

## On the contribution of Imperial Spain to the construction of classical international law in Cervantes' Times

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*Abstract:* The new world order established by the Peace of Westphalia was consolidated in 1648, but the foundations of what would later be known as classical international law had begun to be laid long before that date. Spain played an important role in this process during the sixteenth and seventeenth centuries, the Age of Cervantes. This was clearly demonstrated by the great author in his works, which reflect an Imperial Spain that had already embarked on its decline. The gradual disappearance of the notion of empire, however, is belied by reality, since history shows that empires continued to exist throughout the modern age in one form or another. The period in question also reveals the important contribution made by Spain to the shaping of international law, not only in matters of its norms, but also from other perspectives, such as humanism, having to do with the universal conception of government and human rights—although one that in both cases came from grounds that were largely incipient.

*Keywords:* Empires - Classical international law - Cervantes - Universalism - human rights

### (A) EMPIRE AND INTERNATIONAL LAW

Ferdinand the Catholic, King of Aragon, died in 1516, exactly a century before the death of Miguel de Cervantes in 1616. The century in question saw the birth of Imperial Spain and the beginnings of its decline, which gave birth to modern international law, in which Spain played a decisive role. By the mid-sixteenth century, when Charles V abdicated and withdrew to the Monastery of Yuste, transferring sovereignty over Spain and the Spanish Empire to his son Philip II (1556), his idea of uniting all Europe in a Roman Catholic empire was already doomed to failure in both political and religious terms.<sup>1</sup> This, together with the collapse of religious unity in Europe and the appearance of the first modern states in Europe, constitutes the origin of the European state system within which modern international law took form.

The period was one of profound transformation: the unity of the Christian Empire was coming to an end and the system of European states was gradually taking shape. Spain and Portugal had successfully reconquered the Iberian Peninsula and embarked on the conquest of the New World. National unification, which had commenced under the Catholic Monarchs, was well under way with catholicism as its instrument of assimilation. The great Spanish writer Cervantes lived at a somewhat later time, in a nation forged from these elements, a fact that becomes apparent in his works. He is a Spaniard of the Empire, already in decline, who nevertheless continues to believe in its glory; a Spaniard experiencing the transition from the old world of Christendom to the modern age.

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<sup>1</sup> W. Blockmans, *Carlos V. La utopía del Imperio* (Alianza Editorial, Madrid, 2000), 2015, at 35.

The so-called “one-armed man of Lepanto” had lost his left hand in a sea-battle he described as “the highest and most memorable occasion that past and future centuries will ever hope to see”. That day, as he puts it in *Don Quixote*, “was so fortunate to Christendom, for all nations were undeceived of their error in believing that the Turks were invincible by sea; on that day [...] the Ottoman pride and haughtiness were broken”.

Cervantes’ life and work are a reminder of the importance of the notion of Empire in the imperial origins of both Spain and modern international law. The writer’s life was a reflection of Spain’s imperial adventure,<sup>2</sup> an ideal which he avowedly shared.<sup>3</sup> This enables us to put forward a number of observations on the contribution made by Imperial Spain to the origins of international law and on the notion of empire itself.

All Empires, and the Spanish Empire is no an exception, are the consequence of expansion and subjugation.<sup>4</sup> “Empire,” according to Doyle, “is a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society”<sup>5</sup> The notion of empire has a long history: one only has to think of the empires of antiquity, such as the Chinese, Egyptian, Persian or Roman Empires, amongst others. Regardless of the different periods in question, there is a continuity to the notion of empire that runs through the whole of human history. One could even say that such a common thread persisted even after the appearance of the European state system, even though all trace of it may have disappeared in the theory of international law.

After the demise of the Western Roman Empire in 476, the notion of empire survived in its replacement, the *Imperium Christianum* (or Holy Roman Empire). The imperial idea was attached to the person of the Pope in Rome, Saint Peter’s successor, as its sovereign. A number of studies have analysed the vicissitudes and transformations of the idea of empire during the Middle Ages.<sup>6</sup> With the birth of states in the modern age, the theory of sovereignty combined with the new vision of these political units and the international order would lead to the disappearance of the notion of empire from the latter. A disappearance which, in my opinion, was due to its failure to find a place amongst the pieces of the new order. Thus, the new principles of international law, i.e. equality, sovereignty and non-intervention, which accompanied the birth of classical international law were incompatible with the notion of empire, which disappeared from the textbooks down to the present day, when it resurfaces only in terms of hegemonic power and spheres of influence, at best.<sup>7</sup>

<sup>2</sup> F. L. Cardona, *Prólogo y presentación, Novelas ejemplares* (de Miguel de Cervantes) (Edicomunicación, Barcelona, 1994), at 7.

