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## The International Law of Discovery, Indigenous Peoples, and Chile

Robert J. Miller

*Lewis & Clark Law School, Portland, Oregon, [rmiller@lclark.edu](mailto:rmiller@lclark.edu)*

Lisa LeSage

*Lewis & Clark Law School, Portland, Oregon, [lesage@lclark.edu](mailto:lesage@lclark.edu)*

Sebastián López Escarcena

*Pontificia Universidad Católica de Chile, Santiago*

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# The International Law of Discovery, Indigenous Peoples, and Chile

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\* Professor, Lewis & Clark Law School, Portland, Oregon; Chief Justice, Court of Appeals, Confederated Tribes of the Grand Ronde Community; Citizen, Eastern Shawnee Tribe of Oklahoma.

<sup>§</sup> Associate Dean and Director, Business Law Programs, Lewis & Clark Law School, Portland, Oregon; Fulbright Lecturer in Law, 2010, Pontificia Universidad Católica de Chile, Santiago, Chile.

<sup>+</sup> Assistant Professor of Law and full time Researcher, Pontificia Universidad Católica de Chile, Santiago, Chile; Faculty of Law, Santiago, Chile; PhD (Edinburgh), LLM (Leiden), Abogado (Chile), LLB, BA, Pontificia Universidad Católica de Chile.

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## I. INTRODUCTION

The Doctrine of Discovery (“Discovery” or “the Doctrine”) is an international law principle under which European countries, colonists, and settlers made legal claims against the lands, assets, and human rights of indigenous peoples all over the world in the fifteenth through twentieth centuries.<sup>1</sup> In essence, the Doctrine provided that newly-arrived Europeans automatically acquired property rights in land and sovereign, political, and commercial powers over indigenous peoples without their knowledge or consent.<sup>2</sup> When Europeans planted their flags and religious symbols in “newly discovered” lands, they were using the well-recognized legal procedures and rituals of the Doctrine of Discovery to demonstrate their country’s legal claim to indigenous lands and peoples.<sup>3</sup> This doctrine was created and justified by feudal, religious, racial, and ethnocentric ideas, all premised on the belief of European and Christian superiority over other cultures, religions, and races of the world.<sup>4</sup>

The Spanish and Chilean governments—in their colonial dealings with the indigenous inhabitants of the areas comprising present-day Chile—also used elements of the Doctrine. The modern-day government of Chile continues to enforce various aspects of this legal principle against indigenous peoples today. However, Chile is not the only country to still utilize this legal doctrine. Discovery remains a part of international law and is still applied by the United States, New Zea-

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1. ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 3–6 (2010); Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849, 852–57 (2009); see ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 9–24 (2006) [hereinafter MILLER, NATIVE AMERICA]; Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 8–21 (2005) [hereinafter Miller, Doctrine].
  2. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588–97 (1823).
  3. PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD, 1492–1640, at 9–10 & n.19, 69–73, 101–02 (1995).
  4. MILLER, NATIVE AMERICA, *supra* note 1, at 1–2; ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE c.1500–c.1800, at 8 (1995); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325–28 (1990). See generally STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY (2008); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005).

land, Canada, Australia, and other nations.<sup>5</sup> For example, China, in 2010, and Russia, in 2007, invoked the Doctrine when they planted their flags on the floors of the South China Sea and the Arctic Ocean to claim sovereignty over these areas and the assets under the sea beds.<sup>6</sup> Canada and Denmark have each planted flags on an island off the west coast of Greenland, claiming authority over the island.<sup>7</sup> Discovery is, allegedly, a part of contemporary international law, and it creates an inchoate title to a territory that must be perfected by its effective occupation.<sup>8</sup> The Doctrine has been featured prominently in the international news since at least 2008, as various activists and religious denominations are challenging the validity of Discovery. They are bringing the debate to the forefront, and to the United Nations, and they are working to repeal the Doctrine.<sup>9</sup> Already, one of the Doctrine's elements has been drastically limited since 1975. Specifically, the territories inhabited by indigenous peoples who possess a measure of social and political organization cannot be considered *terra nullius*—void or empty—even if the people who lived there were nomadic.<sup>10</sup>

This Article represents our initial examination of Chilean law and history for evidence of the use of Discovery in the colonization of the lands now called Chile. We are certain that we have so far found only a tiny portion of all the evidence that details the application of the Doctrine in Chile from Spanish times to the present day. Our analysis also takes into account the principle of intertemporal law—that territorial titles must be judged from the perspective of the international

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5. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Attorney-General v. Ngati Apa* [2003] 3 NZLR 643 (CA); *Te Runanganui o Te Ika Whenua Inc. Soc'y. v. Attorney-General*, [1994] 2 NZLR 20 (CA); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.); *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (Can.); *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 1 (Austl.).
  6. William J. Broad, *China Explores A Rich Frontier, Two Miles Deep*, N. Y. TIMES, Sept. 12, 2010, at A1, available at <http://www.nytimes.com/2010/09/12/science/12deepsea.html>; Robert J. Miller, *Finders Keepers in the Arctic?*, L.A. TIMES, Aug. 6, 2007, at A19, available at <http://articles.latimes.com/2007/aug/06/news/OE-MILLER6>.
  7. *Canada Island Visit Angers Danes*, BBC NEWS (July 25, 2005), <http://news.bbc.co.uk/2/hi/europe/4715245.stm>.
  8. See JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 132 (3d ed. 2006); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 139–40 (6th ed. 2003).
  9. See, e.g., Robert J. Miller, *UN Permanent Forum on Indigenous Issues Considers the Effects of the Doctrine of Discovery* (June 15, 2010), [http://lawlib.lclark.edu/blog/native\\_america/?p=3800](http://lawlib.lclark.edu/blog/native_america/?p=3800) (last visited Feb. 9, 2011); Steven Newcomb, *More on the Vatican's Response*, INDIAN COUNTRY TODAY, June 9, 2010, at 5; Gale Courey Toensing, *Indigenous Delegates Ask Pope to Repudiate Doctrine of Discovery*, INDIAN COUNTRY TODAY, Dec. 23, 2009, at 1–2; Robert J. Miller, *Will Others Follow Episcopal Church's Lead?*, INDIAN COUNTRY TODAY, Aug. 12, 2009, at 5.
  10. *Western Sahara Advisory Opinion* 1975 I.C.J. 12, 39, 75 (Oct. 16), available at <http://www.icj-cij.org/docket/files/61/6195.pdf>.

law in force at the time they were asserted.<sup>11</sup> We hope that our effort will add to the work that has already been completed, and to that which is currently under way, to erase the Doctrine from international and national laws and to help reverse some of its pernicious effects on indigenous peoples.

In Part II, we describe what the Doctrine of Discovery is, how it was developed in Europe, and how it was applied by Spain in the New World. Part III examines Chilean history and law to investigate whether Spanish and Chilean governments applied the Doctrine to the indigenous peoples that inhabited that region. We conclude in Part IV that Chile, just as all colonizing settler countries, must first recognize their use of the feudal, ethnocentric, racial, and religiously inspired international law of Discovery against indigenous peoples. Any attempt to redress past wrongs, and to create a more positive and equal future for all Chileans, must begin with recognition of this truth. From there, serious efforts should be made to eradicate the vestiges of Discovery from Chilean law and culture.

## II. THE DOCTRINE OF DISCOVERY

In 1823, the United States Supreme Court held in *Johnson v. M'Intosh*<sup>12</sup> that the Doctrine of Discovery was an established legal principle of English and American colonial law and had also become the law of the United States.<sup>13</sup> In this influential case, the Court defined Discovery to mean that when European nations first discovered new lands, the discovering country automatically gained sovereign and property rights in the lands, even though indigenous peoples were already occupying and using them.<sup>14</sup> The property right thus acquired was defined as being a future right, as a type of limited fee simple right—an exclusive title held by the discovering European

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11. Territorial titles “are to be judged by the law in force at the time the title was first asserted and not by the law of today.” DUGARD, *supra* note 8, at 128; *see also* The Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 845 Hague Ct. Rep. (Scott) 83 (Perm. Ct. Arb. 1928), *available at* [http://untreaty.un.org/cod/riaa/cases/vol\\_II/829-871.pdf](http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf) (“Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or [fails] to be settled.”).
  12. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
  13. *Id.* at 572–74. The case involved land purchases made by British citizens in 1773 and 1775 in North America before the United States existed. *Id.* at 571–72.
  14. *Id.* at 573–74. *Johnson* has become the definitive word on the topic in American law and has been relied on by the leading cases in Australia, Canada, New Zealand, and the United States which have applied the Doctrine of Discovery to the indigenous peoples in those countries. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203 n.1 (2005); *Attorney-General v. Ngati Apa*, [2003] 3 NZLR 643 (CA); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.); *Mabo v. Queensland (No.2)* (1992), 175 CLR 1 (Austral.); *Wi Parata*, [1877] 3 N.Z. Jur. (NS) 72, 77.

country that was subject, however, to the indigenous peoples' use and occupancy rights.<sup>15</sup> In addition, the discovering country also gained a limited form of sovereign power over the native peoples and their governments, which restricted the indigenous peoples' international political, commercial, and diplomatic rights.<sup>16</sup> Because this transfer of rights automatically occurred upon first discovery, it was accomplished without the knowledge or the consent of the native peoples.<sup>17</sup>

In *Johnson*, the U.S. Supreme Court made the meaning of the Doctrine crystal clear: “[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”<sup>18</sup> Hence, a discovering European country gained exclusive property rights that were supposed to be respected by other European countries. Accordingly, the European discoverer gained real property rights to indigenous lands merely by walking ashore and planting a flag in the soil. Indigenous rights, however, “were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.”<sup>19</sup> This happened because while the Doctrine recognized that natives still held some sovereign powers and a legal right to possess their lands and to occupy and use them for as long as they wished, their rights to sell their lands to whomever they wished and for whatever price they could negotiate was destroyed: “[T]heir 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.”<sup>20</sup> As defined then by Europeans and the Doctrine, the discovering European nation gained a right of “preemption;” that is, it gained the right to preclude other nations from buying the indigenous lands “found” by the first European discoverer.

The first discoverer could even grant future interests in the lands of native peoples to others while the lands were still in the possession and use of the indigenous peoples.<sup>21</sup> Obviously, Discovery diminished the economic value of native lands and greatly benefited the discover-

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15. See *Johnson*, 21 U.S. at 573–74, 584, 588, 592, 603; see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139–44 (1810) (explaining that a state’s fee title could co-exist with Indian use and possession); *Meigs v. McClung’s Lessee*, 13 U.S. (9 Cranch) 11, 16–18 (1815) (describing a situation where a grant of land was made prior to the formal extinguishing of Indian title).

16. *Johnson*, 21 U.S. at 574.

17. See *id.* at 573–74.

18. *Id.* at 573; accord *id.* at 574, 584, 588, 603; see also *id.* at 592 (“The absolute ultimate title has been considered as acquired by discovery . . .”).

19. *Id.* at 574.

20. *Id.*

21. *Id.* at 573, 592 (discussing the exclusive right to acquire Indian lands); *id.* at 574, 579 (explaining the right to transfer fee title of Indian lands while still in Indian

ing countries and settlers.<sup>22</sup> Consequently, indigenous real property rights and values were adversely affected immediately and automatically upon the discovery of their lands by outsiders. Moreover, native sovereign powers were greatly affected by the Doctrine, because their national sovereignty and independence were limited by Discovery: native nations' diplomatic, commercial, and political dealings were supposed to be restricted solely to their discovering European country.<sup>23</sup>

The political and economic aspects of this international law were developed to serve the interests of Europeans. The Doctrine was motivated by greed and the economic and political interests of European countries who agreed, to some extent, to share the spoils to be gained in non-European lands. While Europeans often disagreed over the exact definitions of the Doctrine, and sometimes even fought over discoveries, one thing they did not disagree about was that indigenous peoples lost significant property and governmental rights immediately upon European discovery. As one American professor has phrased it: "The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle—one culture's argument to support its conquest and colonization of a newly discovered, alien world."<sup>24</sup>

Adding to the above discussion describing the basic parameters of Discovery, we see the Doctrine as being comprised of ten distinct elements.<sup>25</sup> We set forth these integral elements here so the reader can more clearly follow their development as parts of the Doctrine and can observe their application in European and Chilean law and history.

1. *First discovery*. The first European country to discover lands unknown to other Europeans gained property and sovereign rights over the lands and native peoples. First discovery alone, however, without permanent physical possession, was most often considered to have created only an incomplete title.

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possession); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139–44 (1810) (explaining that a fee title could co-exist with Indian use and possession).

22. See generally Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1078, 1110–31 (2000); Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39 (1994).

23. *Johnson*, 21 U.S. at 574 ("[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished . . ."); see also *id.* at 584–85, 587–88 (stating that the British and American governments "asserted a title to all the lands occupied by Indians . . . [and] asserted also a limited sovereignty over them"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17–18 (1831) (stating that an attempt by another country to "form a political connexion [sic] with [American Indian tribes], would be considered by all as an invasion of our territory, and an act of hostility").

24. WILLIAMS, *supra* note 4, at 326.

25. MILLER, *NATIVE AMERICA*, *supra* note 1, at 3–5.

2. *Actual occupancy and current possession.* To turn a first discovery into a complete title, a European country had to actually occupy and possess the newly found lands. This was usually done by building forts or settlements. This physical possession had to be accomplished within a reasonable amount of time after the first discovery to create a complete title.

3. *Preemption/European title.* Discovering European countries gained the power of preemption, that is, the sole right to buy the land from the indigenous peoples. This is a valuable property right similar to an exclusive option to purchase land. The government that owned the preemption right could prevent or preempt any other European government or individual from buying the land from the native owners.

4. *Native title.* After a first discovery, indigenous peoples and nations were considered by European legal systems to have lost their full property rights and the full ownership of their lands. They only retained the rights to occupy and use their lands. Nevertheless, these rights could last forever if they never consented to sell to the European country that held the preemption power. If they did choose to sell, they could only sell to the government that held the preemption right.

5. *Limited sovereign and commercial rights.* After first discovery, indigenous nations and peoples were also considered to have lost some aspects of their inherent sovereign powers and their rights to international trade and diplomatic relations. Thereafter, they were only supposed to deal with the European government that had first discovered them.

6. *Contiguity.* This element provided that Europeans had a claim to a significant amount of land contiguous to and surrounding their actual discoveries and settlements in the New World. Contiguity became very important when different European countries had settlements somewhat close together. In that situation, each country was deemed to hold rights over the unoccupied lands between their settlements to a point half way between the settlements. Moreover, contiguity held that the discovery of the mouth of a river gave the discovering country a claim over all the lands drained by that river, even if that was thousands of miles of territory.<sup>26</sup>

7. *Terra nullius.* This phrase literally means a land or earth that is void or empty. This element stated that if lands were not possessed or occupied by any person or nation, or even if they were occupied but were not being used in a fashion that European legal systems ap-

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26. For examples of this element, compare the shapes of the Louisiana Territory and the Oregon Country in the United States. See *Territorial Growth of the United States*, MAPS ETC, <http://etc.usf.edu/maps/pages/6200/6207/6207z.htm> (last visited Feb. 9, 2011).



proved, then the lands were considered to be “empty” and available for Discovery claims. Europeans liberally applied this element and often considered lands that were actually owned, occupied, and being used by indigenous peoples to be vacant and available for Discovery claims if they were not being used according to European laws and cultural mores.

8. *Christianity*. Religion was a significant aspect of the Doctrine of Discovery. Under Discovery, non-Christian peoples were not deemed to have the same rights to land, sovereignty, and self-determination as Christians.

9. *Civilization*. The European ideals of civilization were important parts of Discovery and of creating ideas of superiority over indigenous peoples. Europeans thought that God had directed them to bring civilized ways, education, and religion to natives, and to exercise paternalistic and guardian-type powers over them.

10. *Conquest*. This element means that Europeans could acquire native titles by military victories in just wars. However, conquest was also used as a term of art under Discovery to describe the property rights Europeans claimed to have gained automatically over indigenous nations just by showing up and making a first discovery.

#### A. European and Church Formulation of the Doctrine

The Doctrine of Discovery is one of the earliest examples of classical international law—that is, the accepted legal norms and principles that control conduct between different states. The Doctrine was developed to regulate European countries’ actions and conflicts over exploration, trade, and colonization of non-European countries and was used to justify the domination of non-Christian, non-European peoples.<sup>27</sup> The Doctrine was developed in Europe over several centuries primarily by the Catholic Church, Spain, Portugal, England, and the other colonial powers.<sup>28</sup> There were two bases for the Doctrine: (1) the alleged authority of the Christian God and (2) the ethnocentric idea that Europeans had the power and the justification to claim the lands

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27. *Johnson*, 21 U.S. at 572–73; WILLIAMS, *supra* note 4, at 7–8, 325–28; *see also* Antonio Truyol y Serra, *The Discovery of the New World and International Law*, 3 TOLEDO L. REV. 305, 308 (1971) (arguing that the discovery of the New World confronted Europeans “with the problem of the law of colonization, and from this point of view it finally became necessary to pose the problem of the law of nations in a global perspective”).

28. *See* Miller, *Doctrine*, *supra* note 1, at 8–21; PAGDEN, *supra* note 4, at 8, 24–25, 126; WILLIAMS, *supra* note 4, at 13–14; JAMES MULDOON, POPES, LAWYERS, AND INFIDELS 34–48, 107–52 (1979); THE EXPANSION OF EUROPE: THE FIRST PHASE 3–4, 186 (James Muldoon ed., 1977) [hereinafter EXPANSION OF EUROPE]; Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, in EXPANSION OF EUROPE, *supra*, at 191–92; CARL ERDMANN, THE ORIGIN OF THE IDEA OF CRUSADE 8–11, 155–56 (Marshall W. Baldwin & Walter Goffart trans., 1977) (1935).

and rights of indigenous peoples around the world and to exercise dominion over them.<sup>29</sup>

Scholars have traced the expansion of European rule and culture, and especially the Doctrine, to early medieval times, and in particular to the Crusades to recover the Holy Lands during the years 1096–1271.<sup>30</sup> In addition to other justifications for the Crusades, the Church and various popes established the idea of a universal papal jurisdiction, which “vested a legal responsibility in the [P]ope to realize the vision of the universal Christian commonwealth.”<sup>31</sup> This papal responsibility, along with the idea of a “just war,” offered support for Christian-led “holy wars” against infidels and was especially apparent in the Crusades.<sup>32</sup>

In 1240, Pope Innocent IV, a canon lawyer, wrote a legal commentary on the rights of non-Christian peoples. His work influenced both the development of the Discovery Doctrine and the writings of Francisco de Vitoria and Hugo Grotius, famous sixteenth and seventeenth century legal theorists.<sup>33</sup> In his commentary on a papal decree from 1209, Pope Innocent IV asked whether it was “licit to invade a land that infidels possess or which belongs to them?”<sup>34</sup> Innocent ultimately answered “yes,” because such invasions were “just” wars, fought for the “defense” of Christians and for the re-conquest of Christian lands.<sup>35</sup> In answering this question, Innocent focused on the authority of Christians to legitimately dispossess pagans of their *domin-*

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29. See PAGDEN, *supra* note 4, at 24–25, 126 (explaining that in order to be civilized, one must have been Christian); Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery*, Johnson v. McIntosh, and Plenary Power, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 316 (1993) (“Christians simply refused to recognize the right of non-Christians to remain free of Christian dominion.”).

30. See WILLIAMS, *supra* note 4, at 13–14; EXPANSION OF EUROPE, *supra* note 28, at 3–4; ERDMANN, *supra* note 28, at 154–56; JAMES A. BRUNDAGE, MEDIEVAL CANON LAW AND THE CRUSADER 24–26, 136–38 (1969).

31. WILLIAMS, *supra* note 4, at 29; accord BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 1050–1300, at 152–56, 195–97 (Univ. of Toronto Press 1988) (1964); see also PAGDEN, *supra* note 4, at 24–28. Pagden argued that under Roman and natural law, non-Christians were “excluded from the more exacting definition of the term ‘world.’” PAGDEN, *supra* note 4, at 24. Saint Thomas Aquinas and his followers insisted on the universality of the law of nature, while Augustine and Cicero arguably considered pagans to be slaves by nature. See *id.* at 24–25; J.H. BURNS, LORDSHIP, KINGSHIP, AND EMPIRE: THE IDEA OF MONARCHY 1400–1525, at 97–100 & n.5 (1992) (discussing various philosophers’ views on the idea of a single monarchical system embracing the whole of Christendom).

32. See WILLIAMS, *supra* note 4, at 29–32; ERDMANN, *supra* note 28, at 155–56; BRUNDAGE, *supra* note 30, at 19–26, 192–94.

33. WILLIAMS, *supra* note 4, at 13.

34. Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, in EXPANSION OF EUROPE, *supra* note 28, at 191–92; see also EXPANSION OF EUROPE, *supra* note 28, at 186.

35. WILLIAMS, *supra* note 4, at 13–14, 44–45.

*ium*—their sovereignty, lordship, and property rights.<sup>36</sup> He conceded that pagans had some natural law rights and that Christians had to recognize the right of infidels to own property and govern themselves.<sup>37</sup> Yet, he also held that the non-Christian's natural law rights were qualified by the papacy's divine mandate.<sup>38</sup> Because the Pope was entrusted with the spiritual health of all humans, the Pope also had a voice in the secular affairs of all humans.<sup>39</sup> Of course, a "pope can order infidels to admit preachers of the Gospel . . . [and if they do not] they sin and so they ought to be punished . . . and war may be declared against them by the Pope and not by anyone else."<sup>40</sup> Consequently, the Pope was duty-bound to intervene in the secular affairs of infidels if they violated natural law, as defined by Europeans, or if they prevented the preaching of the gospel.<sup>41</sup>

In discussing the invasion of non-Christian countries to "defend" the faith, Pope Innocent IV borrowed from the writings of Saint Augustine, a fifth century scholar, and from earlier popes.<sup>42</sup> Augustine had written that it was proper for Christians to re-conquer lands which had been seized by infidels.<sup>43</sup> In addition, he claimed that Christians had the right to invade nations which practiced cannibalism, sodomy, idolatry, and human sacrifice, reasoning that such wars were a defense of Christianity, to "acquire peace," and thus, were "work[s] of justice."<sup>44</sup>

Pope Innocent IV also found support for holy wars in papal actions nearly two centuries earlier. Immediately preceding the official start of the Crusades, Archdeacon Hildebrand—later Pope Gregory VII, 1073–1085—negotiated a papal treaty with a French Count to fight a holy war against the Muslims in Spain.<sup>45</sup> He also gave William of Normandy a papal banner authorizing the conquest of England in

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36. *Id.* at 13 & n.4; see also PAGDEN, *supra* note 4, at 28 (arguing that Christian claims to universal *dominium* required transferring the definition of "human" to a specific political entity which could have only one ruler); BURNS, *supra* note 30, at 97–100 & n.5, 160–62 (discussing the idea of a single monarchical system embracing the entirety of Christendom).

37. SILVIO ZAVALA, *THE POLITICAL PHILOSOPHY OF THE CONQUEST OF AMERICA* 26 (Teener Hall trans., 1953); WILLIAMS, *supra* note 4, at 13–14, 45, 49.

38. ZAVALA, *supra* note 37, at 26; WILLIAMS, *supra* note 4, at 13, 45.

39. WILLIAMS, *supra* note 4, at 13–17, 45–47.

40. Innocent IV, *supra* note 34; see also EXPANSION OF EUROPE, *supra* note 28, at 186.

41. WILLIAMS, *supra* note 4, at 46–47, 66. Williams also states that pagan nations which denied the Christian God and the authority of the Pope "were denied any legitimacy," and "[t]heir property and lordship could rightfully be confiscated by Crusading Christian armies." *Id.* at 49.

