was Bartolomé de Las Casas (1484-1566), a Bishop from the New World who had firsthand experience of the abuses suffered by the Indigenous Peoples there.²⁴ Las Casas argued forcefully for the full humanity and rights of the Native American peoples. The conflict came to a head in the famous Valladolid debate (1550-51) which pitted Las Casas, who argued on the basis of St. Thomas Aquinas and the Church Fathers, against Juan Ginés de Sepúlveda, a humanist who argued using Aristotle that the native peoples were fit for natural servitude. At various times, laws protecting Indigenous people were passed by the Spanish King, but these were so forcefully opposed by the colonies that they had little effect.

²¹ Arguments put forward in favour of this position included observations of cannibalism in some Indigenous cultures, as well as the fact that some of these often wore no clothing.

²² Probably Juan Lopez de Palacios Rubios.

²³ The Requerimiento was in use from 1512 until the 1540s.

²⁴ Las Casas, originally a Spanish colonist, was present during the preaching of the famous sermon of Montesinos in 1511 which he later described as instrumental in his conversion.

Paul III's Sublimis Deus (1537) and the Church's Position Today

Already during the 1530s, Las Casas and other missionaries had asked the Pope to speak out in defense of Indigenous peoples. In 1537, Paul III issued the powerfully-worded Bull *Sublimis Deus*,²⁵ which begins by stating that God so loved the human race that he gave all people the ability to know him and come to faith in him. It then responds directly to the argument that the native peoples were subhuman and therefore could be deprived of their possessions or enslaved, considering this a lie perpetuated by Satan:

The enemy of the human race . . . inspired his satellites who, to please him, have not hesitated to publish abroad that the Indians of the West and the South, and other people of whom We have recent knowledge should be treated as dumb brutes created for our service, pretending that they are incapable of receiving the Catholic Faith.

We . . . consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it. . . . We define and declare . . . that . . . the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession [*dominio*] of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and have no effect.

In the political and cultural context of the day, this was a forceful declaration of the rights of Indigenous people. Paul III not only flatly rejected the theory of their subhumanity but prohibited the seizure of their property and their enslavement “in any way.” He also declared “null” and of “no effect” anything to the contrary, thereby abrogating any previous authorizations of the enslavement of Indigenous people or the seizure of their property. While it may be objected that Paul III seems to view native peoples here only in terms of their value as potential converts, by declaring their ability to know God he was asserting as vigorously as possible their equality with Europeans and all other human beings.

²⁵ The issuing of this Bull can be confusing, as a Papal Brief with very similar text, called *Pastorale Officium* (May 29, 1537), was also issued the same year. *Pastorale Officium*, however, was partly based on erroneous information. Addressed to the Cardinal Archbishop of Toledo, it mentions approvingly the outlawing of slavery by the King of Spain (something he had done in 1530), but seems unaware of the fact that he had rescinded the ban in 1534. The Brief imposed excommunication on anyone who violated the ban. This Brief understandably irritated the King, and upon learning that the Spanish ban on slavery was no longer in effect, Paul III rescinded the Brief in 1538. It is notable, however, that *Sublimis Deus* was dated several days after *Pastorale Officium* and is addressed not to any particular cleric or ruler, but to the Christian faithful in general. *Sublimis Deus* has never been rescinded. Curiously, subsequent Popes who have cited Paul III's teaching have almost always cited *Pastorale Officium*, even renewing and confirming it along with its canonical penalties. For a detailed explanation of the relationship between *Sublimis Deus* and *Pastorale Officium*, see Gustavo Gutierrez, *Las Casas: In Search of the Poor of Jesus Christ* (Eugene, OR: Wipf and Stock, 2003), 308-312; for an even more detailed exposition of the history behind *Sublimis Deus*, see Michael Stogre, *That the World May Believe: The Development of Papal Social Thought on Aboriginal Rights* (Sherbrooke, QC: Éditions Paulines, 1992), 77-93.

Paul III's declaration was echoed and reaffirmed by subsequent Popes, including Urban VIII in his Bull *Commissum Nobis* (1639), concerning the abuse of Indigenous people by the Portuguese; Benedict XIV in his Bull *Immensa Pastorum* (1741) in which he condemned the enslavement and abuse of Indigenous peoples, confirmed the teaching of Paul III explicitly, and declared the automatic excommunication of any Catholic involved in the slave trade; Gregory XVI in his apostolic letter *In Supremo* (1839) condemning slavery in Africa and the Indies; and by Leo XIII in his encyclical *In Plurimis* (1888).

When Saint John Paul II visited Canada in 1987, he addressed a gathering of Indigenous people at Fort Simpson, recalling again the words of Paul III:

At the dawn of the Church's presence in the New World, my predecessor *Pope Paul III* proclaimed in 1537 *the rights of the native peoples of those times*. He affirmed their dignity, defended their freedom and asserted that they could not be enslaved or deprived of their goods or ownership. That has always been the Church's position . . . My presence among you today marks my reaffirmation and reassertion of that teaching.²⁶

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²⁶ John Paul II, Address at Fort Simpson, NWT (September 20, 1987). John Paul II made a very similar statement, also citing Paul III, at the Yellowknife Airport on September 18, 1984 when fog prevented his plane from landing in Fort Simpson during his first papal visit to Canada.