<sup>3</sup> M. C. Baron, “Soldado del Imperio español: la experiencia militar de Cervantes reflejada en sus escritos”, 82-441 *Studies in Peninsular Literature and Culture* and J. G. Maestro, *Las ascuas del Imperio. Crítica de las novelas ejemplares de Cervantes desde el materialismo filosófico* (Ed. Academia del Hispanismo, 2006).

<sup>4</sup> On the forging of the Spanish Empire see H. Thomas, *El imperio español. De Colón a Magallanes*, Barcelona, 2003, and H. Kamen, *Imperio. La forja de España como potencia mundial* (Aguilar, Madrid, 2003).

<sup>5</sup> He also points out that such control can be achieved by force, by political collaboration or by economic, social or cultural dependence. See A. Colás, *Imperio* (Alianza Editorial, Madrid, 2009).

<sup>6</sup> See R. Folz, *L’idée d’Empire en occident du V au XIV siècle*, Aubier, 1953, p. 21, and M. Diago Hernando, *El Imperio en la Europa medieval* (Cuadernos de Historia, 1996).

<sup>7</sup> One of the few textbooks written in Spanish in which this is not the case is A. Remiro Brotons, et al., *Derecho internacional* (Tirant lo Blanch, Valencia, 2007) at 40.

The New World Order that arose from the Treaty of Westphalia envisaged that princes and all those exercising sovereign power should enjoy full freedom of conscience; that no State of the Empire could attack another under religious pretexts (Article 3); and that subjects were free to choose between the two recognised religions, being obliged, if they chose not to follow the religion of their prince, to emigrate to a state of the religion of their choice without prejudice to their honour, rights or assets (Article 11). Europe was split between Catholic and Protestant states, a newly fragmented Europe in which the doctrine of balance of power was subsequently to develop. A shift occurred in the balance of power between the Papacy and the Empire, brought about by the introduction of the principle of sovereign equality and non-intervention. This was a new era for the international order, one that ushered in the secular system of independent states, the starting point for modern international law.<sup>8</sup>

As has been pointed out above, the notion of empire vanished with the arrival of this new system: on the one hand because it was an idea that was intrinsically linked to the Holy Roman Empire and thus lost its *raison d'être* with the disappearance of the latter,<sup>9</sup> and on the other because it ran contrary to the new principles, even though the new European states would later themselves become empires through the acquisition of territories overseas.

The first rules of the new order appeared in the sphere of discovery and occupation, in the form of title deeds of territorial sovereignty that served to legitimise new conquests, a process that gradually distanced itself from the bounds of Papal authority. If the conquest of America took place under the auspices of the Papal Bull *Inter Caetera*, the Treaties of Tordesillas (1494) and Saragossa (1529) rapidly made the new reality of international law apparent. The rules applied by these new empires, or by their successors, would consolidate principles promoted by imperial powers, such as that of freedom of the seas, the well-known subject of dispute between the Netherlands and Great Britain.<sup>10</sup> Between then and the twentieth century this urge to expand that characterises all empires would occupy centre stage in the process of developing the international order and international society.<sup>11</sup>

The disappearance of the notion of empire was more of a formal matter than a real one, however, and history makes it clear that empires continued to exist. Indeed, colonial empires reached their zenith during a period spanning the nineteenth and twentieth centuries. Latterly doctrine has begun to look at the weaknesses of the European state system, as a European invention, according to Burbank.<sup>12</sup>

<sup>8</sup> J. A. Carrillo Salcedo, *El Derecho internacional en perspectiva histórica* (Tecnos, Madrid, 1991), and L. Gross, "The peace of Westphalia, 1648-1948", *American Journal of International Law* (1948), at 20.

<sup>9</sup> See B. Chudoba, *Spain and the Empire. 1519-1643* (The University of Chicago Press, Chicago, 1951), at 14.

<sup>10</sup> See G. Fahl, *El principio de la libertad de los mares. Práctica de los Estados de 1493 a 1648* (Instituto de Estudios Políticos, Madrid, 1974)

<sup>11</sup> On the relevance of expansionism during the process of evolution of international law, see C. Schmitt, *El nomos de la tierra en el Derecho de gentes del Ius publicum europaeum* (Centro de Estudios Constitucionales, Madrid, 1979), at 17.