42. ERDMANN, *supra* note 28, at 8–11. See generally JOHN MARK MATTOX, *SAINT AUGUSTINE AND THE THEORY OF JUST WAR* (2006).

43. MATTOX, *supra* note 41, at 46–51, 60, 74; WILLIAMS, *supra* note 4, at 44.

44. DE CIVITAE DEI XIX, 13, quoted in PAGDEN, *supra* note 4, at 98; see also WILLIAMS, *supra* note 4, at 14.

45. WILLIAMS, *supra* note 4, at 31; ERDMANN, *supra* note 28, at 155–56.

1066.<sup>46</sup> Moreover, Pope Urban II, 1088–1099, granted Spanish crusaders the same papal indulgences that were granted for making pilgrimages to Jerusalem.<sup>47</sup> Urban thereafter issued the first call for crusades to the holy lands in 1095, and he continued to link crusades with pilgrimages by granting indulgences for crusaders, just as he had done for participants in the holy war with the Moors.<sup>48</sup>

The development of Discovery progressed most significantly in the early 1400s through a controversy between Poland and the Teutonic Knights over non-Christian Lithuania.<sup>49</sup> The Knights were an infamous, crusading, priestly order, who believed Christians could attack pagans at will and deprive them of their property and lordship.<sup>50</sup> The sources of this power were the papal bulls that had been directed at the Holy Lands.<sup>51</sup> This controversy again raised the question of whether the lands and rights of non-Christians could be seized under papal sanction on the basis that infidels lacked lawful *dominium*, sovereignty and property rights.<sup>52</sup>

The Council of Constance was called in 1414 to settle three major disputes, including the Knights' claim to Lithuania. The Knights argued (1) that their territorial and jurisdictional claims could be traced to papal bulls from the Crusading era, which had authorized the complete confiscation of the property and sovereignty of non-Christians; and (2) that infidels lacked *dominium* and therefore were subject to Christian control.<sup>53</sup> Poland's position, however, was the same as Pope Innocent IV in 1240: infidels possessed the same natural law rights as Christians, and, therefore, their lands could only be invaded to punish violations of natural law and to facilitate the preaching of the gospel.<sup>54</sup> The Council accepted Poland's argument.<sup>55</sup> Future crusades, discoveries, and conquests of heathens would have to proceed in accordance with the emerging legal standards of European Christianity.

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46. WILLIAMS, *supra* note 4, at 31; ERDMANN, *supra* note 28, at 154–55.

47. WILLIAMS, *supra* note 4, at 32–34; ERDMANN, *supra* note 28, at 331–32; BRUNDAGE, *supra* note 30, at 30–38.

48. WILLIAMS, *supra* note 4, at 34–37. *See generally* ERDMANN, *supra* note 28, at 306–54.

49. WILLIAMS, *supra* note 4, at 59–60; EXPANSION OF EUROPE, *supra* note 28, at 105–07.

50. WILLIAMS, *supra* note 4, at 60–64; EXPANSION OF EUROPE, *supra* note 28, at 105–07.

51. WILLIAMS, *supra* note 4, at 60–64; EXPANSION OF EUROPE, *supra* note 28, at 105–07.

52. WILLIAMS, *supra* note 4, at 60.

53. *Id.* at 62–65; MULDOON, *supra* note 28, at 109–19.

54. EXPANSION OF EUROPE, *supra* note 28, at 187; Paulus Vladimiri, *Opinio Hostiensis*, in HERMANNUS VON DER HARDT, MAGNUM OECUMENICUM CONSTANTIENSE CONCILIIUM (Frankfurt & Leipzig eds., 1696–1724), reprinted in EXPANSION OF EUROPE, *supra* note 28, at 203–05; WILLIAMS, *supra* note 4, at 64–65.

55. WILLIAMS, *supra* note 4, at 65–66; MULDOON, *supra* note 28, at 119.

These standards supported the idea that pagans had natural rights, but that they also had to comply with European concepts of natural law or risk being conquered. Thus, the Council of Constance formally defined the Doctrine of Discovery. The Church, and secular Christian princes, had to respect the natural-law rights of pagans to own property and to govern themselves, but not if they strayed too far from European normative views.

After this brief overview of the development of the Discovery Doctrine by the Church up to the early 1400s, we now examine the specific application and interpretations of Discovery by various European countries in the New World.

## B. Spanish and Portuguese Development of the Doctrine

In the mid-1300s to the early-1400s, Spain and Portugal clashed over exploration and trade issues in the eastern Atlantic island groups.<sup>56</sup> Portugal had apparently first discovered and claimed the Canary Islands in 1341 and thereafter claimed the Azores, Cape Verdes, and Madeiras.<sup>57</sup> Some of the Canary Island natives had even converted to Christianity.<sup>58</sup> However, Spanish competition and fighting led to attacks on Canary Islanders and even against converted Christians.<sup>59</sup> The Church became involved and, ultimately, Pope Eugenius IV issued a papal bull in 1434 which banned all Europeans from the Canary Islands to protect both the converted and Infidel Canary Islanders.<sup>60</sup> King Duarte of Portugal appealed to the Pope regarding the ban on colonizing the Canaries, arguing that Portugal's explorations and conquests were on behalf of Christianity.<sup>61</sup> The con-

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56. EXPANSION OF EUROPE, *supra* note 28, at 47–48; Treaty of Alcaçovas (1479), *reprinted in* THE SPANISH TRADITION IN AMERICA 17–26 (Charles Gibson ed. & trans., 1968) [hereinafter THE SPANISH TRADITION] (describing Spain and Portugal's division of parts of Africa which they already possessed and division of any lands in the future that they would discover, conquer, and possess); EDGAR PRESTAGE, THE PORTUGUESE PIONEERS 8–9, 42–50, 58–59, (1933); I ROGER BIGELOW MERRIMAN, THE MIDDLE AGES, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 142, 144, 146, 155–56, (1962) [hereinafter MERRIMAN, THE MIDDLE AGES]; II ROGER BIGELOW MERRIMAN, THE CATHOLIC KINGS, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW, 171–72, 180, 188–89 (1962) [hereinafter MERRIMAN, THE CATHOLIC KINGS].

57. MERRIMAN, THE MIDDLE AGES, *supra* note 56, at 142–46; EXPANSION OF EUROPE, *supra* note 28, at 48; C.R. BOXER, THE PORTUGUESE SEABORNE EMPIRE 1415–1825, at 21–29 (1969); PRESTAGE, *supra* note 53, at 8–9, 27, 38–41, 42–50, 54–59, 96–97, 100–02.

58. See Letter from King Duarte I of Portugal to Pope Eugenius IV, *in* EXPANSION OF EUROPE, *supra* note 28, at 54–56.

59. *Id.*

60. *Id.* at 54–56; EXPANSION OF EUROPE, *supra* note 28, at 48; MULDOON, *supra* note 28, at 119–21 (citation omitted).

61. Letter from King Duarte I of Portugal to Pope Eugenius IV, *in* EXPANSION OF EUROPE, *supra* note 28, at 54–56; WILLIAMS, *supra* note 4, at 69.

version of the “wild men” was justified, according to Duarte, because they allegedly did not have a common religion or laws, lacked normal social intercourse, money, metal, writing, housing, clothing, and because they lived like animals.<sup>62</sup> Duarte claimed that the Canary converts to Christianity had made themselves subjects of Portugal and had now received the benefits of civil laws and organized society.<sup>63</sup> In fact, Duarte argued that the Pope’s ban was interfering with the advancement of civilization and Christianity, because Duarte claimed he had commenced his “conquest of the islands, more indeed for the salvation of the souls of the pagans of the islands than for his own personal gain, for there was nothing for him to gain.”<sup>64</sup> The King continued to appeal to the Pope to give Portugal the islands based on the Church’s guardianship duty to infidels.<sup>65</sup>

Duarte’s lawyers based their legal argument for Portugal’s control of the Canary Islands on the analysis of Pope Innocent IV from 1240. The attorneys argued that Portugal only wanted to exercise a trust and guardian relationship with the Islanders and to protect them from other Europeans who would not be as caring as the Portuguese.<sup>66</sup> However, they also explained to Pope Eugenius that the Canary Islanders would not allow Christian missionaries into their lands, which justified the waging of just war and the exercise of whatever military force was necessary to protect and facilitate missionary activities.<sup>67</sup> The lawyers also told the Pope that it was within his guardianship duties and powers to commission a Christian prince to punish and civilize the Islanders.<sup>68</sup> The Pope then consulted at least two canon lawyers on the issue, and those lawyers—also relying on Pope Innocent IV’s commentary—concluded that the Canary Island Infidels had *dominium* under the Roman international law of nations (*jus gentium*) but that the Papacy maintained a legal form of indirect jurisdiction over their secular actions.<sup>69</sup> The canon lawyers agreed that a pope had the authority to deprive infidels of their property and lordship if they failed to admit Christian missionaries or violated natural law.<sup>70</sup>

This dialogue led to a refinement of the Doctrine of Discovery. This new argument for European and Christian domination was based on Portugal’s rights of discovery and conquest that stemmed from the al-

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62. Letter from King Duarte I of Portugal to Pope Eugenius IV, in EXPANSION OF EUROPE, *supra* note 28, at 54.

63. *Id.* at 55; WILLIAMS, *supra* note 4, at 69.

64. Letter from King Duarte I of Portugal to Pope Eugenius IV, in EXPANSION OF EUROPE, *supra* note 28, at 55.

65. *Id.* at 56.

66. WILLIAMS, *supra* note 4, at 70.

67. *Id.*

68. *Id.* at 71.

69. *Id.* at 70–72.

70. *Id.* at 71–72; MULDOON, *supra* note 28, at 126–28.

leged need to protect indigenous peoples from the oppression of others and to lead them to conversion under papal guidance. The Pope could hardly disagree, and he issued the papal bull *Romanus Pontifex*, which authorized Portugal to convert the Canary Island natives and to control the islands on behalf of the Pope.<sup>71</sup> This bull was reissued several times by subsequent popes in the fifteenth century, and each time it significantly extended Portugal's jurisdiction and geographical rights in Africa.<sup>72</sup> For example, in 1455, Pope Nicholas V granted Portugal title to lands in Africa that were already "acquired and that shall hereafter come to be acquired" and authorized Portugal "to invade, search out, capture, vanquish, and subdue all Saracens and pagans" and to place them into perpetual slavery and seize all their property.<sup>73</sup> These bulls epitomized the meaning of Discovery at that time because they recognized the Pope's "paternal interest" in bringing all humankind "into the one fold of the Lord," while at the same time authorizing Portugal's conversion work and recognizing Portugal's title and sovereignty over the lands "which ha[d] already been acquired and which shall be acquired in the future."<sup>74</sup>

Under these bulls and the threat of excommunication for violating Portugal's rights, Catholic Spain had to look elsewhere for exploration and conquest. Consequently, Christopher Columbus's idea of a westward passage to the Indies must have struck a chord with King Ferdinand and Queen Isabella. After having canon lawyers and theologians study the legal and scriptural authority for such a mission, Isabella agreed to sponsor the venture, the purpose of which was "to discover and acquire certain islands and mainland," and she agreed to make Columbus the Admiral of any lands he "may discover and acquire."<sup>75</sup> He then claimed that his discovery of Caribbean is-

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71. WILLIAMS, *supra* note 4, at 72.

72. CHURCH AND STATE THROUGH THE CENTURIES 145-46 (Sidney Z. Ehler & John B. Morrall trans. & eds., 1967) [hereinafter CHURCH AND STATE] (explaining that "[t]he Pontiffs later confirmed the Bull *Romanus Pontifex* in several further enactments and as Portugal has possessed various colonies in Africa ever since this Bull, the effects of the Papal grant of 1455 have been operative from that time until the present day"); The Bull *Romanus Pontifex* (Jan. 8, 1455), *reprinted in* I EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 23 (Frances Gardiner Davenport ed. & trans., 1917) [hereinafter EUROPEAN TREATIES] (translated from the original Latin into English).

73. The Bull *Romanus Pontifex* (Jan. 8, 1455), *reprinted in* EUROPEAN TREATIES, *supra* note 72, at 23-24 (translated from the original Latin into English).

74. CHURCH AND STATE, *supra* note 72, at 146, 150.

75. Ferdinand and Isabella: Capitulations with Columbus, Agreement of April 30, 1492, *in* CHRISTOPHER COLUMBUS, HIS LIFE, HIS WORK, HIS REMAINS, *reprinted in* THE SPANISH TRADITION, *supra* note 56, at 33; II SAMUEL ELIOT MORISON, THE SOUTHERN VOYAGES 1492-1616, THE EUROPEAN DISCOVERY OF AMERICA 31-44 (1974) [hereinafter MORISON, THE EUROPEAN DISCOVERY]; SAMUEL ELIOT MORISON, ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS 105 (1942)

lands inhabited by indigenous peoples turned those islands into the lawful possessions of Spain.<sup>76</sup>

Spain wasted no time in seeking papal ratification of its discoveries and dispatched ambassadors to the Pope to confirm Spain's title to Columbus' discoveries.<sup>77</sup> In May 1493, Pope Alexander VI issued the papal bull *Inter caetera*, ordering that the lands, which "hitherto had not been discovered by others" and were found by Columbus, now belonged to Ferdinand and Isabella along with "free power, authority, and jurisdiction of every kind."<sup>78</sup> The Pope also granted Spain any lands it might discover in the future "provided however they at no time have been in the actual temporal possession of any Christian owner."<sup>79</sup> In addition, since Columbus had reported that the native peoples were well disposed to embrace the Christian faith, the Pope exercised his universal guardianship authority and placed these indigenous peoples under the tutelage and guardianship of Spain.<sup>80</sup>

Spain and Portugal, however, both became concerned about their possibly conflicting papal bulls.<sup>81</sup> Therefore, Spain requested another bull that would clearly delineate its ownership of the lands that Columbus had discovered and might discover in the New World. Alexander VI then issued papal bull *Inter caetera II*, drawing a line of demarcation from the north pole to the south pole, 100 leagues west of the Azore Islands, and granted Spain title, under the authority of God, to all the lands "discovered and to be discovered" west of that line, and granted jurisdiction over any indigenous peoples.<sup>82</sup> This bull also assigned to Spain "the holy and praiseworthy" work of conversion so that it would contribute to "the spread of the Christian rule."<sup>83</sup> However, in 1494, Spain and Portugal signed the Treaty of Tordesillas and moved the papally-drawn demarcation line further west, 370 leagues west of the Cape Verde Islands, to give Portugal part of the New

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[hereinafter MORISON, ADMIRAL]; MERRIMAN, *THE CATHOLIC KINGS*, *supra* note 56, at 193–94.

76. MORISON, ADMIRAL, *supra* note 75, at 229.

77. WILLIAMS, *supra* note 4, at 79.

78. The Bull *Inter Caetera* (May 3, 1493), *reprinted in* EUROPEAN TREATIES, *supra* note 72, at 62 (translated from the original Latin into English).

79. *Id.*

80. *Id.* at 62–63; *see* WILLIAMS, *supra* note 4, at 79–80.

81. WILLIAMS, *supra* note 4, at 80; MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 75, at 97–98.

82. Bull "*Inter caetera Divinae*" of Pope Alexander VI dividing the New Continents and granting America to Spain (May 4, 1493), *reprinted in* CHURCH AND STATE, *supra* note 72, at 157 [hereinafter Bull *Inter caetera Divinae*] (translated from the original Latin into English); *see* MORISON, ADMIRAL, *supra* note 75, at 368–73.

83. Bull *Inter Caetera* (May 4, 1493), *reprinted in* THE SPANISH TRADITION, *supra* note 56, at 36–37.



World.<sup>84</sup> In 1523–29, as both countries tried to establish Discovery claims in the Pacific Ocean, they engaged in further negotiations and extended the Atlantic demarcation line of the 1494 Tordesillas treaty around the globe, into the Pacific, via the Treaty of Saragossa.<sup>85</sup>

Consequently, under then-existing Church, Portuguese, and Spanish-defined canon and international law, along with the Church's interest in expanding Christendom and Spanish and Portuguese economic and political interests, the Doctrine of Discovery had solidified in 1493 to stand for four points. First, the Church had the authority to grant Christian kings some form of title and ownership over the lands of infidels.<sup>86</sup> Second, European exploration and colonization were designed to assist the papacy in carrying out its guardianship duties over all the earthly flock, including infidels.<sup>87</sup> Third, Spain and Portugal held exclusive rights with regard to other European countries to explore and colonize the other parts of the world.<sup>88</sup> Fourth, mere discovery of new lands by Spain or Portugal in their respective spheres of influence and their subsequent acts of symbolic possession on these lands were sufficient to establish ownership rights.<sup>89</sup> The Portuguese, for example, erected stone crosses all along the coast of

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84. Treaty Between Spain and Portugal Concluded at Tordesillas (June 7, 1494), in III FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1684 (W. Keith Kavenagh ed., 1973) [hereinafter FOUNDATIONS]; Treaty of Tordesillas (1494), in THE SPANISH TRADITION, *supra* note 56, at 42–51; C.H. HARING, THE SPANISH EMPIRE IN AMERICA 9 n.7 (1947). Thus, Portugal ultimately colonized Brazil because it lies east of this line. See generally Robert J. Miller & Micheline D'Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT'L L. (forthcoming 2011); MORISON, THE EUROPEAN DISCOVERY, *supra* note 75, at 98.
85. MORISON, THE EUROPEAN DISCOVERY, *supra* note 75, at 476–77, 490–91, 498; III ROGER BIGELOW MERRIMAN, THE EMPEROR, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 447–48, 452–53 (1962) [hereinafter MERRIMAN, THE EMPEROR].
86. See PAGDEN, *supra* note 4, at 31–33; MULDOON, *supra* note 28, at 138–39.
87. See PAGDEN, *supra* note 4, at 31–33; MULDOON, *supra* note 28, at 138–39.
88. See PAGDEN, *supra* note 4, at 31–33; MULDOON, *supra* note 28, at 138–39; MORISON, ADMIRAL, *supra* note 75, at 368.
89. Portugal and Spain often argued that their discovery of new lands and the performance of symbolic possession rituals established their legal claims. See SEED, *supra* note 3, at 9–10 & n.19, 69–73, 101–02; James Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53 POL. SCI. Q. 111, 113–15, 117–18, 120–24 (1938), available at <http://0-www.jstor.org.library.unl.edu/stable/2143606> (arguing that for several centuries England, France, and Spain sometimes considered a symbolic taking of possession as creating legal title under Discovery). *Contra* Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448, 450–52 (1935) [hereinafter Heydte] (explaining that symbolic possession was almost never accepted to have granted ownership but that a country needed actual possession to gain title); The Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 869 Hague Ct. Rep. (Scott) 83 (Perm. Ct. Arb.1928), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_II/829-871.pdf](http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf) (holding that the United States claim of ownership

West Africa to symbolize their possession, and Columbus did the same “with appropriate words and ceremony” on the Caribbean islands he found.<sup>90</sup> Thus, the law of Discovery, as it applied between Europeans, was well settled by the Church, Portugal, and Spain by the late 1400s.

### 1. *Spain takes Discovery to the New World*

Columbus then proceeded to apply this law and Spanish Discovery rights in the New World. He of course performed Discovery ceremonies of possession on the lands he encountered and declared them to be the lawful possessions and property of Spain.<sup>91</sup> In 1493, Columbus aggressively commenced Spanish colonization and commercial activities on the island of Hispaniola.<sup>92</sup> The food supply, however, was soon exhausted, and gold was not as abundant as anticipated.<sup>93</sup> Columbus and the Spanish colonizers then began putting extreme pressure on Indians to deliver gold, and this led to a breakdown in relations.<sup>94</sup> In fact, in 1495, Columbus violently suppressed a native revolt, sold one third of 1500 captive Indians into slavery in Spain, and created a coerced labor program for mining purposes.<sup>95</sup> He also established a feudally inspired tribute system for tribal leaders, or *caciques*, and any

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of an island in the Philippines, based on Spain’s first discovery, without actual occupation, created only an inchoate title).

England, France, and Holland, however, usually insisted on current occupation and possession of lands before they accepted another country’s claim of ownership. When the opposite served their interests, though, they occasionally claimed lands based only on first discovery and symbolic possession via Discovery rituals. PAGDEN, *supra* note 4, at 81–82 (referencing a French explorer’s claim to Tahiti in 1768 by first discovery and symbolic possession); Heydte, *supra*, at 460–61 (quoting King George III’s instructions to Captain Cook: “If you find the country *uninhabited*, take possession of it for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.”); *id.* at 460 (explaining that in 1642 Holland ordered an explorer to take possession of lands by hanging posts and plates “and declar[ing] an intention . . . to *establish a colony*”); FRED ANDERSON, *CRUCIBLE OF WAR: THE SEVEN YEARS’ WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA 1754–1766*, at 25–26 (2000) (commenting that France sent an expedition throughout the Ohio valley in North America in 1749 to renew its 1643 Discovery claim, and the expedition “buried small lead plates . . . ‘as a monument’ . . . ‘of the renewal of possession’”) (internal citation omitted).

90. PAGDEN, *supra* note 4, at 81; WILLIAMS, *supra* note 4, at 78.

91. MORISON, ADMIRAL, *supra* note 75, at 229; MORISON, THE EUROPEAN DISCOVERY, *supra* note 75, at 63, 151. Interestingly, although Columbus thought the native Tainos were uncivilized and differed from Europeans, he did note that they cultivated corn, yams, and other roots, made cassava bread from yucca, and were skilled at pottery and cotton weaving. MORISON, THE EUROPEAN DISCOVERY, *supra* note 75, at 66, 70; MORISON, ADMIRAL, *supra* note 75, at 232.

92. MORISON, THE EUROPEAN DISCOVERY, *supra* note 75, at 115–21, 134–37.

93. WILLIAMS, *supra* note 4, at 82.

94. *Id.*

95. MORISON, THE EUROPEAN DISCOVERY, *supra* note 75 at 135–36.

who did not pay were jailed.<sup>96</sup> In 1499, a significant gold strike occurred on the island and large-scale pit mining commenced, so Columbus expanded the system of forced labor by “commending” groups of Indians to Spanish mine owners.<sup>97</sup> As a result of Columbus’ actions, “[t]housands of Indians died in resistance or in the mines.”<sup>98</sup>

When Queen Isabella learned of these events she was incensed at Columbus for making Indians slaves when they were her subjects and had been entrusted to her care by the Pope.<sup>99</sup> Columbus’ governorship was terminated in 1500, and the Queen appointed a new governor, Nicolas de Ovando, with a mandate to end Indian enslavement and to indoctrinate the Indians into Catholicism.<sup>100</sup> Yet, ironically, the Crown also ordered him, in 1501, to utilize a system of forced labor against the natives “to mine gold and to carry out the other works which we have ordered.”<sup>101</sup> Even more sinister, the Crown issued a secret instruction to Ovando to force Indians to move to newly created Indian towns near the mines to increase gold production and to grow food and erect buildings for the Spanish; Ovando was authorized to “persuade” the Indians to do these tasks by force, if necessary.<sup>102</sup> This system was called the *encomienda*, which means “to commend,” and as Columbus had done, groups of Indians were commended to various Spaniards as forced laborers.<sup>103</sup> The attorneys who drafted the royal decree, a *cédula*, which formally instituted the *encomienda* system, justified the enslavement of the natives by citing the papal bulls.<sup>104</sup> They said that Christianity and civilization could only be forced on the natives by denying them their freedom and taking their labor.<sup>105</sup> One of the royal orders signed by King Ferdinand stated: “Because of the excessive liberty the Indians have been permitted, they flee from Christians and do not work. Therefore they are to be compelled to work, so that the kingdom and the Spaniards may be enriched, and the Indians Christianized.”<sup>106</sup> Moreover, the King’s official priest

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96. LESLEY BYRD SIMPSON, *THE ENCOMIENDA IN NEW SPAIN* 8–9 (1950).

97. LEWIS HANKE, *AM. HIST. ASS’N, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 19–20* (1949); SIMPSON, *supra* note 96, at 8–9.

98. WILLIAMS, *supra* note 4, at 82.

99. TROY S. FLOYD, *THE COLUMBUS DYNASTY IN THE CARIBBEAN 1492–1526*, at 46–47 (1973); WILLIAMS, *supra* note 4, at 82–83.

100. SIMPSON, *supra* note 96, at 9–10; HARING, *supra* note 84, at 10–12; *see also* E. N. VAN KLEFFENS, *HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES 262–66* (1968) (stating that Castilian law was supposed to be applied in the New World).

101. SIMPSON, *supra* note 96, at 9; *see also* Royal Instructions to Ovando, *in* *THE SPANISH TRADITION*, *supra* note 56, at 56 (translating the royal order); HANKE, *supra* note 97, at 19–20.

102. SIMPSON, *supra* note 96, at 12–13 (citing and reprinting the royal order).

103. *Id.* at 8–11.

104. WILLIAMS, *supra* note 4, at 83.

105. *Id.* at 83–84.

106. HANKE, *supra* note 97, at 20 (quoting the royal order).

blamed the Indians for their enslavement and said their greatest vice was idleness and that the King had to “curb their vicious inclinations and compel them to industry.”<sup>107</sup> Another royal preacher argued that Indians had to be enslaved in order to be saved. In coming to that conclusion, he applied Aristotle’s reasoning: some peoples are natural slaves because they are, as he said, a lower class of people set out by nature to be slaves.<sup>108</sup>

The *encomienda* system was quickly established throughout the Spanish New World.<sup>109</sup> Usually a group or village of Indians would be commended to an individual Spaniard.<sup>110</sup> In an almost feudal-type arrangement, in return for the Indian slave laborers, the *encomendero* undertook legal obligations of military service to the Crown, was given jurisdiction and lordship over the Indians, and was required to protect them and instruct them in the Christian religion.<sup>111</sup> Native villages that were not assigned to an individual were supposed to be managed by royal officials.<sup>112</sup> Yet, the system was not a success, on Hispaniola or elsewhere, because the supply of Indians for slaves always dropped precipitously. For example, it is estimated that the population of Hispaniola dropped from 250,000 Indians to around 15,000 in the first two decades of Spanish colonization.<sup>113</sup> Similar declines in native populations and outrageous deprivations against natives, including royally licensed slaving expeditions, followed the Spanish many places in the early sixteenth century.<sup>114</sup>

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107. HANKE, *supra* note 97, at 23.

108. WILLIAMS, *supra* note 4, at 86–87.

109. See SIMPSON, *supra* note 96, at x–xii.

110. WILLIAMS, *supra* note 4, at 84.

111. HANKE, *supra* note 97, at 19; PAGDEN, *supra* note 4, at 91–92; SIMPSON, *supra* note 96, at viii–ix, xiii; THE INDIAN CAUSE IN THE SPANISH LAWS OF THE INDIES 230–31 (S. Lyman Tyler ed., 1980) [hereinafter THE INDIAN CAUSE] (translating Recopilación de Leyes de los Reinos de las Indias 1681 (“Recopilación”), Book 6, Title 9, Law 4, which required *encomenderos* to defend the land for the Crown, and required them to supply horses and arms). For a further discussion of the application of feudalism in New World colonization, see generally Charles Verlinden, *The Transfer of Colonial Techniquet from the Mediterranean to the Atlantic*, in THE BEGINNINGS OF MODERN COLONIZATION 14–17 (1970); CHARLES VERLINDEN, *Medieval Influences in the Rights and Privileges of Columbus*, in THE BEGINNINGS OF MODERN COLONIZATION, *supra*, at 196–202; CHARLES VERLINDEN, *Feudal and Demesrial Forms of Portuguese Colonization in the Atlantic Zone in the Fourteenth and Fifteenth Centuries, Especially Under Henry the Navigator*, in THE BEGINNINGS OF MODERN COLONIZATION, *supra*, at 203–40.

112. WILLIAMS, *supra* note 4, at 84.

113. FLOYD, *supra* note 99, at 89–122; see ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 20 (1970) (estimating that the Indians’ population shrank “from a quarter of a million to fourteen thousand”); see also MORISON, THE EUROPEAN DISCOVERY, *supra* note 75, at 136 (stating that the native population of Hispaniola dropped from an estimated 250,000 in 1492 to 500 by 1538).

114. See, e.g., MERRIMAN, THE EMPEROR, *supra* note 85, at 531–32, 572; SIMPSON, *supra* note 96, at 22–28, 208, 217; see also SIMPSON, *supra* note 96, at xi (arguing

Surprisingly, very few priests traveled to the New World at first.<sup>115</sup> That might seem odd since conversion and the spread of Christianity were allegedly the primary justifications for Spanish conquest. However, King Ferdinand refused to allow priests in the colony until he secured concessions from the Pope for the right of full patronage—that is, the right for Ferdinand to appoint the Spanish bishops.<sup>116</sup> The pope agreed to this in exchange for Ferdinand's military and political support against France.<sup>117</sup> Shortly thereafter, in 1512, the first bishop arrived on Hispaniola, and Ferdinand allowed Dominican priests to travel there starting in 1510.<sup>118</sup> The Dominicans immediately protested the decimation and treatment of the natives and began questioning the legality of Spain's conduct and ownership.<sup>119</sup> The King was not pleased and ordered that the friars be shown the papal bulls and letters "by which we hold these islands" and ordered an end to their sermons against Spanish activities in the New World.<sup>120</sup>

## 2. *The Philosophical Debates in the Spanish Empire*

The Dominican accounts of the colonists' actions against the natives started a serious debate within Spanish legal and religious circles as to the legitimacy of the Crown's authority over native peoples in the New World.<sup>121</sup> This uproar led King Ferdinand to seek legal opinions on the legitimacy of the papal basis of Spain's New World titles, even though he and Isabella—in 1504, 1505, and 1511—and Charles V in 1519—had stated that their title and rights of "conquest" were based on "apostolic authority" and papal "donation."<sup>122</sup> However, the furor caused by the Dominicans reopened the question and forced the King to convene a council of his handpicked supporters, including royal theologians and canon-law scholars.<sup>123</sup> Not surpris-

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that native populations in the New World declined eighty and ninety percent in the sixteenth and seventeenth centuries).

115. WILLIAMS, *supra* note 4, at 85.

116. MERRIMAN, *THE CATHOLIC KINGS*, *supra* note 56, at 88, 152–53.

117. WILLIAMS, *supra* note 4, at 85.

118. *Id.*

119. HANKE, *supra* note 97, at 17–20.

120. *Id.* at 26.

121. PAGDEN, *supra* note 4, at 46; JOHN THOMAS VANCE, *THE BACKGROUND OF HISPANIC-AMERICAN LAW* 141–48 (1943); HANKE, *supra* note 97, at 17–22, 113–32; *see also id.* at 148–49 (stating that the other crowns of Europe questioned Spain's titles in the New World).

122. HANKE, *supra* note 97, at 26, 29, 147 (footnote omitted). Ferdinand also relied on papal authority for his conquest of the Spanish province of Navarre. *See* MERRIMAN, *THE CATHOLIC KINGS*, *supra* note 56, at 154.

123. *See* Hanke, *supra* note 97, at 25–28.

ingly, this council held that Spain's rule and the King's actions in the New World were legal and proper.<sup>124</sup>

One of the King's legal advisors and a member of the council, Juan López de Palacios Rubios, set out the authority for Spain's title in the New World by relying on the writings of Pope Innocent IV. Palacios Rubios had already written the official *apologia* to justify the Crown's recent conquest of Navarre, a province in modern-day Spain, based on papal bulls and by calling the conflict a "very holy, very just war."<sup>125</sup> Now, in contrast, Palacios Rubios sought to refute the idea that Spain's title in the New World was based only on papal grants. Palacios Rubios relied wholeheartedly on Pope Innocent IV's views that infidels possessed natural law rights, but that the Pope could withdraw them by virtue of his temporal jurisdiction to care for the infidels' immortal souls.<sup>126</sup> The Pope could also assign the duty to punish infidels for violations of natural law to Christian princes and even allow these princes to "enact rules of law."<sup>127</sup>

The King's council ultimately drafted seven basic propositions regarding Spanish conquest and colonization.<sup>128</sup> The Council recognized the Indians' rights to freedom and humane treatment, but it concluded that they still must be subject to "coercion" and must be kept close to the Spanish for conversion to occur.<sup>129</sup> Thereafter, in 1512, the Laws of Burgos were promulgated using these seven propositions and required the subjugation and remediation of natives by peaceful and forceful means.<sup>130</sup> These Laws ratified the *encomienda* system as being "in agreement with divine and human law."<sup>131</sup> The Laws also ordered the destruction of native villages and the relocation of Indians close to the Spanish so they could become civilized, receive religious instruction, and make the vacant Indian lands available to the Spanish.<sup>132</sup> Indians were also relocated because the Laws required that they work for the Spanish for nine months each year and then work three months on their own farms or else work for pay for

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124. HANKE, *supra* note 97, at 25–28; WILLIAMS, *supra* note 4, at 89.

125. HANKE, *supra* note 97, at 29; *see also* MERRIMAN, *THE CATHOLIC KINGS*, *supra* note 56, at 345–46 (explaining that the conquest of Navarre was a "war for a just cause").

126. WILLIAMS, *supra* note 4, at 90.

127. WILLIAMS, *supra* note 4, at 91; *see* Truyol y Serra, *supra* note 27, at 315–19.

128. HANKE, *supra* note 97, at 23–25.

129. *Id.* at 23–24.

130. *Id.* at 24–25; *Laws of Burgos (1512–1513)*, in *THE LAWS OF BURGOS OF 1512–1513: ROYAL ORDINANCES FOR THE GOOD GOVERNMENT AND TREATMENT OF THE INDIANS* 11–47 (L. B. Simpson trans., 1960), *reprinted in* *THE SPANISH TRADITION*, *supra* note 56, at 61–82. An English version of the Laws of Burgos is also available online at <http://faculty.smu.edu/bakewell/BAKEWELL/texts/burgoslaws.html>.

131. HANKE, *supra* note 97, at 24 (quoting the Laws of Burgos); *see* SIMPSON, *supra* note 96, at 31–36.

132. HANKE, *supra* note 97, at 24; *see* *THE SPANISH TRADITION*, *supra* note 56, at 9.

Spaniards.<sup>133</sup> This was all done to avoid idleness and promote a Christian way of life among the Indians.<sup>134</sup> A 1513 amendment to the Laws of Burgos allowed Indians who were “ready to become Christians and so civilized and educated that they will be capable of governing themselves” to live by themselves.<sup>135</sup> These Laws clearly legitimated the outright confiscation of Indian assets and labor in the name of conversion, civilization, and assimilation.

The Council’s work was not done, however, because in 1513 Ferdinand also directed it to draft regulations to control future Spanish discoveries and conquests in the New World.<sup>136</sup> Palacios Rubios is credited with drafting the *Requerimiento* that this group produced.<sup>137</sup> This document was plainly intended to justify conquest. It informed indigenous peoples that they had to accept Christian missionaries and Spanish sovereignty or be subjugated.<sup>138</sup> Conquistadors were required to read it to groups of natives before warfare could legally ensue.<sup>139</sup> Its text informed the natives of their natural law obligation to hear the gospel, that their territory had been donated by the Pope to Spain, and that if they refused to acknowledge the Church and the Spanish king, and to admit priests, then Spain was justified in making war on them.<sup>140</sup> Indigenous peoples were given a few minutes to think about these terms, but if they “maliciously” delayed or did not agree to them, then the Spanish could invade and wage just war on them.<sup>141</sup> The Spanish could make them their slaves, take their goods and “do . . . all the harm and damage” that they could, for which the blame would be on the natives.<sup>142</sup> Some conquistadors must have worried that natives would actually accept the terms of the *Requerimiento* and deny the Spanish gaining lands, riches, and glory, because they took to reading it to the forest at night, or to the shore, or

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133. HANKE, *supra* note 97, at 25.

134. *Id.*

135. Laws of Burgos (1512–1513), *supra* note 130, reprinted in THE SPANISH TRADITION, *supra* note 56, at 81.

136. See WILLIAMS, *supra* note 4, at 91.

137. Truyol y Serra, *supra* note 27, at 317.

138. *Requerimiento* (1512), in I THE SPANISH CONQUEST IN AMERICA AND ITS RELATION TO THE HISTORY OF SLAVERY AND TO THE GOVERNMENT OF COLONIES (Sir Arthur Helps trans., 1900–04), 264–67, adapted and reprinted in THE SPANISH TRADITION, *supra* note 56, at 58–60; MULDOON, *supra* note 28, at 141–42; SEED, *supra* note 3, at 69–73.

139. HANKE, *supra* note 97, at 33.

140. *Requerimiento* (1512), *supra* note 138, adapted and reprinted in THE SPANISH TRADITION, *supra* note 56, at 59–60; MULDOON, *supra* note 28, at 140–41; see also PAGDEN, *supra* note 4, at 91 (arguing that the *Requerimiento* was “surely the crassest example of legalism in modern European history”).

141. *Requerimiento* (1512), *supra* note 138, adapted and reprinted in THE SPANISH TRADITION, *supra* note 56, at 59–60.

142. *Id.*

even shouted it as a war cry during attacks, never even giving the indigenous peoples an opportunity to accept its terms.<sup>143</sup>

The ongoing debate over the validity of Spanish rule and continuing reports of the gruesome treatment of Indians led King Charles V to direct the drafting of more laws to control Spanish activities in the New World.<sup>144</sup> In 1542, the New Laws of the Indies were enacted to, among other things, gradually replace the *encomienda* system, protect native peoples, and ensure that new discoveries had the prior permission of the royal government.<sup>145</sup> However, the New Laws caused such violent opposition and protests in the New World that they were initially ignored and later rescinded in the viceroalties of Peru and Mexico.<sup>146</sup>

As part of this ongoing controversy, it should not be surprising that there was a wealth of legal and social commentary produced by Spanish authors over several centuries addressing these events and questions about the Spanish empire in the New World. These writings run the gamut of possible opinions and justifications for papal and royal authority over indigenous peoples.<sup>147</sup> Much of this discussion can be summed up by the canon-lawyer-jurist Fernando Vázquez de Menchaca, who stated that American natives are “our enemies, prejudicial, loathsome and dangerous,” and by the theologian Juan Ginés de Sepúlveda, who wrote that Native Americans were like the Turks and were “*inculti*” and “*inhumani*.”<sup>148</sup>

Into this debate stepped two commentators who are worthy of specific mention, if only for how widely known they have become. In 1518, the Dominican friar Bartolomé de las Casas was appointed by the Crown as the Indian protector in the New World.<sup>149</sup> He was au-

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143. HANKE, *supra* note 97, at 34, 36.

144. VANCE, *supra* note 121, at 141–48.

145. See HANKE, *supra* note 97, at 83, 91–92; New Laws (1542), in THE NEW LAWS OF THE INDIES FOR THE GOOD TREATMENT AND PRESERVATION OF THE INDIANS PROMULGATED BY THE EMPEROR CHARLES THE FIFTH 1542–1543, *adapted and reprinted in* THE SPANISH TRADITION, *supra* note 56, at 109–12 (containing only the section headings of the New Laws); SPANISH LAWS CONCERNING DISCOVERIES, PACIFICATION, AND SETTLEMENTS AMONG THE INDIANS vii–xii (S. Lyman Tyler ed., 1980) [hereinafter SPANISH LAWS] (translating Spanish laws); SIMPSON, *supra* note 96, at 129–32.

146. HANKE, *supra* note 97, at 92, 95–102; SPANISH LAWS, *supra* note 145, at 55–56; SIMPSON, *supra* note 96, at 133–40, 230–33; MERRIMAN, THE EMPEROR, *supra* note 85, at 661.

147. Professor Pagden analyzes some of this extensive body of work. PAGDEN, *supra* note 4, at 48–49, 55–56, 89–99.

148. PAGDEN, *supra* note 4, at 99–100; The famous English jurist, Sir Edward Coke, stated in *Calvin's Case*, (1608) 77 Eng. Rep. 377, 397 (Q.B.), that infidels are the perpetual enemies of Christians.

149. HANKE, *supra* note 97, at 11, 54–58; see also *id.* at 113–32, 153–55, 177 (setting forth Las Casas' views on the conquest of indigenous peoples). See generally BARTOLOMÉ DE LAS CASAS IN HISTORY: TOWARD AN UNDERSTANDING OF THE MAN



thorized by royal order, for example, to establish villages of free Indians as an experiment to see if they would learn civilization more quickly than by slavery and death.<sup>150</sup> Las Casas argued that, in order for Native Americans to be ruled by Spain, they must first have voluntarily surrendered their natural legislative authority to Spain, because under Roman law the Crown did not have the inherent authority to parcel out the natives and their lands.<sup>151</sup> However, despite being an ardent supporter of the rights of native peoples and having documented the terrible conditions they were subjected to in the New World, Las Casas never doubted the legitimacy of the Spanish occupation—in fact, he accepted the authority of the papal bulls, the Spanish Emperor's claim to universal sovereignty, and the bulls' status as charters of evangelization.<sup>152</sup> He also believed that the natives voluntarily wanted to be vassals of the Spanish king and considered it an honor.<sup>153</sup>

In contrast, the theologian Juan Ginés de Sepúlveda viewed the papal bulls as granting Spain the authority to bring Native Americans into the civilized world.<sup>154</sup> Ginés de Sepúlveda wrote a three volume work which portrayed the Spanish King Charles V as struggling against the disrupters of the world order and the Spanish monarchy as heir to the medieval empire and chosen by God to transform the inhuman into the human.<sup>155</sup> As part of this spiritual task, Ginés de Sepúlveda said other peoples might be conquered and enslaved and that Pope Alexander VI had chosen Spain to perform this task in the New World.<sup>156</sup> Thus, in Ginés de Sepúlveda's eyes, the papal bulls' instruction to convert heathens was transformed into a right of conquest in order to civilize them.

The debate lingered on, and, in 1550, King Charles V established another council of jurists and theologians to once again hear argu-

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AND HIS WORK (Juan Friede & Benjamin Keen eds., 1971) [hereinafter *LAS CASAS IN HISTORY*] (collecting English translations of the work of European and Latin American specialists on Las Casas). Spain also appointed protectors of Indians in Chile. See *THE INDIAN CAUSE*, *supra* note 111, at 349 (translating *Recopilación*, *supra* note 111, at Book 6, Title 16, Law 13).

150. HANKE, *supra* note 97, at 58–63; WILLIAMS, *supra* note 4, at 95.

151. PAGDEN, *supra* note 4, at 51–52 (discussing BARTOLOMÉ DE LAS CASAS, *DE REGIA POTESSTATE O DERECHO DE AUTODETERMINACION* 171 (Luciano Pereña et al. eds., 1969) (1554)).

152. PAGDEN, *supra* note 4, at 52; *LAS CASAS IN HISTORY*, *supra* note 149, at 33–39; Manuel Giménez Fernández, *Fray Bartolomé de Las Casas: A Biographical Sketch*, in *LAS CASAS IN HISTORY*, *supra* note 149, at 83–85.

153. PAGDEN, *supra* note 4, at 51–52, 92.

154. *Id.* at 99.

155. *Id.* at 100.

156. See *THE SPANISH TRADITION*, *supra* note 56, at 113–20 (translating Sepúlveda's arguments); Bonar Ludwig Hernandez, *The Las Casas–Sepulveda Controversy: 1550–1551*, S.F. STATE UNIV., <http://userwww.sfsu.edu/~epf/2001/hernandez.html> (last visited Feb. 9, 2011); ZAVALA, *supra* note 37, at 52–54.

ments about the Spanish treatment of Indians.<sup>157</sup> Las Casas and Ginés de Sepúlveda engaged in a famous debate before this council about Spanish rights of conquest, just war, and the colonization of indigenous peoples.<sup>158</sup> In essence, Ginés de Sepúlveda argued that Indians were barbarians who had committed crimes against natural law and needed to be taught Christianity.<sup>159</sup> Las Casas, however, stated that Indians were rational humans, stalled at a backward stage of development, who would peacefully receive the one true religion, and that Spain had no right to enslave them or to wage war against them.<sup>160</sup> He also argued that Spain's role in the New World was solely spiritual and should not be based on economic or political concerns.<sup>161</sup>

Into this wide ranging theoretical, legal, spiritual, and political discussion stepped Francisco de Vitoria. He was a Dominican priest, the first chair in theology at the University of Salamanca for twenty years and a royal advisor.<sup>162</sup> As such, Vitoria was the leading Dominican theologian at the leading center of learning in all of Spain, and he is recognized today as one of the earliest writers in international law and the most important and influential of Spain's theorists from the early sixteenth century.<sup>163</sup> In 1532, Vitoria delivered lectures—published in 1557—entitled “On the Indians Lately Discovered” in which he accepted the idea that indigenous peoples possessed natural rights.<sup>164</sup> This principle led him to three conclusions regarding Spanish colonization in the New World.<sup>165</sup> His conclusions have been “adopted essentially intact as the accepted European Law of Nations on American Indian rights and status.”<sup>166</sup>

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157. Hernandez, *supra* note 156.

158. See generally Hernandez, *supra* note 156, at 4; DAVID M. TRABOULAY, COLUMBUS AND LAS CASAS: THE CONQUEST AND CHRISTIANIZATION OF AMERICA 1492–1566, at 167–188 (1994); LEWIS HANKE, ALL MANKIND IS ONE: A STUDY OF THE DISPUTATION BETWEEN BARTOLOMÉ DE LAS CASAS AND JUAN GINÉS DE SEPÚLVEDA IN 1550 ON THE INTELLECTUAL AND RELIGIOUS CAPACITY OF THE AMERICAN INDIANS (1974).

159. See Hernandez, *supra* note 156.

160. *Id.*

161. *Id.* But see EXPANSION OF EUROPE, *supra* note 28, at 5 (stating that religious motivation was never the sole interest of expansion and, from the beginning, economic and social motives were inextricably associated with religious values).

162. PAGDEN *supra* note 4, at 46–47; WILLIAMS, *supra* note 4, at 97. “Francisco de Vitoria” is the Spanish spelling of his name, while “Franciscus de Victoria” is the Latin form. THE INDIAN CAUSE, *supra* note 111, at xiv n.1.

163. See PAGDEN, *supra* note 4, at 46; WILLIAMS, *supra* note 4, at 96–97 n.135. See generally Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942); FRANCISCI DE VICTORIA, DE INDIS ET DE IURE BELLI RELECTIONES (Ernest Nys ed., John Pawley Bate trans., 1917).

164. See WILLIAMS, *supra* note 4, at 96–99.

165. See generally VICTORIA, *supra* note 163, at 115–62.

166. WILLIAMS, *supra* note 4, at 97.

First, Vitoria concluded that the Native Americans possessed natural legal rights as free and rational people.<sup>167</sup> Just as Pope Innocent IV and numerous other scholars had held, Vitoria agreed that infidels held property and sovereignty rights, or *dominium*.<sup>168</sup> Spain's title in the New World could not then be based on papal donation because the Pope could not give away infidels' natural law rights. Title by discovery was wrong because the Indians were free men and the true owners of their lands.<sup>169</sup>

Vitoria's second conclusion was that the Pope's grant of title in the New World to Spain was invalid and could not affect the inherent rights of the Indians.<sup>170</sup> The Pope possessed no temporal power over Indians or any other nonbeliever.<sup>171</sup> Vitoria even apparently rejected the *Requerimiento*, because he wrote that "even if the barbarians refuse to recognize any lordship of the Pope, that furnishes no ground for making war on them and seizing their property."<sup>172</sup>

Finally, though, he concluded that violations by Indians of the natural law principles of the Law of Nations—as defined by Europeans—might justify a Christian nation's conquest and empire in America.<sup>173</sup> As a result, infidels now had to obey European natural law.<sup>174</sup> According to Vitoria, the duties that Indians owed Europeans under the Law of Nations included allowing Spaniards the right to travel wherever they wished.<sup>175</sup> This was based on the natural society and fellowship of humans, which Vitoria derived from the Old and New Testaments.<sup>176</sup> Moreover, these natural law obligations required natives to allow Spaniards open and free commerce, trade, and profits wherever they traveled.<sup>177</sup> This also included the idea that Indians had to allow the Spanish to collect and trade items that were treated as common, such as fish, animals, and, most importantly, precious metals.<sup>178</sup> Thus, both the Spanish and Vitoria were happy to define

167. See VITORIA, *supra* note 163, at 115–28.

168. *Id.* at 123.