<sup>12</sup> J. Burbank and F. Cooper, *Imperios. Una nueva visión de la historia universal* (Crítica, Barcelona, 2011), at 35.

Nor is it possible to analyse the construction of Spain as a nation-state without reference to the Spanish Empire.<sup>13</sup> The so-called Spanish hegemony of the sixteenth and seventeenth centuries, the period in which Cervantes lived, led to the international projection of Spain and contributed to laying the foundations of modern international law. Centuries later, even the destruction and disappearance of the Spanish Empire during the nineteenth century has failed to eliminate certain imperial myths—analysed by Balfour<sup>14</sup>—and continues to impinge on the present-day reality of Spain.

## (B) THE SPANISH EMPIRE AND THE NEW CORNERSTONES OF INTERNATIONAL LAW

### (1) The shifting stage during the transition to the modern age

The fifteenth to seventeenth centuries constitute a period of transition from the *Imperium Christianum* to the *Ius Publicum Europaeum* that brought with it a shift in the foundations of the international order, which thus had to adopt a new model. Society gradually moved away from theocratic power, from the *Imperium Christianum* (*sacrum imperium*), whose main mission was to defend the Church. The medieval theocratic mindset underwent a total transformation as a result of the appearance of the European state system and the laying of the cornerstones of modern international law. During the Middle Ages the *Pater communis christianitatis* (*suma potestas*) exercised his religious authority as a theoretically top-down preceptive power for organising society and preserving the peace.<sup>15</sup>

The Battle of Lepanto reflects a moment of transition at a time when the Papacy continued to exercise its central power, albeit very much in decline. The belligerents were the Ottoman Empire, on the one hand, and a coalition of Catholic forces —the Holy League— on the other. The Holy League was the fruit of an agreement concluded on 25 May 1571 between representatives of the Pope (Pius V), Philip II of Spain, the Republics of Venice and Genoa, the Grand Duchy of Tuscany, the Duchies of Savoy and Parma and the Knights of Malta. The purpose of the agreement was to create a military coalition strong enough to attack Turkey and North Africa and recapture Cyprus and the Holy Land. The ‘crusading spirit’ of the Middle Ages was still alive at that time, and as far as Spain was concerned the battle would help it achieve its dual aim of retaking Jerusalem (allowing Philip II to be crowned King of Jerusalem) and controlling the whole of North Africa.

During the Middle Ages a balance prevailed between the universalist tradition, inherited from the Roman Empire, and the newly arrived modern monarchies, which brought with them a growing feeling of nationalism. The dream of imperial unity was replaced by a dynastic sentiment, the first

<sup>13</sup> See A. M. Bernal, *España. proyecto inacabado. Costes/beneficios del Imperio* (Ambos Mundos, Marcial Pons, Madrid, 2005), at 13 and 25.

<sup>14</sup> S. Balfour, *El fin del Imperialismo español* (Crítica, Madrid, 1997), at 235.

<sup>15</sup> See A. Truylol Serra, *Historia del Derecho internacional* (Tecnos, Madrid, 1998); J. A. Carrillo Salcedo, “El fundamento del Derecho internacional: algunas reflexiones sobre un problema clásico”, *REDI* (1998), 1, 13-31; J.L. Brierly, “Le fondement du caractère obligatoire du Droit international”, *RCADI* (1928) III, 467-549; A. Verdross, “Le fondement du Droit international”, *RCADI* (1927) I, 253; M. Boegner, “L’influence de la réforme sur le développement du Droit international”, *RCADI* (1925) II, 245 *et seq.* and H. Lutz, *Reforma y contrarreforma* (Alianza Universidad, Madrid, 1994).

sign of patriotism or of modern nationalism.<sup>16</sup> As the jurist and expert in international law Barcia Trelles has pointed out, “imperialism ran contrary to internationalism”. In his essay on Francisco de Vitoria, Barcia<sup>17</sup> sets the ancient and medieval imperial tendency against the modern idea of international law first propounded by Vitoria, which served as a limitation on universal dominion. In the language of the time imperialism carried a meaning that was very different to the one it has now.