169. See *id.* at 138–39 (arguing that lands inhabited by the aborigines were not empty, and therefore, Discovery did not grant title).

170. WILLIAMS, *supra* note 4, at 97, 99–100; VITORIA, *supra* note 163, at 137–38. Vitoria dismissed the idea that the Indians' title could pass by Discovery, because Indians were free men and the true owners of the lands they possessed under their natural law rights. *Id.* at 129–31, 135–39.

171. *Id.* at 137; WILLIAMS, *supra* note 4, at 100.

172. VITORIA, *supra* note 163, at 137.

173. *Id.* at 150–51, 153; WILLIAMS, *supra* note 4, at 97, 100–01.

174. See generally VITORIA, *supra* note 163, at 150–62.

175. *Id.* at 151–54; WILLIAMS, *supra* note 4, at 100–01.

176. VITORIA, *supra* note 163, at 151–54; WILLIAMS, *supra* note 4, at 100–01; ANTHONY PAGDEN, SPANISH IMPERIALISM AND THE POLITICAL IMAGINATION 23–24 (1990).

177. WILLIAMS, *supra* note 4, at 101–02; VITORIA, *supra* note 163, at 152–53.

178. Columbus had originated the idea that New World natives lacked a conception of privately held property in his widely circulated letter of 1493, and Amerigo Ves-

almost all of the assets of indigenous peoples as being commonly held property, which the Spanish had a natural law right to take.<sup>179</sup>

Vitoria also wholeheartedly accepted the idea of just or holy war if natives violated any of these European natural laws:

If the Indian natives wish to prevent the Spaniards from enjoying any of their . . . rights under the Law of Nations . . . the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. . . . [T]hey may follow it up with war . . . . [W]hen the Indians deny the Spaniards their rights under the law of nations they do them a wrong. Therefore, if it be necessary, in order to preserve their right, that they should go to war, they may lawfully do so.<sup>180</sup>

Vitoria stated that in just wars the Spanish could seize the natives' cities and reduce them to subjection, take them into captivity, and depose their former lords and install new ones.<sup>181</sup> All of this conduct was to be judged, not by papal standards, but by the norms of western European Christians.

Furthermore, the Spanish could do this based on their Christian guardianship responsibilities to civilize barbarian peoples who did not comport with natural law.<sup>182</sup> Vitoria also argued that, as part of the right and obligation to preach the gospel, it was appropriate for the Pope to assign this right exclusively to a suitable Christian prince.<sup>183</sup> Indigenous peoples were required to listen to and provide facilities for the missionaries, and if they did not, "the Spaniards [could] make war . . . . [T]his furnishe[d] the Spaniards with another justification for seizing the lands and territory of the natives and for setting up new lords . . . with an intent directed more to the welfare of the aborigines than to their own gain."<sup>184</sup> In essence, Vitoria left the law and the justifications for empire where they already were. All he added was the idea of the European Law of Nations, a secular, systematic statement of the superior rights of "civilized" Europeans.<sup>185</sup>

Vitoria's first two points sound like treason and heresy because he rejected Spain's property and sovereign rights in the New World if they were based solely on papal grants or first discovery. However, what Vitoria actually did was to strengthen the justifications for the Spanish empire by basing them on both papal grants of religious obligations and the "universal obligations of a Eurocentrically constructed

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pucci reinforced that idea in his widely read *Mundus novus*. WILLIAMS, *supra* note 4, at 102.

179. VICTORIA, *supra* note 163, at 153; WILLIAMS, *supra* note 4, at 103.

180. VICTORIA, *supra* note 163, at 154.

181. *Id.* at 155.

182. *Id.* at 160–61.

183. *Id.* at 156–57.

184. *Id.* at 157–58. The claim to be working for the welfare of native peoples echoes what Portuguese King Duarte said in 1434 about the Canary Islanders. See *supra* notes 56–70 and accompanying text.

185. WILLIAMS, *supra* note 4, at 106.

natural law.”<sup>186</sup> Under Vitoria’s reasoning, New World native peoples were required to allow Spaniards to exercise Spain’s natural law rights, which included rights to travel, to engage in free trade and commerce, to take profit from items the natives allegedly held in common, and to send missionaries to preach the gospel.<sup>187</sup> Vitoria’s conclusion, which would have greatly pleased the King, was that if infidels violated any of these natural law rights and obligations, then Spain could protect its rights, “defend” itself, and fight a lawful and just war against the natives.<sup>188</sup>

Consequently, while Vitoria apparently rejected the sole authority of the Pope to grant Spain rights in the New World and the Doctrine of Discovery rationale in the first two steps of his analysis, the third step created an enormous loophole for Spain. His argument that natives were bound by the Eurocentrically defined natural law rights of the Spanish was an ample excuse to invade and engage in “just war” against any native nations that dared to oppose the Spanish. Thus, Vitoria limited the natural law freedoms of American Indians by allowing Spain’s natural law rights to trump native rights. The legal regime envisioned by Vitoria was just as destructive to native sovereignty, property, and human rights as the earlier definition of the King’s authority based solely on papal grants.<sup>189</sup>

### C. Other European Countries and Discovery

Following the developments discussed above, other European countries became eager to use the Doctrine of Discovery to claim lands and assets outside of Europe. England, France, Holland, and Russia, for example, used this concept of international law and claimed the rights and powers of first discovery, including sovereign rights, commercial rights, and title in various parts of the world.<sup>190</sup>

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186. *Id.* at 98.

187. See VICTORIA, *supra* note 163, at 150–61; ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 61–62 (1947) (explaining that Vitoria believed interference with the preaching of the gospel to be a just cause for war, that the Spanish had rights to travel and trade in the New World, and that the Spanish possessed the right to profit from the common activities of the indigenous peoples).

188. See VICTORIA, *supra* note 163, at 154–55; SEED, *supra* note 3, at 88–97 (discussing the Spanish justifications for the *Requerimiento*); PAGDEN, *supra* note 4, at 97–98 (discussing the defense of faith as one Spanish rationale for just war); HANKE, *supra* note 97, at 133–46, 156–72 (stating that Spain fought “just wars” in Mexico, Nicaragua, Chile, Peru, and the Philippines); NUSSBAUM, *supra* note 187, at 61–62.

189. It is worth noting that, notwithstanding the arguments of Vitoria and other theorists, the Castilian Crown, and most Spaniards continued to argue the importance of the papal bulls at least up to the end of the seventeenth century. PAGDEN, *supra* note 4, at 32, 48.

190. See, e.g., MILLER, NATIVE AMERICA, *supra* note 1, at 12–23, 44–48, 120–26, 131–36 (discussing the European powers dividing up the New World and Africa).

England claimed for centuries that John Cabot's 1496–1498 explorations, and his alleged first discoveries of the east coast of North America, gave it a Discovery claim against other European countries.<sup>191</sup> England also contested Dutch and Swedish settlements in the 1640s in North America due to England's claim of "first discovery, occupation, and the possession" of its colonial settlements.<sup>192</sup> In turn, France contested England's claims of first discovery. France argued that its first discoveries and possession of areas that are now part of Canada and the United States had established its Discovery claims of ownership and sovereignty.<sup>193</sup>

Notwithstanding their first discovery claims in North America, France and England faced a common problem regarding colonization and trade, because, in 1543, they were Catholic countries and were concerned about infringing upon Spain's rights in the New World, violating the papal bulls, and risking excommunication.<sup>194</sup> Yet, they were also hungry to get a share of the new territories and spoils. Therefore, the legal scholars of England and France analyzed canon law, the papal bulls, and history and devised new theories of Discovery which allowed their countries to colonize and trade in the New World.<sup>195</sup> Not surprisingly, Europeans were very creative at interpreting Discovery in ways that benefitted their specific situations.

One of the new theories, primarily developed by English scholars, held that the Catholic King Henry VII would not be in violation of the 1493 papal bulls if English explorers restrained themselves to only claiming lands not yet discovered by any other Christian prince.<sup>196</sup> This new definition of Discovery was further refined by the Protestant

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191. WILLIAMS, *supra* note 4, at 161, 170–71, 178.

192. West India Company to the States General: The Dutch Define Indian Land Ownership (May 5, 1632) & English Answer to the Remonstrance of the Dutch Ambassadors (May 23, 1632), in *NEW YORK AND NEW JERSEY TREATIES 1609–1682*, at 30–32 (Alden T. Vaughan & Barbara Graymont eds., 1998) (Volume VII of *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS 1607–1789*).

193. See, e.g., PAGDEN, *supra* note 4, at 33–34; JOSEPH JOUVENY, AN ACCOUNT OF THE CANADIAN MISSION FROM THE YEAR 1611 UNTIL THE YEAR 1613 (1710), in I *THE JESUIT RELATIONS AND ALLIED DOCUMENTS: TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE 1610–1791*, at 193, 218–19 (Reuben Gold Thwaites ed., John Cutler Covert et al. trans., 1959) [hereinafter *THE JESUIT RELATIONS*]; Letter from Father Pierre Biard to the Reverend Father Provincial, at Paris (Jan. 31, 1612), in II *THE JESUIT RELATIONS*, *supra*, at 33; Last Relation of What Took Place in the Voyage Made by Sieur de Poutrincourt to New France, Twenty Months Ago, in II *THE JESUIT RELATIONS*, *supra*, at 127; A Relation of Occurrences in the Mission of New France During the Years 1613 and 1614, in II *THE JESUIT RELATIONS*, *supra*, at 199, 203; Relation of New France by Father Pierre Biard, in III *THE JESUIT RELATIONS*, *supra*, at 33, 39, 41.

194. See WILLIAMS, *supra* note 4, at 74, 81 (explaining that the sanction of excommunication backed the papal bulls).

195. See generally *id.* at 126–225.

196. See generally *id.*

Queen Elizabeth I and her advisers to require the occupancy and actual possession by Europeans of non-Christian lands as crucial elements of a Discovery claim.<sup>197</sup> Consequently, Henry VII and his successors, Elizabeth I and James I, instructed their explorers to discover and colonize lands “unknown to all Christians” and “not actually possessed of any Christian prince.”<sup>198</sup>

England and France thus added the elements of occupancy and actual possession as requirements for Discovery claims, and they applied these new elements in their dealings with Spain and Portugal. In the 1550s, England and France negotiated separate treaties with Spain and Portugal to settle issues regarding discoveries and trade in the New World.<sup>199</sup> Spain and Portugal refused to consider any treaty terms that allowed England and France to explore and colonize within the exclusive areas that Spain and Portugal had been granted under

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197. See *supra* note 8; Heydte, *supra* note 89, at 452 (“At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation.”). In December 1523, Spain’s Charles V denied that Portugal had gained Discovery rights in Mallucco merely by finding the lands when he wrote: “[I]t was evident that to ‘find’ required possession, and that which was not taken or possessed could not be said to be found, although seen or discovered.” *Id.*; accord FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF THE CONQUEST* 132 (1975) (“In 1580 the English government had propounded ‘possession’ instead of just ‘discovery’ as the basis of Christian right . . .”). The Dutch rationalized their trading activities in North America because the British could not prevent another’s “trade in countries whereof his people have not taken, nor obtained actual possession from the right owners.” JENNINGS, *supra*, at 133.
198. Letters Patents of Henry VII Granted to John Cabot (March 5, 1496/97), in I FOUNDATIONS, *supra* note 84, at 18; Patent of New England Granted by James I (Nov. 3, 1620), in I FOUNDATIONS, *supra* note 84, at 22–27; Letters Patent to Sir Humphrey Gilbert (June 11, 1578), in III FOUNDATIONS, *supra* note 84, at 1690–93; Charter to Sir Walter Raleigh (Mar. 25, 1583/4), in III FOUNDATIONS, *supra* note 84, at 1694–97; First Charter of Virginia (Apr. 10, 1606), in III FOUNDATIONS, *supra* note 84, at 1698; Patent of the Council for New England (Nov. 3/13, 1620), in SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1775, at 24–25 (New York, MacMillan & Co., William MacDonald ed., 1889).
199. WILLIAMS, *supra* note 4, at 133; Heydte, *supra* note 89, at 458–59 (explaining that Elizabeth I rejected the idea that the papal bulls alone granted sovereign title and stated that first discovery by itself “cannot confer property”); I CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 163–67 (1922) (explaining the requirement of effective occupation of newly-discovered lands in order to perfect a discovery title). France insisted on a general right to trade in the West Indies while Spain relied on its papal title to argue for monopoly rights. The French would not agree to exclude Frenchmen from places discovered by them and not actually subject to either the King of Spain or King of Portugal. See generally Treaty between France and Spain, concluded at Cateau-cambrésis (April 3, 1559), reprinted in EUROPEAN TREATIES, *supra* note 72, at 219–21.

the papal bulls, even if they were not yet in possession of all those lands.<sup>200</sup>

England and France also developed another justification for Discovery claims over the lands and rights of indigenous peoples. This was the principle of *terra nullius*, or “vacant land.”<sup>201</sup> This principle dictated that lands which were not possessed by any person or nation, or which were occupied by non-Europeans but were not being used in a manner European legal systems approved, were considered to be waste and vacant.<sup>202</sup> England, Holland, France, and the United States relied on this principle to claim that lands actually occupied and being used by indigenous nations were legally “vacant” and “unused,” or *terra nullius*, and open to appropriation.<sup>203</sup>

Thus, all the European countries that colonized the New World utilized the Doctrine of Discovery to serve their interests. The Doctrine was widely accepted and applied by both Europeans and the United States as the legal authority for colonization around the world and for the domination of the indigenous inhabitants.<sup>204</sup> Europeans occasionally disagreed over the exact meaning and application of Discovery, and sometimes they violently disputed their opposing claims. Yet, one principle they never disagreed on was that indigenous peoples and nations lost sovereign, property, and human rights immediately upon their “discovery” by Europeans.

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200. See *supra* notes 196–99 and accompanying text.

201. This principle derives from Roman law, but it also exists in Islamic law, where *mawat*—dead or empty or unclaimed land—can be turned into privately owned land by reclamation activities such as fencing, occupying, or cultivating the land. See SIRAJ SAIT & HILARY LIM, *LAND, LAW & ISLAM: PROPERTY & HUMAN RIGHTS IN THE MUSLIM WORLD* 12, 22, 61, 70, 170 (2006).

202. COLIN G. CALLOWAY, *CROWN AND CALUMET: BRITISH-INDIAN RELATIONS 1783–1815*, at 9 (1987) (“Europeans regarded North America as a vacant land that could be claimed by right of discovery . . .”). *Terra nullius* is a doctrine that essentially ignored the title of original inhabitants based on subjective assessments of their level of “civilization.” See HENRY REYNOLDS, *THE LAW OF THE LAND* 7, 12–13 (1987), reprinted in H. McRAE, G. NETTHEIM & L. BEACROFT, *ABORIGINAL LEGAL ISSUES: COMMENTARY AND MATERIALS* 63 (1991). The term has two meanings: “a country without a sovereign recognized by European authorities and a territory where nobody owns any land at all.” *Id.* Legal scholars used the Eurocentric doctrine to justify colonization by European countries. See *id.* But see PAGDEN, *supra* note 4, at 91 (arguing that Spain and Portugal did not base their claims on *terra nullius*, because their claims originated from a papal charter—unlike England and France—and so their claims had been made prior to actual occupation).

203. See PAGDEN, *supra* note 4, at 76–78; see, e.g., *United States v. Rogers*, 45 U.S. 567, 572 (1846); *Martin v. Waddell’s Lessee*, 41 U.S. 367, 409 (1842).

204. See generally MILLER, RURU, BEHRENDT & LINDBERG, *supra* note 1; Miller & Ruru, *supra* note 1; MILLER, *NATIVE AMERICA*, *supra* note 1; Miller & D’Angelis, *supra* note 84.



### III. THE DOCTRINE OF DISCOVERY IN CHILEAN LAW AND HISTORY

As discussed above, Spain was heavily involved in developing the Doctrine of Discovery as part of the law of nations and in then using that legal authority to explore and claim lands, assets, and peoples in North, Central, and South America. The ten elements of Discovery that we set out above, however, are primarily based on the definition of Discovery under Anglo-American legal regimes.<sup>205</sup> In this section, we use those elements to compare and contrast how Spain and Chile used the Doctrine.<sup>206</sup>

#### A. First Discovery

Spain claimed first discovery rights throughout the New World, in addition to the allegedly exclusive rights granted to it by the demarcation lines set forth in the papal bulls and Treaty of Tordesillas.<sup>207</sup> Spanish kings enacted numerous laws to control and direct first discoveries of new territories.<sup>208</sup> Moreover, in the papal bulls of 1493, Pope Alexander VI recognized that other Christian princes could validly claim and continue to possess lands they had first discovered in Spain's area if the discoveries had been made before January 1, 1493.<sup>209</sup>

In addition to Columbus' first discovery claims in the New World, other Spanish explorers and conquistadors made similar claims. In 1513, Vasco Nuñez de Balboa crossed the isthmus of Panama, pro-

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205. See *supra* notes 25–27 and accompanying text; MILLER, *NATIVE AMERICA*, *supra* note 1, at 3–5.
206. As a former Spanish colony, and upon achieving independence from Spain, Chile's claimed titles to the land come from the recognized titles of Spain. See FEDERAL RESEARCH DIVISION, *CHILE: A COUNTRY STUDY* 7–14 (Rex A. Hudson ed., 3d ed. 1994) [hereinafter *CHILE: A COUNTRY STUDY*] (outlining Chile's history as a Spanish colony and giving a brief overview of its push for independence). In other words, the titles which allegedly justify Chile's occupation of the entire landmass were those of the previous European power, to which the state of Chile was the successor. We repeat what we stated in the introduction: this is our initial examination of Chilean law and history on this subject, and we have no doubt uncovered so far only a small portion of the relevant legal and historical evidence on this topic.
207. See, e.g., MERRIMAN, *THE EMPEROR*, *supra* note 85, at 453–54 (explaining that Spain sought to claim first rights in islands that were within the Portuguese areas of control); CHURCH AND STATE, *supra* note 72, at 157.
208. See, e.g., SPANISH LAWS, *supra* note 145, at vii–viii, 1, 62 (quoting Law xxxix of the New Laws of 1542–43; Philip II law of July 1573; Recopilación, *supra* note 111, at Book 4, Title 1, Law 1).
209. Bull *Inter caetera Divinae*, *supra* note 82, reprinted in CHURCH AND STATE, *supra* note 72, at 157 (translated from the original Latin). On September 26, 1493, the Pope issued another bull and further clarified this point. See *The Bull Dudum Siquidem of September 26, 1493*, REFORMATION ONLINE, <http://www.reformation.org/dudum-siquidem.html> (last visited Feb. 9, 2011).

claimed himself the first discoverer of the Pacific Ocean, and claimed the entire sea and all its adjoining lands for Spain.<sup>210</sup> It is reported that when the expedition peaked the last mountain and observed the Pacific Ocean that a priest began singing the Te Deum, and the men engaged in symbolic possession ceremonies by erecting a stone monument, cutting a tree into a cross, and marking trees with crosses.<sup>211</sup>

In 1518–1521, Ferdinand Magellan's expedition circumnavigated the globe, and Magellan was apparently the first European to discover the area that is now called the Straits of Magellan in southern Chile.<sup>212</sup> Magellan had been authorized by the King of Spain to discover and take possession of lands in the King's name and was granted jurisdiction and authority over the lands and seas he discovered.<sup>213</sup> Magellan arrived at the straits in November 1520 and called the place "*tierra de los patagones*," or Patagonia, when he observed natives with huge feet wearing animal skins and guanaco-skin footwear stuffed with straw who left huge footprints in the snow.<sup>214</sup> Magellan's log relates that he also took detailed measurements of the land and named capes he encountered, including Cabo Fermosos and Cabo Deseado.<sup>215</sup> The expedition also named locations in modern-day Argentina.<sup>216</sup> Since the King had ordered Magellan to claim any newly discovered lands west of the Tordesillas demarcation line, we can safely presume that he claimed southern Chile for Spain on the numerous occasions expedition members went ashore for water and wild celery as well as when they erected a cross on Carlos III is-

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210. See MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 75, at 203; WASHINGTON IRVING, *VOYAGES AND DISCOVERIES OF THE COMPANIONS OF COLUMBUS 110–13* (James W. Tuttleton ed., 1986); I WILLIAM H. PRESCOTT, *HISTORY OF THE CONQUEST OF PERU, WITH A PRELIMINARY VIEW OF THE CIVILIZATION OF THE INCAS 194–95* (London, S. & J. Bentley, Wilson, and Fley, 1859); *see also* FRUTOS ASENJO GARCÍA, *VASCO NÚÑEZ DE BALBOA: EL DESCUBRIMIENTO DEL MAR DEL SUR 88* (1991); IV ROGER BIGELOW MERRIMAN, *PHILIP THE PRUDENT, THE RISE OF THE SPANISH EMPIRE IN THE OLD WORLD AND IN THE NEW 166* (1934) [hereinafter MERRIMAN, *PHILIP THE PRUDENT*] (explaining that in 1561 the Spanish explorer Valafane traveled up the east coast of the modern day United States and made first discovery claims for Spain).

211. IRVING, *supra* note 210, at 112.

212. CHILE: A COUNTRY STUDY, *supra* note 206, at xv.

213. See MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 75, at 337; I COLECCION DE DOCUMENTOS INÉDITOS PARA LA HISTORIA DE CHILE *Desde el Viaje de Magallanes Hasta la Batalla de Maipo 1518–1818*, at 2, 14 (*J.T. Medina ed., 1888*) [hereinafter COLECCION DE DOCUMENTOS . . . *Hasta la Batalla de Maipo*].

214. The term "patagón" is probably a colloquial use of the word "patón," meaning "big foot" in Spanish. MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 75, at 367–68, 378; MIGUEL LUIS AMUNÁTEGUI, *COMPENDIO DE LA HISTORIA POLÍTICA Y ECLESIASTICA DE CHILE 17–18* (1867) [hereinafter AMUNÁTEGUI, *COMPENDIO*].

215. MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 75, at 386; I COLECCION DE DOCUMENTOS . . . *Hasta la Batalla de Maipo*, *supra* note 213, at 220–21.

216. I COLECCION DE DOCUMENTOS . . . *Hasta la Batalla de Maipo*, *supra* note 213, at 266.

land.<sup>217</sup> He later spent three weeks sailing up the coast of Chile, coming just north of the present-day city of Valdivia before heading west across the Pacific.<sup>218</sup>

Thereafter, Spain commenced its first discovery claims in northern Chile in 1534 when Charles V authorized Diego de Almagro to travel to this new territory and in the name of the King and the Crown of Castile “to conquer, pacify, and settle the described territory.”<sup>219</sup> The King also conferred upon Almagro various governmental powers, territorial jurisdiction, and lands and ordered him to “conquer and settle” a strip extending 200 leagues to the south<sup>220</sup> of the lands and jurisdiction that had been granted to Francisco Pizarro in modern day Peru.<sup>221</sup> In 1535, Almagro crossed the Atacama Desert and entered the valley of Copiapó, both located in modern-day Chile, and explained his motives for traveling to the area to the natives.<sup>222</sup> The arduous voyage to Chile, along with the lack of large cities and major deposits of gold, sent the expedition home disappointed.<sup>223</sup>

In 1539, however, Charles V granted another commission to Pedro Sancho de Hoz to make discoveries and to conquer and govern lands, including the islands off the coast of southern Chile and the territory south of the Straits of Magellan.<sup>224</sup> Hoz ultimately took part in an expedition to Chile led by Pedro de Valdivia.<sup>225</sup> When they reached the valley of Copiapó, in the modern-day Atacama Region and Copiapó Province of Chile, the country “was solemnly taken possession of in the name of the king of Spain.”<sup>226</sup> The expedition then pressed on to

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217. Cf. MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 75, at 394, 396; MERRIMAN, *THE EMPEROR*, *supra* note 85, at 421–22.

218. MORISON, *THE EUROPEAN DISCOVERY*, *supra* note 75, at 397, 402, 407; MERRIMAN, *THE EMPEROR*, *supra* note 85, at 430–31. See generally STEFAN ZWEIF, *CONQUEROR OF THE SEAS: THE STORY OF MAGELLAN* (1938).

219. MIGUEL LUIS AMUNÁTEGUI, *LA CUESTION DE LÍMITES ENTRE CHILE I LA REPÚBLICA ARGENTINA* 22, 34 (1879) (reprinting the capitulación to Almagro) [hereinafter AMUNÁTEGUI, *LA CUESTION*] (authors’ translation).

220. MERRIMAN, *THE CATHOLIC KINGS*, *supra* note 56, at 28, 87; MERRIMAN, *THE EMPEROR*, *supra* note 85, at 571; AMUNATEGUI, *LA CUESTION*, *supra* note 219, at 22.

221. MERRIMAN, *THE CATHOLIC KINGS*, *supra* note 56, at 28, 87; MERRIMAN, *THE EMPEROR*, *supra* note 85, at 571; accord H. R. S. POCOCK, *THE CONQUEST OF CHILE* 16–17, 28 (1967); JULIO PEREZ CANTO, *CHILE: AN ACCOUNT OF ITS WEALTH AND PROGRESS* 134 (1912), available at <http://babel.hathitrust.org/cgi/pt?id=uc1.b23.802>.

222. POCOCK, *supra* note 221, at 16, 28; MERRIMAN, *THE EMPEROR*, *supra* note 85, at 571–72.

223. CANTO, *supra* note 221, at 134.

224. See AMUNÁTEGUI, *COMPENDIO*, *supra* note 214, at 25.

225. POCOCK, *supra* note 221, at 49–52; Capitulación y asiento que se tomó con Pero Sancho de Hoz para efectuar descubrimientos en la Mar del Sur, reprinted in VIII COLECCION DE DOCUMENTOS . . . *Hasta la Batalla de Maipo*, *supra* note 213, at 16–17; MERRIMAN, *THE EMPEROR*, *supra* note 85, at 590–91.

226. MERRIMAN, *THE EMPEROR*, *supra* note 85, at 591; see SIMON COLLIER & WILLIAM F. SATER, *A HISTORY OF CHILE, 1808–2002*, at 6–7 (2d ed. 2004).

the present-day site of Santiago and founded that city on February 12, 1541, with all the royally prescribed ceremonies.<sup>227</sup> Valdivia wrote Charles V in 1545 that he was the “founder, breeder, defender, conqueror, and discoverer” of Chile.<sup>228</sup>

Thus, the conclusion seems obvious that Spain used the element of first discovery to establish its claims in the New World and in Chile.

## B. Actual Occupancy and Current Possession

Both the Spanish monarchs and the papacy realized the importance under international law of a discovering nation fully establishing its first discovery claims by actually occupying and possessing the new lands it claimed to have found. In the bulls issued in 1493, while granting Spain ownership of all the lands Columbus had found and which Spain would find west of the demarcation line, the Pope created one exception that reflects an understanding of this Discovery element. The Pope stated that if another country had discovered land in Spain’s area of control and it was already “actually possessed by some other Christian king or prince” as of January 1, 1493, then that country’s legal claim was valid even within Spain’s exclusive area.<sup>229</sup> However, if a country had only made a first discovery in Spain’s exclusive area of control and had not yet “actually taken [it] into possession,” then the claim was invalid.<sup>230</sup> This papal view reflected the second element of Discovery.

In light of this element, one of the most important goals of the Spanish government was to see that newly discovered lands were fully occupied and settled by Spaniards as soon as possible, even before undertaking further discoveries. In 1538, for example, Charles V issued an order concerning unclaimed land and demanded more than mere discovery of the land; he ordered “the discovery, conquest, and settlement of the ‘islands in the Southern Sea.’”<sup>231</sup> In other examples, the Viceroy of Mexico demanded the speedy occupation of present-day Florida, and King Philip concurred because he feared that if settlements were not quickly established Spanish claims risked being pre-

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227. MERRIMAN, *THE EMPEROR*, *supra* note 85, at 591.

228. POCOCK, *supra* note 221, at 100–01; Carta de don Pedro de Valdivia a S.M. Carlos V, dándole noticia de la conquista de Chile, de sus trabajos y del estado en que se hallaba la colonia, in *CARTAS DE PEDRO DE VALDIVIA AL EMPERADOR CARLOS V* (1861) [hereinafter *CARTAS DE PEDRO DE VALDIVIA*], reprinted in *I COLECCION DE HISTORIADORES DE CHILE Y DOCUMENTOS RELATIVOS A LA HISTORIA NACIONAL* 1, 1 (1861) [hereinafter *COLECCION DE HISTORIADORES*] (reprinting the letter to Charles V “giving him the news of the conquest of Chile”).

229. Bull *Inter caetera Divinae*, *supra* note 82, reprinted in *CHURCH AND STATE*, *supra* note 72, at 157–58 (translated from the original Latin into English).

230. *The Bull Dudum Siquidem of September 26, 1493*, REFORMATION ONLINE, <http://www.reformation.org/dudum-siquidem.html> (last visited Feb. 9, 2011).

231. MERRIMAN, *THE EMPEROR*, *supra* note 85, at 453–54 (citation omitted).

empted by French settlements.<sup>232</sup> In fact, Spain later argued to France that Spanish claims to Florida were established beyond question because they were based on “the bull of Alexander VI and the Tordesillas Line, as well as by right of priority in discovery and colonization.”<sup>233</sup> Similarly, in occupying Chile, the Viceroy of New Castile and King Philip ordered that forts be built in the Straits of Magellan to prove the Spanish occupation.<sup>234</sup>

The Crown also enacted laws demonstrating its knowledge of the importance of actually occupying the lands it claimed by first discovery, even within its papal and Tordesillas demarcation areas. In 1573, King Philip II enacted a law “to facilitate the performance of the discoveries, the establishment of new settlements and the pacification of the lands and provinces still to be discovered in the Indies and to do so for the service of God and Ourselves and for the benefit of the natives.”<sup>235</sup> He also ordered the necessary settlements of Spaniards be made in the lands discovered and that each Spanish discoverer was responsible “for populating the discovered land.”<sup>236</sup> In fact, Philip ordered that he would not approve any new discovery expeditions until the lands already discovered “shall be settled.”<sup>237</sup> The King even ordered some Spaniards in Chile to live in their communities for one year or else they would lose their property rights.<sup>238</sup>

Spanish subjects also understood the importance of occupying and physically possessing the lands they had discovered. In a 1559 recommendation to the Crown on various colonial policies, the author stated that the King and Queen

have a special title and permission from the Pope to take hold of and convert the provinces of the Indies, it's clear that Your Majesty may occupy and take all of said provinces . . . And because the more Your Majesty discovers and populates, the more powerful Your Majesty becomes to retain what has been earned.<sup>239</sup>

Thus, the elements of Discovery were well known to royal officials and conquistadors.

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232. MERRIMAN, PHILIP THE PRUDENT, *supra* note 210, at 163–64.

233. *Id.* at 175–76.

234. *See id.* at 184.

235. SPANISH LAWS, *supra* note 145, at 1.

236. *Id.* at 8; *see also id.* at 10–11 (describing the protocol for establishing new settlements).

237. *See id.* at 62 (translating *Recopilación*, *supra* note 111, at Book 4, Title 1, Law 1).

238. THE INDIAN CAUSE, *supra* note 111, at 244 (translating *Recopilación*, *supra* note 111, at Book 4, Title 9, Law 32).

239. Extracto de un parecer del Doctor Vaquez sobre los repartimientos, encomiendas y aprovechamientos de los indios, in IV COLECCION DE DOCUMENTOS INEDITOS, RELATIVOS AL DESCUBRIMIENTO, CONQUISTA Y ORGANIZACION DE LAS ANTIGUAS POSESIONES ESPAÑOLAS DE AMÉRICA Y OCEANÍA 141, 145 (Kraus Reprint Ltd. 1964–66) (1864–84) [hereinafter COLECCION DE DOCUMENTOS . . . DE AMÉRICA Y OCEANÍA].

Demonstrating the knowledge of the occupancy and possession element of Discovery, Spain and Portugal were advocates of what can be called “symbolic possession,” or fictional occupancy. They often argued that when they merely spied new lands in their respective *Tordesillas* areas, and then performed various ceremonies on that land, that such action was sufficient to establish the “possession” that Discovery required.<sup>240</sup> We have already noted that the Spanish explorers Columbus and Balboa, and then Magellan and Almagro acting in what are now parts of Chile, engaged in symbolic possession by planting flags and crosses and erecting stone monuments to prove they had arrived and to establish Spain’s claim, even though they could not at that time physically and permanently occupy the lands.<sup>241</sup>

In fact, Spanish kings ordered their explorers to engage in this activity. In 1573, the Crown enacted a law that ordered its discoverers to “take possession of those lands, provinces or parts where they arrive or disembark, in Our Name by performing the required solemnities and acts; they will issue some proof of this act and give public testimony so that it can be legally proven.”<sup>242</sup> The Crown also ordered its explorers to name the lands, provinces, mountains, rivers, villages, and towns they found and to name the villages and towns they established.<sup>243</sup> In 1568, Philip II ordered that, upon discovering a new island or land, Spanish explorers should “take possession in Our name, observing appropriate formalities, publicly and in an authentic way.”<sup>244</sup>

Acts of symbolic possession were also undertaken by the Spanish in Chile. When Pedro de Valdivia arrived in Copiapó, “he went through the solemn ceremonies of taking possession of his province in the name of the Spanish monarch.”<sup>245</sup> Valdivia then named the Copiapó valley “the valley of the *Posesión*” and the entire territory *Nueva Extremadura* or *Nuevo Extremo*.<sup>246</sup> He was also aware of the importance and urgency for Spain to occupy the entire coast and he wanted to push Spanish occupancy to the Magellan Straits before another country arrived there.<sup>247</sup> In fact, in 1544, Valdivia ordered Juan Bautista de Pastene to sail along the coast of Chile to the Straits with

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240. See *supra* notes 191–93 and accompanying text; see also MERRIMAN, PHILIP THE PRUDENT, *supra* note 210, at 166 (stating that in 1561 the Spanish explorer Valafane traveled up the east coast of the modern-day United States to South Carolina “and formally took possession in the king’s name”).

241. See, e.g., *supra* notes 90, 211, 217 and accompanying text.

242. SPANISH LAWS, *supra* note 145, at 4–5, 76 (translating a 1573 law, retained in *Recopilación*, *supra* note 111, at Book 4, Title 2, Law 11); accord *supra* notes 220–28 and accompanying text regarding southern Chile.

243. SPANISH LAWS, *supra* note 145, at 5.

244. *Id.* at 76 (translating *Recopilación*, *supra* note 111, at Book 4, Title 2, Law 11).

245. POCOCK, *supra* note 221, at 64.

246. *Id.*

247. *Id.* at 108.

the “authority to take possession of the country in the name of the King and his Governor, Pedro de Valdivia,” and to use Valdivia’s personal secretary “to provide a record of all that took place on the voyage.”<sup>248</sup> Around the 41st latitude, Pastene, in the presence of a dozen Indians, “declared that he claimed and took possession of the land” and had the secretary record his speech to “certify in such a manner as shall be credited by His Majesty . . . how I now in his name and on behalf of Pedro de Valdivia do take and seize tenure, possession and ownership of these natives and of all this land and province, and its surroundings.”<sup>249</sup> He spoke the words three times and then cut branches, tore out plants, dug in the earth, drank river water, and made a cross and drew other crosses in the dirt.<sup>250</sup> Pastene carried out similar ceremonies two more times on his return trip north.<sup>251</sup>

In the 1840s and 1850s, Chile engaged in acts of symbolic possession and of actual occupation to claim the Straits of Magellan.<sup>252</sup> The Republic of Chile, as the successor of Spain in its territory, became increasingly concerned about potential English and French claims in the Straits, and it began an aggressive campaign to occupy the southern part of the country based on the territorial titles formerly claimed by the Spaniards.<sup>253</sup> In 1842, President Manuel Bulnes appointed Domingo Espineira the first intendant of Chiloe, and he ordered him to launch an expedition to take possession of the Straits of Magellan.<sup>254</sup> In 1843, the government ordered Captain John Williams—better known in Chile as Juan Guillemos—to build Fort Bulnes in the Straits, and it ordered him over several years’ time to occupy the fort to solidify Chile’s claim to the Straits.<sup>255</sup> Furthermore, in September 1843, Guillemos arrived in Port Famine, raised the Chilean flag, and declared in the name of the Republic of Chile that the Straits of Magellan were Chilean Territory.<sup>256</sup> Captain Guillemos took formal possession of the Straits, as he documented in his log:

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248. *Id.* at 108–09.

249. *Id.* at 109–10.

250. *Id.* at 110.

251. *Id.*

252. José Bengoa, *Chile Mestizo, Chile Indígena*, in *MANIFEST DESTINIES AND INDIGENOUS PEOPLES* 119, 128 (David Maybury-Lewis et al. eds., 2009) [hereinafter Bengoa, *Chile Mestizo*]; GEORGE V. RAUCH, *CONFLICT IN THE SOUTHERN CONE: THE ARGENTINE MILITARY AND THE BOUNDARY DISPUTE WITH CHILE 1870–1902*, at 20–23 (1999).

253. See generally Robert D. Talbott, *The Chilean Boundary in the Strait of Magellan*, 47 *THE HISP. AM. HIST. REV.* 519 (1967), available at <http://www.jstor.org/stable/2510673?seq=2>.

254. Talbott, *supra* note 253, at 520–21; NICOLAS ANRIQUE R., *DIARIO DE LA GOLETA “ANCU” AL MANDO DEL CAPITAN DE FRAGATA DON JUAN GUILLERMO (1843) PARA TOMAR POSESION DEL ESTRECHO DE MAGALLANES 10 (1901)* [hereinafter *DIARIO DE LA GOLETA*] (reprinting the diary of the captain of the Ancud).

255. *DIARIO DE LA GOLETA*, *supra* note 254, at 50–57.

256. *Id.* at 10, 12.

In the presence of everyone I took possession of the Straits of Magellan and its territory with the customary formalities in the name of the Republic of Chile to whom these belong in conformance with the first Article of the Constitution, confirmed with the national flag, and with a 21-gun salvo . . . . In compliance with the order of the Supreme Government [of Chile] the 21st day of the month of September, 1843, . . . with all of the formalities of custom, we take possession of the Straits of Magellan and its territory in the name of the Republic of Chile to whom it belongs in conformance with the first Article of the Constitution . . . .<sup>257</sup>

The party also landed at several points throughout the Straits to claim the area. For example, on Elizabeth Island they planted the Chilean flag and a cross.<sup>258</sup> Chile further manifested its sovereignty over the Straits by signing a “Treaty of Friendship and Commerce” with chief Santos Centurion of the Teheulche tribe on March 20, 1844.<sup>259</sup>

In its efforts to conquer the Araucanians,<sup>260</sup> Chile also realized the importance of occupying native lands to expand its national territory. In the 1880s, the Secretary of Interior ordered an expedition to occupy Araucanian territory with the objective “to occupy the ground, measure it and give it out, to colonize Araucania with foreign colonists, extend the national territory and unite the central zone with Valdivia and the south.”<sup>261</sup> The Secretary also ordered forts built “to make the occupation and reduction of the [Araucanian] territory efficient, [so] that . . . a significant population could develop and prosper over time.”<sup>262</sup>

### C. Preemption/European Title

We found no evidence of Spain or Chile using the preemption element of Discovery to argue to foreign rivals that they could not buy or acquire the lands of the indigenous peoples in Chile. This is no doubt due to the very limited competition other European governments presented in Chile. As the following discussion shows, Spain and Chile did actively exercise Discovery rights of preemption and actual ownership of the land in Chile against their own citizens and the indigenous peoples, and they controlled the acquisition of lands from indigenous individuals and groups and thereby exercised their powers through the “European title.”

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257. *Id.* at 39–40 (authors’ translation of the ship’s log).

258. *Id.* at 49.

259. Talbott, *supra* note 253, at 521 (citing ARMANDO BRAUN MENÉNDEZ, FUERTE BULNES 204–05 (2d ed. 1968))

260. “Araucanians” is the term by which the Spaniards referred to a number of native peoples, such as the Picunches, Mapuches, Pehuenches, and Huilliches, although it is now clear that such a generalized use of the term was unwarranted. *See* POCOCK, *supra* note 221, at 229–43.

261. JOSÉ BENGOA, HISTORIA DEL PUEBLO MAPUCHE: SIGLO XIX y XX 280 (6th ed. 2000) [hereinafter BENGOA, HISTORIA] (authors’ translation).

262. *Id.* at 282 (authors’ translation).



From the very beginning of New World colonization, the lands, waters, minerals, and Indian labor, among other things, were considered the property of the Crown to be granted away as the king pleased.<sup>263</sup> Spanish laws controlled the distribution of lands, assets, and Indian labor, and these rights could be granted only by the Crown through royal orders or officials.<sup>264</sup> In a very specific example of the use of preemption authority against Indians and Spaniards, Philip II ordered in 1571: “When the Indians sell their real estate and movable property, in accordance with what is permitted them, they shall be announced for public auction in the presence of the Justicia, real estate being on thirty-day terms . . . .”<sup>265</sup> Consequently, under the preemption element, the central royal government controlled the sales of native lands, just as England and the English colonies did in North America, and as the United States still does to this day.<sup>266</sup>

In the colony of Chile, Pedro de Valdivia and the Assembly of Santiago exercised the Crown’s preemption powers and European title when they distributed lands and *encomiendas* of Indian labor to the explorers/settlers.<sup>267</sup> For example, on July 26, 1549, the Assembly stated that “in the name of S.M. [His Majesty],” various “land and ranches given up to today and that may be given in the future” were to be given to the grantees in a fee simple type of ownership, because the lands ceded to the Spanish settlers “may be sold, bartered, donated, exchanged, and done with as the owners see fit.”<sup>268</sup> On that same day, the Assembly recognized that Valdivia had “mandate[d] in the name of S.M.” that no one could “occupy a piece of land, nor lands, nor ranches, but by being provided and given by the men of this Assembly, according to the ordinances created by said Assembly.”<sup>269</sup>

The Chilean government has also exercised preemptive control over the acquisition and use of indigenous lands. In 1852, Chile enacted a law that created the province of Arauco, and it authorized the President to regulate the indigenous peoples, their property, and the governance of the province.<sup>270</sup> The law stated that “the indigenous situated to the south of Bío Bío and north of the province of Valdivia . . . will be subject to the authority and regime that, based on the spe-

263. See HARING, *supra* note 84, at 5–6, 31–32; SPANISH LAWS, *supra* note 145, at 59.

264. SPANISH LAWS, *supra* note 145, at 59, 155 (translating *Recopilación*, *supra* note 111, at Book 4, Title 12, Law 1); THE INDIAN CAUSE, *supra* note 111, at 196–97 (translating *Recopilación*, *supra* note 111, at Book 6, Title 8, Law 1).

265. The Indian Cause, *supra* note 111, at 83 (translating the law of 1571 of Philip II, Book VI, Title 1, Law 27).

266. MILLER, NATIVE AMERICA, *supra* note 1, at 27, 31–35; see 25 U.S.C. § 177 (2006).

267. See MERRIMAN, THE EMPEROR, *supra* note 85, at 593, 618.

268. Cabildo de 26 de julio de 1549, in ACTAS DEL CABILDO DE SANTIAGO DE 1541 A 1557 [hereinafter ACTAS DEL CABILDO], *reprinted in* I COLECCION DE HISTORIADORES, *supra* note 228, at 195

269. *Id.*

270. Ley de 2 de julio de 1852, DIARIO OFICIAL [D.O.].

cial circumstances, the President of the Republic determines.”<sup>271</sup> Furthermore, the government issued property rules for Arauco and other provinces which required the government to approve all land transactions to Indians or involving lands situated in Indian territory.<sup>272</sup> Similarly, in a law of December 4, 1855, the government mandated that “[a]ll purchases of lands made in the province of Valdivia to indigenous or a person selling under that character, or of lands situated in indigenous territories, has to be done with the intervention of the Mayor of Valdivia or the Governor.”<sup>273</sup> Any such sales that were “made without the intervention of the Mayor of Valdivia or the designated official, are null.”<sup>274</sup> Again, in 1874 and 1883, the government forbade private citizens from buying lands from Indians in specified areas.<sup>275</sup> All of these prohibitions are mirror images of the United States’ exercise of its power of preemption in 1790 that still applies to American Indian lands to this day.<sup>276</sup>

In the 1860s and 1870s, Chile demonstrated its awareness of several aspects of this element of Discovery, including what we call European title. In 1868, the government acknowledged that the Mapuches—an Arucanian tribe—held some kind of ownership rights to their lands, and the state enacted a law requiring it to purchase those rights from the Mapuches.<sup>277</sup> The government also enacted leg-

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271. *Id.*

272. Decreto No. 109, de 14 de marzo de 1853. In 1855 the decreto was extended to the Province of Valdivia. See Decreto de 4 de diciembre de 1855. In 1856 it was extended to the colonized territory of Llanquihue. See Decreto de 9 de julio de 1856. For a brief overview, see Kevin J. Worthen, *The Role of Indigenous Groups in Constitutional Democracies: A Lesson from Chile and the United States*, in *THE HUMAN RIGHTS OF INDIGENOUS PEOPLES* 235, 245–46 (Cynthia Price Cohen ed., 1998).

273. Decreto de 4 de diciembre de 1855.

274. *Id.*

275. Ley de 4 de agosto de 1874, art. 6. This prohibition was extended to the acquisition of all native lands in 1883. See Ley de 20 de enero de 1883, art. 1; Worthen, *supra* note 272, at 249 & n.54.

276. Compare 25 U.S.C. § 177 (2006), with Trade and Intercourse Act, 1 Stat. 137 (July 22, 1790), reprinted in *DOCUMENTS OF UNITED STATES INDIAN POLICY* 15 (Francis Paul Prucha ed., 3d ed. 2000); see also MILLER, *NATIVE AMERICA*, *supra* note 1, at 44–45 (providing a brief overview of the United States Congress’s first uses of preemption authority against American Indians).

277. See Fernando Casanueva, *Indios Malos en Tierras Buenas: Visión y Concepción del Mapuche Según las Elites Chilenas*, in *COLONIZACIÓN, RESISTENCIA Y MESTIZAJE EN LAS AMÉRICAS: SIGLOS XVI–XX* 322 (Guillaume Boccara ed., 2002). Specifically, Casanueva stated:

In 1868, in order to legally affirm the presence of the State in the recently conquered indigenous territories and to prevent injustices and frauds against the indigenous peoples, Cornelio Saavedra proposed a purchase of [Mapuche] lands by the State, assuring in them a possession that guarantees their stay. In this way, the Government would be able to subsequently sell, take back or colonize said lands with nationals or foreigners that would work to the benefit of the country.

isolation in 1866 and 1874 to regulate the purchase of Indian lands, and in 1927, 1972, and 1979 it passed laws to try to control property rights in Mapuche areas and to convince Mapuche communities to subdivide their communally-owned lands into private lots.<sup>278</sup> The primary outcome of most of these reform efforts was further loss of Mapuche lands.<sup>279</sup>

In a decree in 1873 Chile exercised its preemption power and control over native lands by forbidding Indians from selling or mortgaging the lands and limiting certain other Indian rights in land. Specifically, the government decreed:

[t]hat the furtherance and civilization of the Araucans is the obligation of the State as the most efficient system for converting them into useful citizens of the Republic and to achieve their gradual pacification and complete submission to constitutional authorities . . . [that] each indigenous family will be assigned lands comprising 30 square hectares of surface area.<sup>280</sup>

Chile also exercised the implied power of preemption because the government established a precedent of issuing laws specifically allowing sales of indigenous lands for limited periods and under certain conditions.<sup>281</sup> On other occasions, Chile enacted specific legislation granting specific persons the ability to purchase lands owned, or previously owned, by indigenous peoples. A law issued on January 25, 1899, for example, granted specific authorization for the purchase of indigenous lands.<sup>282</sup> Given these facts, it is clear the government used the power of preemption to take or purchase indigenous lands or to allow others to purchase indigenous lands.

Chile also enacted legislation, starting at least as early as 1874, which prohibited the acquisition of indigenous lands without government approval and took within its sole power the authority to allow purchases of such lands. The law of January 13, 1903, for example,

*Id.*

278. COLLIER & SATER, *supra* note 226, at 96–97, 216–17, 337; *see also* Worthen, *supra* note 272, at 240–57 (discussing numerous Chilean laws and governmental actions, over nearly one hundred years, which controlled and limited Mapuche land and water rights).
279. *See generally* Worthen, *supra* note 272.
280. Decreto de 29 de octubre de 1873.
281. *See* Ley de 4 de agosto de 1874, DIARIO OFICIAL [D.O.]; Decreto de 30 de Noviembre de 1876, DIARIO OFICIAL [D.O.]; Ley 9 de noviembre de 1877, DIARIO OFICIAL [D.O.]; Ley N°. 1, de 11 de enero de 1893, DIARIO OFICIAL [D.O.]; Ley N°. 1.185, de 25 de enero de 1899, e de febrero de 1899, DIARIO OFICIAL [D.O.]; Ley N°. 1.581, de 13 de enero de 1903, DIARIO OFICIAL [D.O.]; Ley N°. 1.716 de 23 de diciembre de 1904, DIARIO OFICIAL [D.O.]; Decreto de 11 de Diciembre de 1903.
282. Ley N°. 1.185, de 25 de enero de 1899, DIARIO OFICIAL [D.O.] (“Ezequiel Segundo Lavanderos is granted the power to acquire, by purchase or exchange, the indigenous lands found in the region. . . . The contracts authorized by the previous disposition cannot be realized until after the indigenous have been situated, and will not take effect without the consent of the Inspector General of Lands, who will complete . . . the registration of the exchange and purchase-sale.”).

“prolongs for 10 years the prohibition of acquiring indigenous lands, such prohibition contained in Article 6 of the law of August 4th of 1874.”<sup>283</sup> In addition a law of December 23, 1904, authorized the President of the Republic to alienate by “public auction the mountainous lands, in the territories of colonization of the indigenous peoples in lots not to exceed 20,000 square hectares.”<sup>284</sup> Thus, in this law, Chile explicitly permitted the purchase of lands previously possessed and owned by the indigenous peoples in governmental auctions, once again demonstrating the element of preemption because the government claimed the ability to order such auctions and to control the sales of indigenous lands.

In January 1960, the Chilean government addressed the sale of land held under “mercy titles,” or “*títulos de merced*,” in which the government had previously recognized native land rights and granted land titles based only on mercy.<sup>285</sup> The law explicitly limited the sale of lands which Mapuches had obtained from the government through mercy titles, but it did allow them to transfer such lands to the Bank of Chile or other institutions created by law in which the State had some interest or capital contribution.<sup>286</sup>

As is evident, Chile exercised the power of preemption over the Mapuche Indians and prevented them from exercising their own property rights and freely alienating their own lands, and it required them to transfer their lands exclusively to, and through, the Chilean government.

#### D. Native Title

The Discovery element of native or Indian title presumes that indigenous peoples own the lands they occupy and control but that upon the arrival of Europeans, natives legally and immediately lost the full ownership rights of their lands. The discovering European country allegedly acquired the preemption rights and the European title and powers discussed in section III.C above. This presumption represents ethnocentrism at its worst.<sup>287</sup> We will not repeat the evidence discussed above because most of it, including that proving that Spain and Chile exercised preemption and ownership rights over native lands,

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283. Ley N°. 1.581, 13 de enero de 1903 DIARIO OFICIAL [D.O.].

284. Ley N°. 1.716, 23 de diciembre de 1904 DIARIO OFICIAL [D.O.].

285. See Worthen, *supra* note 272, at 246–47 (describing the foundation for provision of *títulos de merced* to the Mapuche natives).

286. Decreto con Fuerza de Ley N°. 65 de 14 de enero de 1960, art. 7 DIARIO OFICIAL [D.O.].

287. In the 1820s, two very prominent justices—Chief Justice John Marshall and Justice Story—of the United States Supreme Court wrote that the Doctrine of Discovery had been enforced by European powers against American Indians “by the sword.” MILLER, *NATIVE AMERICA*, *supra* note 1, at 12, 53 (citations omitted).

also defines the limited property rights indigenous peoples were alleged to have retained after Spain's first discovery.

The Spanish Crown recognized some rights of Indian land ownership and ostensibly protected those rights from outright confiscation in several colonial-era laws.<sup>288</sup> However, in contrast, the evidence also shows that Spain assumed from the beginning of its entry into the New World, and into what is now Chile, that indigenous land rights were subject to Spain's title and overall control. Thus, Spanish law considered indigenous titles to be limited, and not representing full ownership of the land. Various Spanish laws specifically limited and affected Indian real property rights in the New World and in Chile.<sup>289</sup> As early as 1550, the Assembly of Santiago began to legislate regarding Indian land rights, and it assigned lands to settlers and even to Indians.<sup>290</sup>

In 1852, Chile enacted a law granting the President the authority to control native lands south of the Bío Bío River and "to dictate the ordinances" he thought necessary "for the better governance of the borders."<sup>291</sup> Obviously, the government thought that the indigenous peoples and their land rights were not free from Chilean control. The land rights of indigenous peoples which were recognized by Spain, and any they were granted were considered temporary rights to occupy land.<sup>292</sup>

In 1866, Chile officially recognized some Indian rights in land, although far less than full ownership rights, and Chile even began granting Indian communities titles of "favor" or of "mercy" to signify their limited ownership rights. The *títulos de merced*, which were "held in the name of the Republic" and were "of possession only," were granted for lands on reservations, or "*reducciones*."<sup>293</sup> Moreover, in

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288. See, e.g., *THE INDIAN CAUSE*, *supra* note 111, at 81, 84–85, 111–12, 353–55 (translating *Recopilación*, *supra* note 111, at Book 6, Title 1, Law 23; Title 1, Law 30; Title 3, Law 9; and Title 16, Law 21 (Chile)); *SPANISH LAWS*, *supra* note 145, at 166 (translating *Recopilación*, *supra* note 111, at Book 4, Title 12, Law 18, which states that Indians' lands and irrigated fields must be left to them).

289. *SPANISH LAWS*, *supra* note 145, at 35–36, 117–18 (translating a 1573 law of Philip II, Book 4, Title, 7, Law 23); *THE INDIAN CAUSE*, *supra* note 111, at 83, 108–09, 366 (translating a law of Philip II from 1571, Book VI, Title 1, Law 27; a law of Carlos II, Book 6, Title 3, Law 1; and a law of Philip IV, Book 6, Title 16, Law 38); MERRIMAN, *THE EMPEROR*, *supra* note 85, at 618–19.

290. *Cabildo de 5 de noviembre de 1550*, in *ACTAS DEL CABILDO*, *supra* note 268, reprinted in *I COLECCION DE HISTORIADORES*, *supra* note 228, at 260–61.

291. *Ley de 2 de Julio de 1852* (authors' translation).

292. See II MIGUEL LUIS AMUNÁTEGUI, *LOS PRECURSORES DE LA INDEPENDENCIA DE CHILE 201* (1871) [hereinafter AMUNÁTEGUI, *LOS PRECURSORES*].

293. *Ley de 4 de Diciembre de 1866*, arts. 5 & 6 ("The Foundation of Population in the Indigenous Territories and Norms for the Privatization of this Territory"); see also BENGOA, *HISTORIA*, *supra* note 261, at 329 (stating that after the defeat in 1881, "[t]he Araucania [Mapuche territory] was declared government land and it proceeded to colonize the land so as to put the land into production. . . . The

1868, “to legally affirm the presence of the State in the indigenous territories recently conquered,” the government proposed “a purchase of their lands,” thereby “assuring in them a possession that guarantees their stay.”<sup>294</sup> These actions reflect the definition of the limited Indian title under Discovery.

Furthermore, in a 1910 Act, the government continued the 1866 program of granting mercy titles by creating a Commission to oversee these grants. The Commission granted “titles of dominion [possession] to the indigenous that prove[d] to have possessed the lands for one full continuous year.”<sup>295</sup> In an attempt to protect these native land rights of possession, the Commission was authorized to grant Indians a title “even if they have lost the material tenancy of the soil by the occupation of third parties, so long as it is demonstrated that the occupation [was] clandestine or violent.”<sup>296</sup> Thus, Chile tried to protect the possessory rights of indigenous peoples but, significantly, it did not recognize a stronger form of native property right.

Chile continued to do almost anything it pleased with the property rights of indigenous peoples. In 1928, the President was authorized “to expropriate . . . indigenous lands” located in the Maquegua, Province of Cautin, or to exchange them with others.<sup>297</sup> In addition, the law of July 1, 1932, re-authorized the President’s powers from the 1866 law to establish Indian “settlements in the indigenous territory and the areas that those territories may be divided into.”<sup>298</sup>

As demonstrated above, by exercising extensive and unilateral legal authority over native land rights Spain and Chile clearly supported the Discovery idea that Indians held only limited titles to their lands.

### E. Native Limited Sovereign and Commercial Rights

This element of the Doctrine holds that indigenous governmental rights, sovereign powers, and commercial rights were legally limited upon the arrival of Europeans. In the papal bulls of 1493, the Pope

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Mapuches were subjected to the rigor of civilization; they received small favors [pieces] of land, they were shut in their reservations, [and] they were obligated to transform into farmers.”) (authors’ translation).

294. Casanueva, *supra* note 277, at 322; see also Andrea Aravena, *Los Mapuches—Warriache Procesos Migratorios e Identidad Mapuche Urbana en el Siglo XX*, in *COLONIZACIÓN, RESISTENCIA Y MESTIZAJE EN LAS AMÉRICAS: SIGLOS XVI–XX* 363 (Guillaume Boccara ed., 2002) (“With the creation of the reservations, the objective of the State was to establish the Mapuches on small plots of land permitting the liberation of the rest of the land in order to integrate the country and proceed to an effective colonization of the same.”) (authors’ translation).

295. Decreto de 19 de Mayo de 1910.

296. *Id.*

297. Ley 4.332, de 21 de Junio de 1928.

298. Decreto No. 124 de 1 de Julio de 1932.

explicitly granted Spain this type of authority over governmental relations, diplomacy, trade, and economic activities of indigenous peoples and governments in the New World.<sup>299</sup> Spain and Chile then enforced this power of Discovery against native peoples. Sections III.C and III.D above demonstrate various ways in which indigenous real property rights were alleged to have been limited by Discovery. Here we will examine examples of the type of sovereign and commercial rights which Spanish and Chilean legal regimes assumed indigenous peoples lost due to European discovery.

While both the Spanish Crown and the Pope spoke often and in eloquent language about traveling to the New World solely to convert the natives and for their welfare, most conquistadors and colonial and royal officers had other ideas. As Ferdinand Pizarro told an Incan chief, he had come “to assert his master’s *lawful supremacy* over [Peru],”<sup>300</sup> and as he told a priest, “I have come to take away from them their gold.”<sup>301</sup> The Crown itself repeatedly demonstrated its overriding interest in ruling the New World and acquiring the economic assets of the indigenous governments and peoples.<sup>302</sup> The Crown directed that Indians were to be persuaded to recognize the “Lordship and Universal Jurisdiction that We have over the Indies” and that they must pay tributes “in order to comply with the responsibilities to which they are obligated.”<sup>303</sup> Spanish kings also ordered their administrators to study “the ways [the] treasury might be benefited most advantageously in the Indies.”<sup>304</sup>

The most prominent example of the governmental and commercial powers Spain and Chile assumed they obtained under Discovery was the authority to extract forced labor from native peoples, and to relocate natives to perform these labors. The Crown considered Indians to be its subjects and, as a result, considered itself able to enact laws regulating their existence, relocating them, and ordering them to pay

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299. See Bull *Inter caetera Divinae*, *supra* note 82, reprinted in CHURCH AND STATE, *supra* note 72, at 157–58 (translating from the original Latin); see also *id.* at 158 (“[B]y this our donation . . . we strictly forbid any persons . . . without your special licence . . . to approach, for the purpose of trade or for any other reason, the islands and mainlands found or to be found, already discovered or to be discovered . . .”).

300. I PRESCOTT, *supra* note 210, at 274.

301. HANKE, *supra* note 97, at 7; see also EXPANSION OF EUROPE, *supra* note 28, at 5 (stating that religious motivation was never the sole reason for expansion, and that economic and social motives were inextricably associated with religion); accord MERRIMAN, THE EMPEROR, *supra* note 85, at 547.

302. See, e.g., SPANISH LAWS, *supra* note 145, at 2 (explaining that the king commanded his explorers “to discover the land with commercial and trading purposes” and to find out about land values and assets); accord *id.* at 59.

303. SPANISH LAWS, *supra* note 145, at 41.

304. THE INDIAN CAUSE, *supra* note 111, at lvii.

tribute, or “*mita*,” through forced labor and cash payments.<sup>305</sup> From the arrival of Valdivia onwards, the colonial government assumed both criminal and civil jurisdiction along with commercial control over the Indians, and it assigned lands and natives to individual Spaniards. Natives were forced to relocate and to work nine months of the year for pay (allegedly) in mines, farms, and at other jobs, to pay the royal tribute, and to give the Spanish fifteen days of free labor a year.<sup>306</sup> Natives were then allowed to work on their own lands for only three months of the year.<sup>307</sup> These provisions were obviously severe limitations on indigenous commercial rights and replaced the governmental rights and powers of indigenous communities with Spanish rule. While Spanish law differentiated between its force labor system and slavery and the *encomienda*, it is hard to see any actual difference.<sup>308</sup>

In the regions of Chile where the Spanish were powerful enough to take over, the rights of the native peoples and the powers of the indigenous governments were severely restricted.<sup>309</sup> Spanish law, however, did continue to recognize and support some of the sovereign powers of native leaders, or “*caciques*,” and thus the indigenous governments did continue to exercise some of their original authority. For example, Spanish kings decreed that native leaders in Chile and elsewhere would continue in office and exercise their original criminal and civil jurisdiction over many aspects of native affairs.<sup>310</sup> In fact, the Crown authorized the elections of *caciques* to govern Indian towns, in Chile and elsewhere, and even incorporated some native legal customs into the Spanish laws for the Indies.<sup>311</sup>

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305. SPANISH LAWS, *supra* note 145, at 15; THE INDIAN CAUSE, *supra* note 111, at 144–45 (translating Recopilación, *supra* note 111, at Book 6, Title 5, Law 1); MERRIMAN, THE CATHOLIC KINGS, *supra* note 56, at 230–31; MERRIMAN, THE EMPEROR, *supra* note 85, at 619.

306. THE INDIAN CAUSE, *supra* note 111, at 103–05, 108–09, 112–13 (translating Recopilación, *supra* note 111, at Book 6, Title 2, Laws 14–15; Title 3, Laws 1, 10), 343, 346 (translating Book 6, Title 16, Laws 3, 9 regarding Chile), 353 (translating Book 6, Title 16, Law 21 (Chile)), 356 (translating Book 6, Title 16, Law 24 (Chile)), 357 (translating Book 6, Title 16, Law 26 (Chile)), 366 (translating Book 6, Title 16, Law 38 (Chile)), 373 (translating Book 6, Title 16, Law 51 (Chile)), 382 (translating Book 6, Title 16, Laws 66 & 67 (Chile)).

307. THE INDIAN CAUSE, *supra* note 111, at 353–55 (translating Book 6, Title 16, Law 21 (Chile)).

308. ZAVALA, *supra* note 37, at 46–51, 54–55 (exploring the Spaniards’ distinction between “natural” slavery and “legal” slavery); MORISON, THE EUROPEAN DISCOVERY, *supra* note 75, at 136.

309. See, e.g., *supra* notes 173–79, 263–86, and accompanying text.

310. THE INDIAN CAUSE, *supra* note 111, at 115 (translating Recopilación, *supra* note 111, at Book 6, Title 3, Laws 15–16), 188–91, 194 (translating Book 6, Title 7, Laws 1, 4, 7–8, 13), 368 (translating Book 6, Title 16, Law 42 (Chile)).

311. THE INDIAN CAUSE, *supra* note 111, at 10–11 (citing and translating Recopilación, *supra* note 111, at Book 2, Title 1, Law 4; Book 5, Title 2, Law 22).



The Araucanians and their governments were also able to maintain almost all of their inherent sovereign powers and commercial rights in the vast area south of the Bío Bío River because they held off the Spanish and Chilean military conquests for over 300 years.<sup>312</sup> In fact, Spain recognized “Indomitable Araucania” as, effectively, a separate country.<sup>313</sup> Spain kept a small standing army on the border,<sup>314</sup> and signed treaties with the Mapuche tribes, under which the indigenous governments agreed to some limitations on their absolute freedom and sovereignty.<sup>315</sup>

By signing treaties with native governments, Spain was explicitly recognizing the sovereign existence and authority of the indigenous governments.<sup>316</sup> In the Treaty of Quilín in 1641, the Araucanian tribes agreed to ally with the Spanish and to resist settlements by other Europeans, but at the same time Spain recognized “the almost complete independence of the Araucanos.”<sup>317</sup> Yet, according to one nineteenth century commentator, through this treaty the Mapuche agreed that they “could live independently as the same Spanish servants of the Spanish crown . . . [and the Spanish] were authorized to peacefully raise and re-populate [their] old colonies and establishments.”<sup>318</sup> A different commentator interpreted this treaty as preserving the Indians’ “absolute independence and liberty without anyone bothering them in their territory nor reduc[ing] them to slavery.”<sup>319</sup> The same commentator agrees that the Araucanians had agreed to accept “as their enemies the enemies of the Spanish, which is to say, that they were not to align themselves with foreigners that may arrive at [their] shores with hostile purposes.”<sup>320</sup> Consequently, the terms of this treaty did limit Mapuche sovereignty to some extent.

In 1852, Chile enacted a law to promote contractual and commercial relations with Indians, yet at the same time the government claimed its superior right to regulate the indigenous peoples and to

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312. COLLIER & SATER, *supra* note 226, at 5; Bengoa, *Chile Mestizo*, *supra* note 252, at 120–22, 127; Theodore Macdonald, *Introduction to MANIFEST DESTINIES AND INDIGENOUS PEOPLES* 1, 11–12 (David Maybury–Lewis et al. eds., 2009).

313. COLLIER & SATER, *supra* note 226, at 5.

314. *Id.*

315. *Id.* at 13, 41; Carlos Lázaro A., *El Parlamentarismo Fronterizo en la Araucanía y las Pampas*, in *COLONIZACIÓN, RESISTENCIA Y MESTIZAJE EN LAS AMÉRICAS: SIGLOS XVI–XX* 201, 208–09 (Guillaume Boccara ed., 2002) (discussing the terms of El Parlamento de Catiray (The Parliament [Treaty] of Catiray) (1612)).

316. See Bengoa, *Chile Mestizo*, *supra* note 252, at 127; cf. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12 (1831).

317. AMUNÁTEGUI, *LOS PRECURSORES*, *supra* note 292, at 231.

318. AMUNÁTEGUI, *COMPENDIO*, *supra* note 214, at 59–60 (authors’ translation).

319. IV DIEGO BARROS ARANA, *HISTORIA GENERAL DE CHILE* 267–68 (2000) (authors’ translation).

320. *Id.* at 268.

govern the Araucanian province.<sup>321</sup> One historian characterizes the concerns Chile felt about the independent Mapuches this way:

An eminent danger exists that the cities of the South will be invaded by hordes of barbarians and, similarly, that foreign nations could lay claim to the land through an eventual attack. . . . A foreign power could acquire lands in the Araucania and, later, take possession of the territory. . . . Following the norms of International Law, the Araucanos constitute a nation and could enter into contracts, treaties or pacts with another foreign nation.<sup>322</sup>

The foregoing examples seem to establish conclusively that Spain and Chile recognized, but at the same time limited, indigenous sovereign and commercial rights.

## F. Contiguity

Spain and Chile did use the contiguity element of Discovery and claimed lands contiguous to their discoveries and actual settlements in the New World. The Pope, of course, granted Spain this very right over the entire Americas in 1493.<sup>323</sup> That is about as expansive a use of the element of contiguity as can be cited.

Columbus then used the authority and the alleged rights of the Spanish monarchs to claim the lands he encountered in 1492. Similarly, in 1513, when Balboa waded into the Pacific Ocean, he claimed it and all the adjoining lands for Spain.<sup>324</sup> In 1523, the Crown granted Lucas Vásquez de Ayllón a patent (authority) to establish a colony in Florida and to govern 800 leagues of coastline.<sup>325</sup> A law decreed by Philip II in 1573 also reflected contiguity ideals, because he ordered that once newly acquired areas had been populated, the discovery and settlement of the lands bordering the occupied areas could begin.<sup>326</sup>

In Chile, Charles V used the contiguity element when he granted Diego de Almagro the governorship of New Toledo and the ability to exercise jurisdiction over lands in modern day northern Chile that had

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321. See Ley de 2 de julio de 1852. It is entitled: "Establishing the Province of Arauco and Authorizing the President of the Republic, for the Regulation of the Government of the Borders and the Protection of the Indigenous." *Id.* (authors' translation). The statute reads, in relevant part:

Article 1- . . . The territories inhabited by the indigenous peoples will be subject to the authority and regime that, given their special circumstances, is determined by the President of the Republic. . . . Article 3- The President of the Republic is authorized to promulgate the ordinances that he deems convenient . . . for the most efficient protection of the indigenous peoples, to promote their prompt civilization and to arrange contracts and commercial relations with them.

*Id.* (authors' translation).

322. Casanueva, *supra* note 277, at 306 (authors' translation).

323. See *supra* notes 77-82 and accompanying text.

324. IRVING, *supra* note 210, at 110-13.

325. MERRIMAN, THE EMPEROR, *supra* note 85, at 524.

326. SPANISH LAWS, *supra* note 145, at 11 (translating Book 4, Title 1, Law 1).

not yet been discovered or occupied by Spanish explorers which abutted Peru.<sup>327</sup> The King continued to use the contiguity element in Chile when he gave Sancho de Hoz the right to govern all the lands south of the Straits of Magellan, because he appears to have been relying on contiguity to grant the lands surrounding the actual lands Magellan discovered in 1520.<sup>328</sup> Pedro de Valdivia also relied on contiguity when he assumed that Spain held rights to the lands surrounding the Straits. Valdivia had tried to travel to the Straits and establish Spanish occupation, but he reported to the King in 1552 that he got no closer than within about 150 leagues of the Straits.<sup>329</sup> He also sent an expedition to southern Chile in 1544 with the authority to take possession of the country for the King of Spain, and the group claimed the “natives and of all this land and province, and its surroundings,”<sup>330</sup> although they themselves had just stepped ashore.

In 1541, the Assembly of Santiago declared the territory of Chile to include:

[T]hese kingdoms of Nueva Extremadura, which begin in the valley of the Posesión, that in the language of the Indians is Copiapó, with the valley of Coquimbo, Chile and Mapocho, and the provinces of Poromacae, Rauco and Quiriquino, with the island of Quiriquino that the chief Leochengo rules, with all of its other bordering provinces, so that it is of service to S.M.<sup>331</sup>

This statement demonstrates that the Spanish considered their territory to include all of modern-day Chile, including areas that had not yet been occupied by or even seen by Spaniards. In fact, they were also claiming the lands of known Indian chiefs and any lands that were contiguous to the known lands. Furthermore, in 1549, the Assembly recognized that Valdivia was exercising Spanish authority over, and taking assets from, lands which the indigenous peoples occupied, again demonstrating the expansive definition of Spanish and Chilean territory.<sup>332</sup>

The contiguity element is visible in other aspects of Chilean history. In the first chapter of its 1833 Constitution, Chile claimed the lands of the Mapuche peoples as being within its territory, even though Chile had no actual control over or possession of those lands:

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327. POCOCK, *supra* note 221, at 16.

328. See AMUNÁTEGUI, COMPENDIO, *supra* note 214, at 25; POCOCK, *supra* note 221, at 16, 49–52; Capitulación y asiento que se tomó con Pero Sancho de Hoz para efectuar descubrimientos en la Mar del Sur, *reprinted in* VIII COLECCION DE DOCUMENTOS . . . *Hasta la Batalla de Maipo*, *supra* note 213, at 16–17; MERRIMAN, THE EMPEROR, *supra* note 85, at 590.

329. POCOCK, *supra* note 221, at 204.

330. *Id.* at 109–10; *see also supra* notes 218–22 and accompanying text (setting forth various discoveries of lands comprising present-day Chile).

331. Cabildo de 11 de Agosto de 1541, *in* ACTAS DEL CABILDO, *supra* note 268, *reprinted in* I COLECCION DE HISTORIADORES, *supra* note 228, at 100.

332. Cabildo de 2 de Agosto de 1549, *in* ACTAS DEL CABILDO, *supra* note 268, *reprinted in* I COLECCION DE HISTORIADORES, *supra* note 228, at 200.

“The territory of Chile extends from the desert of Atacama to the Cape Hornos, and from the Andes mountains to the Pacific ocean, including the Archipeligo of Chiloé, all the adjacent islands, and those of Juan Fernández.”<sup>333</sup> Furthermore, the Chilean Minister of the Treasury, Vicente Reyes, in 1868, invoking the Republic’s theory of uninterrupted territoriality, stated that “the Chilean laws should apply to *all* the inhabitants in the *entire* territory; in other words not only the indigenous lands are Chilean, but rather those same Indians are Chilean.”<sup>334</sup> The Congress stated that “our political Constitution determines that the limits of Chile are: on the north from the desert of Atacama, to the east to the Andes mountains, to the south Cape Horn and to the west the Pacific sea. This clearly means that within those limits there can be nobody that does not obey all the laws of Chile.”<sup>335</sup>

Chile and its citizens also developed a national story that justified their contiguity claims to the Straits of Magellan notwithstanding the Araucanian territory that stood in the way for over three hundred years.<sup>336</sup> Commentators call this story Chile’s “southern destiny” and its “Magellanic vocation.”<sup>337</sup> Identical visions of national destinies of territorial expansion were used by other colonial/settler countries such as the United States, where the story is called “Manifest Destiny,” and Argentina, where it is known as the “Conquest of the Desert.”<sup>338</sup>

### G. Terra Nullius

The *terra nullius* element of Discovery claims that Europeans legally owned any vacant and empty lands that they encountered. Whether this element of Discovery was used by Spain is questionable, because all the areas it claimed under Discovery were occupied by numerous peoples and well-established cultures and governments. As Francisco de Vitoria wrote in the 1530s, “the possessions [in the Indies] were under a master, and therefore they do not come under the head of discovery [of vacant lands].”<sup>339</sup> Also, in an advisory opinion in

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333. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 1, available at <http://www.leychile.cl/Navegar?idNorma=137535&tipoVersion=0> (last visited Feb. 9, 2011).

334. Casanueva, *supra* note 277, at 310.

335. *Id.* (authors’ translation).

336. See Bengoa, *Chile Mestizo*, *supra* note 252, at 119–20, 128, 133.

337. Macdonald, *supra* note 312, at 11; Bengoa, *Chile Mestizo*, *supra* note 252, at 133.

338. See MILLER, *NATIVE AMERICA*, *supra* note 1, at 115–61. See generally Claudia N. Briones & Walter Delrio, *The “Conquest of the Desert” as a Trope and Enactment of Argentina’s Manifest Destiny*, in *MANIFEST DESTINIES AND INDIGENOUS PEOPLES* 51 (David Maybury-Lewis et al. eds., 2009).

339. *THE INDIAN CAUSE*, *supra* note 111, at xiv; see also PAGDEN, *supra* note 4, at 91 (“[A]s Vitoria pointed out, the lands they had settled in were evidently not unoccupied.”).

1975, the International Court of Justice did state, albeit in dicta, that territories inhabited by indigenous peoples who possessed a measure of social and political organization were not *terra nullius*, even if the people were nomadic.<sup>340</sup> Nonetheless, we found several examples of Spain and Chile using *terra nullius* and analogous ideas to claim indigenous lands.

We should note that there are two ways to define *terra nullius*. The first is when a particular area of land was physically empty of human beings, and the second was to consider a land “empty,” even when a region was occupied by a human society, if that society was governed by a form of government that European law did not recognize.<sup>341</sup> Spain and Spanish commentators used both arguments to consider lands in the New World to be “vacant” and available for Discovery claims.

In 1572, a Spanish jurist and adviser to Toledo, the Viceroy of Peru, justified Spain’s title and rule by stating: “The Indies were justly won. By the concession of the [P]ope, or because those kingdoms were found deserted by the Spaniards.”<sup>342</sup> Also, in the 1500s, Viceroy Toledo authorized a treatise to be written to justify Spain’s title in the Indies to the King. Toledo and the treatise considered it “unreasonable and dangerous . . . to attribute to these Incas the true lordship of these kingdoms.”<sup>343</sup> Europeans at the time did not consider native political organizations as governments at all; Toledo’s statement reflected this widely-held view and argued against the Incas’ very existence as a sovereign state.

In 1523, the regulations on colonization in the New World issued by Charles V, and later laws issued that same year, ordered that sites where Spanish cities were to be established “should be vacant and capable of occupation.”<sup>344</sup> One commentator also notes that Spanish settlers had many ways of acquiring lands that became vacant due to the deaths of the Indian owners.<sup>345</sup>

In 1866, Chile expressly applied *terra nullius* principles to Mapuche lands. In the law of December 4, 1866, the government granted the President the power to demarcate Mapuche lands, to grant titles to non-Indian settlers, and to grant titles of mercy to Mapuches.<sup>346</sup> However, any lands that were “non-populated” or that

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340. Western Sahara Advisory Opinion, 1975 I.C.J. 12, 39, 75 (Oct. 16), available at <http://www.icj-cij.org/docket/files/61/6195.pdf>.

341. See *supra* note 185 and accompanying text.

342. HANKE, *supra* note 97, at 167 (citation omitted).

343. *Id.*

344. POCOCK, *supra* note 221, at 70; see also SPANISH LAWS, *supra* note 145, at 12 (“The places must be places not occupied by the Indians, unless the Indians willingly consent to it.”).

345. THE INDIAN CAUSE, *supra* note 111, at 419–20.

346. See Ley de 4 de diciembre de 1866.

were not assigned by the President would be considered unpopulated territories.<sup>347</sup> And, in 1868, the Chilean government applied *terra nullius* again when it wanted to acquire more Mapuche land. The government used language indicating that Chile considered all Mapuche lands to be vacant and available to Chile or, in the alternative, that Chile was claiming to own all lands within Mapuche territories that were vacant. Specifically, the government stated: “The State can enter to advantageously transfer the large stretches of vacant land which exist between the [Malleco River] and the Bío Bío [River] . . . 200,000 square hectares will remain with civilized landowners, 50,000 to the indigenous inhabitants *and the rest should be considered empty and therefore property of the State.*”<sup>348</sup> One commentator notes that in the second half of the 1800s, Chile considered the Mapuche lands to the south to be “empty lands” and “practically uninhabited,” and it enacted pro-immigration policies to help fill this “unoccupied territory.”<sup>349</sup> Consequently, while it is alleged that Spain never claimed lands in the New World on the basis of *terra nullius*, it appears that Spain and Chile were aware of this element of Discovery and occasionally relied on it to make legal claims of land ownership.

## H. Christianity

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . [T]he character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and [C]hristianity. . . .<sup>350</sup>

Little time is needed to prove that Spain and Chile believed their status as Christians made them superior to indigenous peoples. Their Christian status also served to bolster their claim for possession of legal rights over the lands and peoples in the New World. The evidence in support of this conclusion is overwhelming.

When Pope Alexander VI donated the Americas to Spain in 1493, the grant was premised on Spain’s obligation to take Christianity to the New World and convert the heathen savages. The *Requerimiento*, mandated by the Crown to be read by conquistadors to indigenous peoples, announced the intention to convert natives to Catholicism. The Crown repeatedly stressed the obligation of explorers to convert natives and preach the gospel, and it enacted a multitude of regula-

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347. *Id.* at art. 6.

348. Casanueva, *supra* note 277, at 309–10 (emphasis added) (authors’ translation).

349. Bengoa, *Chile Mestizo*, *supra* note 252, at 129, 131.

350. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572–73 (1823).

tions and laws on how to carry out this duty.<sup>351</sup> Explorers were ordered to “convert the provinces of the Indies,” to take priests with them to teach religion to the natives, and to teach the children “the confession and the Lord’s prayer.”<sup>352</sup> Additionally, each Indian village was to have a church and priest.<sup>353</sup> In the royal order granting Diego de Almagro the right to discover modern-day Chile, the King ordered him to take priests and to teach Indians the Catholic faith; Almagro was not to conquer, discover, or settle the territory without the priests present.<sup>354</sup>

When Pedro de Valdivia established the city of Santiago in 1541, he did so “in honor of the patron saint of Spain.”<sup>355</sup> Valdivia explained to the Chilean natives that he had come to bring them the one true faith, but no notice was given, ironically, of the other objectives of his expedition:

Having received the surrender of Chief Michimalonco, Valdivia said: Do not think that we have come here for your gold. Our emperor, a great man, has great quantities of treasure . . . We have come to instruct you on the knowledge of the true God, and liberate you from the devil, whom you idolize. But, because of this, you are to serve us and feed us, and give whatever else we ask for from your lands, . . . and you are to give us sufficient people to take gold from your mines.<sup>356</sup>

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351. See, e.g., THE INDIAN CAUSE, *supra* note 111, at xvi–xvii (stating that the Crown recognized that religious purposes were the primary reason the 1493 papal bulls granted Spain the Indies), 130 (translating *Recopilación*, *supra* note 111, at Book 6, Title 4, Law 15, in which Indians were to pay the costs of missions and religious instruction), 228 (translating Book 6, Title 9, Law 1, in which Spanish *encomenderos* were required to work for the spiritual welfare of Indians), 325 (translating Book 6, Title 15, Law 1); SPANISH LAWS, *supra* note 145, at 35–36 (translating Book 4, Title 7, Law 23), 38, 41–42; MERRIMAN, THE CATHOLIC KINGS, *supra* note 56, at 205, 230–31.
352. Extracto de un parecer del Doctor Vaquez sobre los repartimientos, encomiendas y aprovechamientos de los indios, in IV COLECCION DE DOCUMENTOS . . . DE AMÉRICA Y OCEANÍA, *supra* note 239, at 145; Instrucion para el Gobernador e oficiales, sobrel Gobierno de las Indias, e lo que en ellose se debe observar (Mar. 20–29, 1503), in XXXI COLECCION DE DOCUMENTOS . . . DE AMÉRICA Y OCEANÍA, *supra* note 239, at 156–57, 160–61 (instructions for Spanish officials concerning the Indies); Real Cédula para que los Capitanes que por mandado de Su Alteza fueren a descubrir Tierrafirme a las Indias, fallando que los dichos canibales non se quieren convertir e estobieren pertinaces e inobidientes, los captiven e traygan a estos Reynos, pagando la parte que pertenesciere a Sus Altezas (Aug. 1503), in XXXI COLECCION DE DOCUMENTOS . . . DE AMÉRICA Y OCEANÍA, *supra* note 239, at 196–198 (instructions for Spanish officials concerning the Indies)
353. Instrucion para el Gobernador e oficiales, sobrel Gobierno de las Indias, e lo que en ellos se debe observar (Mar. 20–29, 1503), in XXXI COLECCION DE DOCUMENTOS . . . DE AMÉRICA Y OCEANÍA, *supra* note 239, at 156–57, 160–61 (instructions for Spanish officials concerning the Indies).
354. AMUNÁTEGUI, LA CUESTION, *supra* note 219, at 26.
355. I DIEGO BARROS ARANA, HISTORIA GENERAL DE CHILE 179 (2000); see AMUNÁTEGUI, COMPENDIO, *supra* note 214, at 26.
356. AMUNÁTEGUI, LOS PRECURSORES, *supra* note 292, at 39.

In 1563, the Spanish governor of Chile stated that one of the best ways to ensure that the Indians were well treated was “that they recognize the benefits of God Our Father in taking them out of their miserable gentile status, bringing them to our holy Catholic faith and our servitude.”<sup>357</sup> Thereafter, Chilean colonization and the conquest of the indigenous peoples continued to emphasize that conversion and the superiority of Christianity partly justified Spanish rights.<sup>358</sup>

## I. Civilization

The Spanish and Chilean colonizers presumed that the superiority of their cultures and civilizations justified their conquests and jurisdiction over infidel and barbarian indigenous peoples. In 1526, for example, a royal ordinance on discoveries ordered conquistadors to inform natives that they had been sent to teach Indians “good customs, to dissuade them from vices,”<sup>359</sup> while other laws required teaching Indians to wear clothes and shoes and to be “taught how to be civilized”<sup>360</sup> so as to “live in a socially acceptable manner.”<sup>361</sup> Other colonizing countries had the same ethnocentric viewpoints and used similar degrading terms in order to convince themselves that native peoples were lower-class humans who needed the paternalistic care and direction of European societies.<sup>362</sup>

Likewise, the Spanish Crown assumed that its government and civilization was superior to the indigenous cultures of the New World. In 1591, for example, one king wrote that the Indians “seem to have been born only to serve the Spanish.”<sup>363</sup> The Spanish conquistadors mirrored this thinking. One stated that “the Indians are servants of nature, incapable of understanding and bad by instinct, a species of beast that could not do other things than beastly things.”<sup>364</sup> These

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357. *Id.* at 12.

358. See POCOCK, *supra* note 221, at 28 (Diego de Almagro), 69 (Pedro de Valdivia); THE INDIAN CAUSE, *supra* note 111, at 103–04 (translating Book 6, Title 2, Law 14), 110 (translating Book 6, Title 3, Law 4), 260 (translating Book 6, Title 10, Law 20 (Chile)), 348–49 (translating Book 6, Title 16, Law 12, in which Chilean Indians were required to pay to support their religious instructors).

359. HANKE, *supra* note 97, at 111.

360. SPANISH LAWS, *supra* note 145, at 38.

361. SPANISH LAWS, *supra* note 145, at 41–42; see also *id.* at 117–18 (translating Recopilación, *supra* note 111, at Book 4, Title 7, Law 23); THE INDIAN CAUSE, *supra* note 111, at 79 (translating Book 4, Title 1, Law 19), 274–76 (translating Book 4, Title 12, Law 1), 315–16 (translating Book 4, Title 13, Law 21).

362. See, e.g., MILLER, NATIVE AMERICA, *supra* note 1, at 27–28, 39–40, 163–72; MILLER, RURU, BEHRENDT & LINDBERG, *supra* note 1, at 43, 49, 76–78, 87–88, 92, 107, 128, 149, 171–72, 175, 186, 216–18, 220–21, 250.

363. AMUNÁTEGUI, LOS PRECURSORES, *supra* note 292, at 16.

364. *Id.*



ideas reflected the Aristotelian and Spanish idea that certain peoples were of such low status that natural law destined them for slavery.<sup>365</sup>

It is evident from the above passages that the Spanish considered indigenous peoples uncivilized and that the Spanish took it upon themselves to reform natives and civilize them. This thinking was identical to that of numerous colonizer/settler societies. The first president of the United States, for example, compared American Indians to animals and called them “Savage as the Wolf” when discussing how Indians would respond to American expansion.<sup>366</sup>

Chilean governments and officials also presumed the superiority of their civilization, culture, and laws over those of indigenous peoples. In an 1852 law, the legislature authorized the President to dictate whatever ordinances he deemed necessary to protect the indigenous peoples and “to promote their prompt civilization.”<sup>367</sup> An 1859 editorial in *El Mercurio*—a Chilean newspaper—demonstrates the widespread belief in the inferiority of indigenous societies and cultures. Indeed, the final conquest of the Mapuches was seen as a fight between the Chilean and Mapuche civilizations, a fight between good and evil. Specifically, the newspaper stated:

This is the fight that exists since the world is the world; this is the eternal antagonism between good and evil, vice and virtue, knowledge and ignorance; a fight and antagonism both necessary and useful, to bring about humanity by any means necessary, employing those whose strength humanity still ignores.<sup>368</sup>

One Chilean historian has characterized the invasion and expropriation of indigenous lands as being justified by three points, which incorporated the old colonial voices:

(a) The Indians are members of an inferior race, savage, impossible or very difficult to civilize. (b) Chile had to overcome its geographic discontinuity . . . [and] (c) The Chilean civilization, white and of European origin and, therefore, superior, together with the Republican order, had to be imposed in the entire national territory.<sup>369</sup>

This language reflects the civilization element of Discovery, as well as that of contiguity, because the majority of Chileans could not conceive of an inferior race preventing Chile from overcoming the problem of its “geographic discontinuity.”

According to one commentator, Chile’s most famous historian of the second half of the nineteenth century, Diego Barros Arana, adopted social evolutionist theories and depicted the life of the Chilean Indians as primitive, barbarian societies “with the most degrading

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365. See *supra* notes 108, 126.

366. MILLER, NATIVE AMERICA, *supra* note 1, at 28, 39–40, 45, 78.

367. See Ley de 2 de julio de 1852 (authors’ translation).

368. Casanueva, *supra* note 277, at 306 (citation omitted).

369. *Id.* at 304–05.

imagery.”<sup>370</sup> José Bengoa explains that this Chilean consciousness and the perception of natives as lower than humans led easily to policies of “*reducciones*,” or reservations, and the concentration of indigenous peoples into small areas, as it did similarly in the United States and in other colonizer/settler societies.<sup>371</sup> These actions are not surprising since the influential Chilean cabinet member Antonio Varas, who served from 1850 to 1860, traveled to the United States to study its policies regarding migration, territorial occupation, and dealings with the Indians.<sup>372</sup>

The Chilean government, just like the Spanish Crown, believed it had a duty to civilize indigenous peoples. In 1873, the government stated:

It is the obligation of the State for the furtherance and civilization of the Araucanians as the most efficient system to convert them to useful citizens of the Republic and to finalize their pacification and to submit them to the laws and constituted authorities. Having considered that the establishment of a colony of Indians, a population within a limited territory, can serve fruitfully the purposes above where with the land they can be obedient to their domestic ways and the development of their societal habits.<sup>373</sup>

Thus, through legislation, the Chilean government forced integration on Indians in order to civilize them by placing them on *reducciones*, granting Mapuche Indians titles of mercy, and forcing state-run agrarian reforms. These measures reflect the same kinds of ideas and tactics that other settler/societies pursued.<sup>374</sup>

As late as 1972, the Chilean government was still pursuing ideas of integrating the Mapuche Indians and other indigenous peoples into Chilean culture and society. A law enacted on September 15, 1972, established the Institute of Indigenous Development in order to “promote the social, economic, educational, and cultural development of the indigenous peoples and to procure their integration into the na-

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370. Bengoa, *Chile Mestizo*, *supra* note 252, at 130 (discussing DIEGO BARROS ARANA, *HISTORIA GENERAL DE CHILE* (Eduardo Castro Le-Fort et al. eds., Editorial Universitaria 1999) (1884–1902)). The works of Diego Barros Arana, including all 16 volumes of the *Historia General de Chile*, are available online, digitally scanned, at MEMORIA CHILENA, PORTA DE LA CULTURA DE CHILE, [http://www.memoriachilena.cl/temas/documentos.asp?id\\_ut=diegobarrosarana\(1830-1907\)](http://www.memoriachilena.cl/temas/documentos.asp?id_ut=diegobarrosarana(1830-1907)).

371. Bengoa, *Chile Mestizo*, *supra* note 252, at 130; *see also* MILLER, NATIVE AMERICA, *supra* note 1, at 163–72 (giving an overview of the United States’ exercise of Discovery against the Indian Nations); MILLER, RURU, BEHRENDT & LINDBERG, *supra* note 1, at 61–62, 67, 76–78, 81–82, 100–03, 128–29, 131, 149, 172, 175, 180–82, 186, 213–18, 220–21 (same). Furthermore, Bengoa quotes a commander, Sir Aurelio Arriagada, as calling the Mapuches an “armed horde of savages” in 1875. BENGEOA, *HISTORIA*, *supra* note 261, at 262.

372. Bengoa, *Chile Mestizo*, *supra* note 252, at 131.

373. Decreto de 29 de octubre de 1873.

374. *See* Bengoa, *Chile Mestizo*, *supra* note 252, at 131; *supra* note 372 and accompanying text.

tional community, considering its idiosyncrasy and respecting their customs.”<sup>375</sup>

Thus, there is no question that Spain and Chile attempted to justify their territorial and sovereign claims in Chile through the Discovery element of civilization and the presumption their civilizations and cultures were superior.

## J. Conquest

We define this element in two ways. First, throughout human history, an actual physical conquest in warfare acquired many rights and powers for the conqueror.<sup>376</sup> The Spanish Crown and the Republic of Chile exercised these powers after engaging in war against the indigenous peoples in the territory that is now modern-day Chile. Second, pursuant to the Doctrine, the mere arrival of Europeans in the territories of indigenous peoples was considered to be similar to a physical conquest. This is because a “first discovery” was presumed to grant European countries the Discovery rights that we have discussed above.<sup>377</sup> Spain claimed these same rights based upon its first discovery and actual conquest based on the principle of just war.<sup>378</sup>

Spain presumed, by its arrival in the New World, that it had automatically acquired rights of conquest and that indigenous peoples should immediately submit to Spanish sovereignty and religion. The *Requerimiento* was designed to explain this requirement to natives, to give them a few minutes to consider pledging allegiance to the Spanish government and religion, and then to authorize Spanish attacks if natives resisted this exercise of Spanish authority.<sup>379</sup> However, very few natives, if any, simply allowed the Spanish to march in and take over, and, as a result, Spain fought many wars to conquer territories and peoples in the New World and elsewhere.<sup>380</sup> The Crown authorized its explorers from the Canary Islands and beyond to “conquer, pacify, and people the region[s].”<sup>381</sup>

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375. Ley 17.729 de 15 de septiembre de 1972, Título Segundo, DIARIO OFICIAL [D.O.] (authors' translation).

376. MILLER, *NATIVE AMERICA*, *supra* note 1, at 4–5.

377. *Id.* at 5.

378. See *supra* notes 32, 67, 125, 104, 116, 140–43, 158, 181, 188 and accompanying text; *supra* sections III.A and III.B; SPANISH LAWS, *supra* note 145, at 35–36, 117–18 (translating *Recopilación*, *supra* note 111, at Book 4, Title 7, Law 23); THE INDIAN CAUSE, *supra* note 111, at xiv–xv, 13 (translating Book 1, Title 1, Law 4), 41 (translating Book 3, Title 4, Laws 8–10). Other countries, including the United States, borrowed the Spanish idea of just war to justify their conquests of indigenous peoples. See, e.g., MILLER, *NATIVE AMERICA*, *supra* note 1, at 36, 42, 46, 64.

379. See *supra* notes 140–43 and accompanying text.

380. See, e.g., *infra* notes 382–84 and accompanying text.

381. MERRIMAN, *THE EMPEROR*, *supra* note 85, at 529.

When Pedro de Valdivia arrived in Chile in 1540 he stated he had been ordered to “conquer and populate [Chile],”<sup>382</sup> and he was then involved in almost constant warfare against the indigenous peoples as he and other Spaniards tried to take the lands, assets, and labor of Indians.<sup>383</sup> The Mapuches killed Valdivia and held off European and Chilean expansion south of the Bio Bio River for over 300 years until the 1880s, when the Chilean army ultimately occupied the remaining Mapuche lands.<sup>384</sup> Following that conquest, the Executive Power of the Congress stated that Araucania would “be re-populated with civilized and industrious colonists” and that “civilization and industry have won an immense quantity of fertile lands.”<sup>385</sup>

Spain explicitly applied just war principles many times in Chile. Dominicans apparently urged various governors to read the *Requerimiento* to the Mapuche Indians and to wage war against them, not cruelly or barbarously, but with humanity and justice, so as to bring “them to the dominion of the king by peaceful methods, by good treatment and by teaching them the principles of Christianity.”<sup>386</sup> The Mapuches were so successful in their war with Spain, however, that they came to be considered not as naïve native opponents, but as rebellious apostates, which justified war and their enslavement—allegedly more extreme than the regular *encomiendas*—due to their resistance to royal dominion.<sup>387</sup> The Viceroy of Peru asked for religious advice about his rights and duties under just war principles against the Araucanians, since they had rejected his authority and allegedly left the Christian faith.<sup>388</sup> In 1599, Chilean governor Alonso de Ribera thought he was permitted to enslave the Indians due to their rebellion, and an Augustinian, Juan de Vascones, sent a petition to the court and Council of the Indies giving nine reasons for waging

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382. Carta de don Pedro de Valdivia a S.M. Carlos V, dándole noticia de la conquista de Chile, de sus trabajos y del estado en que se hallaba la colonia, in CARTAS DE PEDRO DE VALDIVIA, *supra* note 228, reprinted in I COLECCION DE HISTORIADORES *supra* note 228, at 1.

383. See, e.g., Bengoa, *Chile Mestizo*, *supra* note 252, at 119–21; AMUNÁTEGUI, LOS PRECURSORES, *supra* note 292, at 77, 84, 260–61.

384. BENGEOA, HISTORIA, *supra* note 261, at 261, 265, 280, 283; COLLIER & SATER, *supra* note 226, at 96; CHILE: A COUNTRY STUDY, *supra* note 206, at 25; Casanueva, *supra* note 277, at 309; Lidia R. Nacuzzi, *Los Grupos, Los Nombres, Los Territorios y los Blancos: Historia de Algunos Nombres Étnicos*, in COLONIZACIÓN, RESISTENCIA Y MESTIZAJE EN LAS AMERICAS: SIGLOS XVI–XX 280 (Guillaume Bocara ed., 2002).

385. Casanueva, *supra* note 277, at 307, 309 (citation omitted); see JOSE AYLWIN, LAND POLICY AND INDIGENOUS PEOPLES IN CHILE: PROGRESS AND CONTRADICTIONS IN A CONTEXT OF ECONOMIC GLOBALIZATION 5–6 (2006).

386. HANKE, *supra* note 97, at 137 (citation omitted).

387. HANKE, *supra* note 97, at 138. See generally Melchor Calderon, *Treatise on the Importance and Usefulness of Enslaving the Rebel Indians of Chile*, reprinted in II JOSÉ TORIBIO MEDINA, BIBLIOTECA HISPANO-CHILENA 5–20 (1965).

388. HANKE, *supra* note 97, at 138–39.

just war against the Araucanians.<sup>389</sup> On May 26, 1608, King Philip III issued a new law for Chile which granted permission to enslave all Indian males at least ten and a half years old and all Indian females at least nine and a half years old.<sup>390</sup> The King stated that Spain had tried all peaceful means to reduce the Indians to the Church and to obedience to the Crown “and they have failed miserably in taking advantage of these offerings, and have repeatedly broken the peace,” and “[f]or these reasons they deserved to be given as slaves.”<sup>391</sup> In 1609, Pope Paul V also authorized war against the Mapuches.<sup>392</sup>

Spanish explorers also applied the second meaning of the conquest element of Discovery in Chile because they considered that their mere discovery of the lands and their arrival therein was similar to a conquest, and this justified appropriating lands, assets, and the forced labor of Indians and establishing cities and expanding their borders.<sup>393</sup> Thus, there is no question that Spain and Chile utilized the conquest element of Discovery and claimed the legal rights that it allegedly granted to European conquerors.

## K. Rapa Nui (Easter Island)

Chile’s acquisition and exercise of sovereignty over Rapa Nui—otherwise known as Easter Island—reflects its use of several of the elements of Discovery. We will only briefly review this history here and will focus on Chile’s use of international law.

### 1. *The Pre-Chilean Era*

It is unclear where the native inhabitants of Rapa Nui originated, but substantial evidence demonstrates that they governed their island for centuries with a strong hierarchical society.<sup>394</sup> Beginning in the

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389. *Id.* at 139.

390. *Id.*

391. THE INDIAN CAUSE, *supra* note 111, at 103 (translating Book 6, Title 2, Law 14).

392. CHILE: A COUNTRY STUDY, *supra* note 206, at xv.

393. *See, e.g.,* POCOCK, *supra* note 221, at 16, 28 (Diego de Almagro), 69 (Pedro de Valdivia); *accord* SPANISH LAWS, *supra* note 145, at 155 (translating Recopilación, *supra* note 111, at Book 4, Title 12, Law 1).

394. *See* COMISIÓN VERDAD HISTÓRICA Y NUEVO TRATO, EL PUEBLO RAPA NUI, *in* I INFORME COMISIÓN VERDAD HISTÓRICA Y NUEVO TRATO 277–78 (2003) [hereinafter INFORME]. This political body’s title in English would be the “Historical Truth and New Treaty Commission.” The Commission was appointed by the Chilean government, by presidential decree in 2001, to research and make recommendations to the government of Chile regarding indigenous affairs. *See generally* Decreto Comisión, *in* I INFORME, *supra*. Chaired by Patricio Alwyin, the ex-president of Chile, the Commission was comprised of lawyers, politicians, historians, experts, and members of Chile’s indigenous groups who conducted historical and legal research. *Id.* The Commission’s official final report, issued in August of 2003, consists of several individual reports, including reports dealing specifically with the Rapa Nui of Easter Island, the Report of the Group of Ancient Rapa Nui,

late 1600s, the island was invaded by several waves of foreigners, including the Spanish, Dutch, Peruvian, and French.<sup>395</sup> It was not until 1888, however, that the island was formally annexed by Chile.<sup>396</sup>

Although no original written records remain, it is generally agreed that the first European who set foot on the island was a British captain in 1687.<sup>397</sup> It appears, however, that the Spanish were the first to actually “claim” the island and did so in 1770.<sup>398</sup> As discussed previously, this was an example of claiming ownership by first discovery alone. In November of 1770, Captain Don Felipe González was the first known Spaniard to set foot upon Easter Island.<sup>399</sup> King Carlos III of Spain commanded the Viceroy of Peru to undertake this expedition and to locate the island sighted by the British in 1687.<sup>400</sup> The King’s order “included a warrant for taking possession of the country in the King’s name.”<sup>401</sup>

The Spanish expedition documented its actual possession of the island and used the same ceremonies of possession that European countries had long utilized:

On the crosses being planted on their respective hilltops the Spanish ensign was hoisted, and the troops being brought to ‘Attention!’ under arms, D Joseph Bustillo, junior Captain, took possession of the island of San Carlos with the accustomed ceremonies in the name of the King of Spain . . . this day, the 20th of November 1770. The procedure was duly witnessed with the proper formalities; and for the greater confirmation of so serious an act some of the natives present signed or attested the official document by marking upon it certain characters in their own form of script. Then we cheered the king seven

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the Work Group on Legislation and Institutionalization, and a report by several authors working with Don Mario Tuki Hey. See generally INFORME, *supra*. The entire report can be accessed at [http://biblioteca.serindigena.org/libros\\_digitales/cvhynt/index.html](http://biblioteca.serindigena.org/libros_digitales/cvhynt/index.html).

395. VICTOR M. VERGARA, *LA ISLA DE PASCUA, DOMINACION Y DOMINIO* 16–30 (1939); RODULFO A. PHILLIPI, *JEOGRAFIA: LA ISLA DE PASCUA I SUS HABITANTES* 1–4 (1873); see also Luis Mizón, *Easter Island’s Last Secret*, THE UNESCO COURIER, Dec. 1997, at 24, 25–27, available at <http://unesdoc.unesco.org/images/0010/001098/10984leo.pdf#109878> (detailing the incursions of Easter Island by various groups of foreigners); David K. Foot, *Easter Island: A Case Study in Non-sustainability*, 48 GREENER MANAGEMENT INT’L 11, 13–14 (2004/2005).
396. INFORME DEL GRUPO DE TRABAJO LEGISLACIÓN E INSTITUCIONALIDAD, in III INFORME, *supra* note 394, at 75.
397. THE VOYAGE OF CAPTAIN DON FELIPE GONZÁLEZ TO EASTER ISLAND 1770–1: PRECEDED BY AN EXTRACT FROM THE OFFICIAL LOG OF MYNHEER JACOB ROGGEVEEN IN 1722 xvi–xxvi (Bolton Glanvill Corney et al. eds., 1903), available at <http://www.archive.org/stream/voyagecaptaindo00unkngoog#page/n0/mode/2up> [hereinafter THE VOYAGE OF CAPTAIN DON FELIPE GONZÁLEZ]; VERGARA, *supra* note 395, at 16.
398. THE VOYAGE OF CAPTAIN DON FELIPE GONZÁLEZ, *supra* note 397, at xv, xvii, xlv.
399. *Id.* at xlv.
400. *Id.* at xliii.
401. *Id.*

times, next to which followed a triple volley of musketry from the whole party, and, lastly, our ships saluted with 21 guns.<sup>402</sup>

## 2. *Chile's Annexation of Rapa Nui*

Rapa Nui was often visited by European ships and Peruvian slavers over the next century, and non-natives acquired much of the land on the island.<sup>403</sup> In the 1880s, Chilean sea captain Policarpo Toro Hurtado began to promote the idea of the Chilean government taking possession of the island.<sup>404</sup>

In September 1887, Chile's Minister of Hacienda and President Balmaceda issued a decree authorizing a sale between Chile and the non-native landholders on the island and for Captain Toro Hurtado to take possession in the name of Chile.<sup>405</sup> Toro Hurtado also received ecclesiastical authorization from the Tahitian archdiocese as well as formal written assurances from French authorities in Tahiti that France had no intention of colonizing the island.<sup>406</sup> On September 9, 1888, Toro Hurtado, representing the Chilean government, signed a deed of cession, "*un acuerdo de voluntades*," with Ariki Atamu Tadena, acting for the council of chiefs of the Rapa Nui.<sup>407</sup> In the official proclamation that Toro Hurtado signed with the Rapa Nui and the non-native landholders, Chile accepted "the cessation entirely, completely and without reservation the Sovereignty of Easter Island, the cessation that we have affected with the chiefs of this Island for the Government of Chile."<sup>408</sup>

402. *Id.* at 104 (translation of ship captain's log) (footnote omitted); see also *Lloyd's Evening Post and British Chronicle*, No. 2249, 529 (Nov. 29–Dec. 2), reprinted in *THE VOYAGE OF CAPTAIN DON FELIPE GONZÁLEZ*, *supra* note 399, at xlvii ("After visiting David Island, the Commandant took possession of it in the name of the King of Spain, with all the military formalities that tend to command respect from his new subjects. A cross was immediately erected to perpetuate the memory of that event and the island was named Saint Charles.>").

403. Grant McCall, *European Impact on Easter Island: Response, Recruitment and the Polynesian Experience in Peru*, 11 *J. PAC. HIST.* 90, 90–105 (1976); VERGARA, *supra* note 397, at 16–30; EL PUEBLO RAPA NUI, in I INFORME, *supra* note 394, at 282–83; Mizón, *supra* note 397, at 25–27; Foot, *supra* note 397, at 13–14.

404. VERGARA, *supra* note 395, at 30–31.

405. *Id.* at 31; INFORME DEL GRUPO DE TRABAJO LEGISLACIÓN E INSTITUCIONALIDAD, in III INFORME, *supra* note 396, at 74.

406. EL PUEBLO RAPA NUI, in I INFORME, *supra* note 394, at 291–92.

407. VERGARA, *supra* note 395, at 31 (citation omitted).

408. The text of this agreement, or *acuerdo*, was written in Spanish on one side and on the other in ancient Rapa Nui and Tahitian. The Spanish text does not make any reference to the ownership of property, but only references the supreme authority of Chile and that the Rapa Nui gave up the land forever and without right ("ceder para siempre y sin reserva"). It also specified that the Rapa Nui chiefs reserved the titles that were invested in them. The Rapa Nui/Tahitian text, however, differs somewhat from the Spanish version. Although the Spanish text talks about the cessation of rights to the land, the Rapa Nui uses the concept of "friend of the place." Various interpretations of the Rapa Nui indicate that they granted super-

Chile ordered its Subinspector of Colonization to leave two Chilean families to colonize the island.<sup>409</sup> Captain Toro Hurtado then went to the island to take possession for Chile.<sup>410</sup> Toro Hurtado noted that the natives did not appear to have any private or permanent rights to property.<sup>411</sup> The newspapers reported on “the occupation of the Isla de Pascua” and that “the taking of possession of this island took place the 9th on the present (day) with the formalities and ceremonies in the style of these cases. To certify this they performed a short act in Spanish and pascuense, or what they call the language of the naturals.”<sup>412</sup>

The Chilean government then immediately entered into an exclusive agreement with Captain Toro Hurtado and his brother wherein they rented nearly the entire island for sheep farming from 1888 to 1892.<sup>413</sup> In 1892, the Toro brothers sold their interests to another private party, and the natives were relegated to a small section of the island.<sup>414</sup> This agreement, which was a formal governmental directive, provided that the private party who received the rights over the land had to maintain at least three Chilean families on the island at his expense “as a base of colonization.”<sup>415</sup> Within a year, Chile had also established a naval base on the island.<sup>416</sup>

In 1916, humiliated by publicity over the exploitation of the island’s natives, the Chilean government nullified the private contract,

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vision of the land to the Chilean government but reserved their unalienable ancestral rights to their land. See Transcripción del acta de Cesión de Rapa Nui al Estado Chileno, 1888, available at [http://www.memoriachilena.cl/temas/documento\\_detalle.asp?id=mc0012427](http://www.memoriachilena.cl/temas/documento_detalle.asp?id=mc0012427) (last visited Jan. 30, 2011); Maria Pereyra-Uhrle, *Easter Island Land Law*, 12 REVUE JURIDIQUE POLYNESIENNE 133, 135 (2006), available at <http://www.upf.pf/IMG/pdf/9-RJP12-pereyra.pdf>. In February 1889, Pope Leo XIII signed a decree, “Cum in Oceania Orientali,” ordering that Easter Island be incorporated into the archdiocese of Santiago. INFORME DEL CONSEJO DE ANCIANOS RAPA NUI, in III INFORME, *supra* note 396, at 501.

409. DON MARIO TUKI HEY ET AL., INFORME PREPARADO POR LOS SEÑORES MARIO TUKI HEY Y OTROS (RAPA NUI), in III INFORME, *supra* note 394, at 449–52.

410. *Id.*

411. CLAUDIO CRISTINO F., ANDRÉS RECASENS S., PATRICIA VARGAS C., EDMUNDO EDWARDS & LILIAN GONZÁLEZ, LA UNIVERSIDAD DE CHILE, ISLA DE PASCUA PROCESO ALCANCES Y EFECTOS DE ACULTURACION (1999) (“[N]o existía el derecho particular y permanente de la propiedad . . .”) (citation omitted), available at <http://www.facso.uchile.cl/publicaciones/sitios/lenguas/pascuense/ipa00.htm>.

412. EL PUEBLO RAPA NUI, in I INFORME, *supra* note 394, at 294 (citation omitted)

413. Pereyra-Uhrle, *supra* note 408, at 136.

414. VERGARA, *supra* note 395, at 46–47 (citation omitted); Pereyra-Uhrle, *supra* note 408, at 136.

415. VERGARA, *supra* note 395, at 46–47.

416. Nancy Yañez Fuenzalida, *El Acuerdo de Voluntades Estado Chile – Pueblo rapa nui: Bases Normativas para Fundar la Demanda de Autonomía rapa nui*, in DERECHOS HUMANOS Y PUEBLOS INDÍGENAS: TENDENCIAS INTERNACIONALES Y CONTEXTO CHILENO 419 (José Alwyn O. ed., 2004); VERGARA, *supra* note 397 at 48, 164.



and in 1917, it appointed a commission to look into the abuses.<sup>417</sup> That same year, Chile enacted a law placing the governance of Easter Island under the direction and authority of the Maritime Department of Valparaiso.<sup>418</sup> This law delegated approximately 2000 acres of land to the Rapa Nui people for their use, but it did not confer any other rights upon them.<sup>419</sup>

The island remained under the Maritime Department's authority until 1933 when Easter Island was placed under the dominion of the Chilean Treasury.<sup>420</sup> Another government-appointed commission recommended that the ownership of the Rapa Nui properties be registered in the name of the Treasurer of Chile because of the "absence of evidence of written ownership over said territories."<sup>421</sup> On November 11, 1933, Chile enacted a law clearly based on the Discovery idea of *terra nullius*: it stated that "all lands within the territorial limits which do[] not belong to any other owner are assets of the state."<sup>422</sup>

Victor Vergara, a prominent lawyer, historian, and the secretary of the 1933 Commission on Easter Island, claimed that Chile rigorously adhered to the elements of international law and legitimately occupied the island:

The Government of Chile took possession of Easter Island using the best methods to acquire dominion and sovereignty: the occupation, which was verified with rigorous observance to the precepts of international law. Occupation is, in general terms, the act for which a state takes possession of a territory or a part of that territory, with the *intention* of annexing it to its sovereignty.<sup>423</sup>

Vergara also argued that the doctrine of "*res nullius*," or *terra nullius*, applied to Chile's annexation of Rapa Nui, and he cited that international legal principle as it had been understood by the Conference of Berlin in 1885 when European nations convened to partition Africa using that same doctrine.<sup>424</sup> He concluded that Chile could justifiably consider Rapa Nui empty because the natives of the island were "a small group of people decimated by epidemics and leprosy, persecuted and exploited by pirates and private occupants."<sup>425</sup> Vergara concluded that Chile had abided by the concept of "*animus domini*"—the intent to establish permanent sovereignty over Easter Island—when it took actual possession of the island, signed documents, and raised its flag.<sup>426</sup>

417. VERGARA, *supra* note 395, at 49–50.

418. *Id.* at 50–52 (citation omitted).

419. Pereyra-Uhrle, *supra* note 408, at 136; VERGARA, *supra* note 397, at 50–52, 182–84.

420. VERGARA, *supra* note 395, at 50.

421. Fuenzalida, *supra* note 416, at 420–21.

422. *Id.* (citing Cód. Civ. Art. 590)

423. VERGARA, *supra* note 395, at 33.

424. *Id.*

425. *Id.*

426. *See id.* at 36.

The Chilean government began seriously exercising sovereignty over the island in 1936 when the Commander-in-Chief of the Armed Forces issued a decree entitled "Internal Rules of Life and Work on the Island."<sup>427</sup> This decree prescribed the social, moral, educational, and family life of the island's inhabitants.<sup>428</sup> The decree did not, however, extend to the islanders the rights enjoyed by Chileans under their Constitution.<sup>429</sup> Islanders were subjected to the mercies of martial law, did not have the right to vote or other political rights, and did not have the right to file lawsuits or enjoy the same constitutional criminal rights as other Chileans.<sup>430</sup> In addition, similar to the *encomienda* and the fifteenth and sixteenth century Spanish laws imposed on Chilean Indians, the Rapa Nui were not free to travel as they pleased, and they were required to work for free on Mondays for the Chilean Treasury.<sup>431</sup>

In 1953, the governance of the Island was turned over to the Commander-in-Chief of the Armed Forces.<sup>432</sup> The Island stayed under this jurisdiction until 1965–66 when the government enacted the Isla de Pascua (Easter Island) Law, created the Department of Easter Island, and gave the native Easter Islanders Chilean citizenship and the right to vote.<sup>433</sup>

The Rapa Nui, Easter Island history of Chile is a stark example of the Chilean government exercising the powers and elements of the Doctrine of Discovery to acquire and rule native lands.

#### IV. CONCLUSION

In our opinion, the evidence presented above demonstrates that there is no question that Spain and Chile used the international law of Discovery as a basis for their claims to the New World and the lands and rights of the indigenous peoples of modern-day Chile. Both countries utilized the elements of Discovery set out above, but like all colonizer/settler societies, they applied some a bit differently or used a slightly different definition of one element or another to deal with the specific situations they encountered. It is clear, however, that Spain and Chile relied on international law to claim the lands and assets of the indigenous peoples who lived in, and still live in, the lands encompassed by Chile today.

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427. *Id.* at 50.

428. *Id.*

429. *Id.*

430. *Id.*

431. Fuenzalida, *supra* note 416, at 421; *see supra* notes 133, 306–08 and accompanying text.

432. Fuenzalida, *supra* note 416, at 421.

433. Ley 16.411 de 3 de enero de 1966, DIARIO OFICIAL [D.O.]; Fuenzalida, *supra* note 416, at 422.

The reason we have engaged in this research and written this Article is twofold. First, we wanted to investigate whether Chile was acquired and conquered by Spain using the Doctrine of Discovery and whether Chilean governments also used the Doctrine. As already stated, we conclude that Discovery was the legal basis and the justification for Spain's and Chile's domination of Chile's indigenous peoples and acquisition of their lands and assets.

Second, if the Doctrine was behind the colonization and European settlement of Chile, we wanted to contribute to the already substantial body of work by Chilean lawyers and historians and to disseminate that information so that the Chilean government, courts, and citizens, including the indigenous peoples of Chile, can better understand their own colonial and legal histories. As one commentator has stated:

Law in a society can only be explained by its history, often its ancient history and frequently its contacts with foreign legal history. . . . Law operates, or should operate, on the basis of social reality, but it is the product of human imagination. Often reality and imagination do not mesh.<sup>434</sup>

We hope that our examination of the legal history of Chile has given some perspective to how the history of many countries, including Chile, is deeply intertwined with the Doctrine of Discovery. If people understand that the European acquisition of Chile was founded on feudal, religious, racial, and ethnocentric justifications, then everyone is better equipped to work through the issues that still face Chile and all settler societies. These modern-day issues include relations with indigenous peoples, the laws that affect indigenous peoples, and working toward a just resolution of long-standing issues. Any attempt to heal old wounds, redress past wrongs, and to create a more positive and equal future for all Chileans must begin with the truthful recognition both of Chile's history and of the development of its legal regimes. From there, it must proceed with serious efforts to eradicate the vestiges of the Doctrine of Discovery from Chilean law and society.

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434. Alan Watson, *Legal Culture v Legal Tradition*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 1, 1 (Mark Van Hoeck ed., 2004).