## (2) The new rules of universalization

The international society of the European state system was exclusively limited to the Old World, as its very name tells us. Outside Europe, there were other empires (the Ottoman, Chinese and Japanese Empires, amongst others), failed states (such as those of the Barbary Coast) and territories with other forms of organisation which were collectively referred to as ‘savage’ by Europeans. This European international society was both imperial and expansionist in nature, initially on the part of Spain and Portugal, subsequently followed by other European states—France, the Netherlands, Great Britain, Belgium, Germany and Italy—who in later centuries were also to form their own colonial empires. Such was the Europe of Empire, which reached down until well into the twentieth century.

The demise of the last of these new Empires was not to occur until shortly before the dawn of the twenty-first century: a case in point is the Portuguese Empire, which came to an end in 1975 after almost 500 years of existence.<sup>18</sup> One of the consequences of this state of affairs is that the process of universalisation took place under the banner of European culture and civilization. European culture played a decisive role in the origins, foundations and development of international law, which can be seen as a product of European civilisation that extended its presence to the rest of the world as part of the process of universalisation.<sup>19</sup>

Europe's dominion over the rest of the world was based on the idea that European civilisation was superior to all others, a vision that was maintained down to the mandate system established by the League of Nations. The Spanish Empire, however, justified and legitimised its expansionism on more humanistic grounds, represented by scholars such as Vitoria or Suárez, in contrast to the way in which the African continent was divided up, based on the distinction between civilised, barbarian and savage peoples.<sup>20</sup> Spanish scholarship can thus be said to have made a significant contribution to the foundations of the new international order.<sup>21</sup>

<sup>16</sup> See M. Bremond, and J. Gaudemet, *L'Empire chrétien et ses destinées en occident du XI au XIII siècle* (LGDJ, Paris, 1944), at 5.

<sup>17</sup> C. Barcia Trelles, “Francisco de Vitoria et l'école moderne du Droit international”, *R.C.A.D.I.* (1927) II, at 148.

<sup>18</sup> M. E. Chamberlain, *La descolonización. La caída de los Imperios europeos* (Ariel, Barcelona, 1997).

<sup>19</sup> See my essays C. Fernandez Liesa, C., *Cultura y derecho internacional* (Universidad de Alcalá de Henares, Madrid, 2012) and “La evolución del proceso de secularización del Derecho internacional”, in Dionisio Llamazares Fernández (ed.), *Estado y religión. Proceso de secularización y laicidad. Homenaje a Don Fernando de los Ríos*, (UC3M-BOE Colección monografías nº 36, Madrid, 2001) at 85.

<sup>20</sup> A. Remiro Brotóns, *Civilizados, bárbaros y salvajes en el nuevo orden internacional* (Mc Graw-Hill, Madrid, 1996) and M. Koskenniemi, *El discreto civilizador de naciones. El auge y la caída del Derecho internacional. 1870-1960* (Buenos Aires-Madrid, 2005).

<sup>21</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).



European imperialism, from the conquest of the New World down to the twentieth century, was to be reflected in a number of principles of international law: that of freedom of the seas,<sup>22</sup> for example, was imposed on the rest of the world by Europeans. The foundations of modern international law were laid on the basis of an inextricable link between its characteristic features and the interests of European imperial power.<sup>23</sup> Some authors explain this phenomenon from exactly the opposite perspective, but in our opinion the underlying sense is the same. Thus, Fisch and Onuma<sup>24</sup> consider that international law—which in their opinion did not come into being until the nineteenth century—arose as a result of Europe's weakness rather than its power. And they do have a point if one opts for the perspective that the universalisation of international society only began with the end of decolonisation, meaning that international law in its truest sense, between equal states, could not be promoted until the second half of the twentieth century.

Another notion that underwent a major transformation during the transition to the modern period was that of the use of force in international relations, the Battle of Lepanto being a significant milestone in this regard. To some extent it shared the spirit of the Crusades, of God's war.<sup>25</sup> Pope Leo IV (847-855) had originally offered salvation, and Pope John VIII (872-882) remission of penance and indulgence for their sins, to those who "out of love to the Christian religion, shall die in battle fighting bravely against pagans or heathens". By the sixteenth century the ideology of the Crusades had already started to disappear within the Catholic Church itself; the Battle of Lepanto and the War of the Holy League against the Ottoman Empire (1684-1689) were to be the last crusades of a world that was in its final throes.

The ideology that inspired the Crusades was progressively abandoned as the modern era got under way. In sixteenth-century Spain the Hapsburg monarchy successfully integrated the crusading mentality into the burgeoning power of the state.<sup>26</sup> This was the transition from medieval law to the new modern law, which following the writings of Gentili and Grotius, amongst others, transcends the medieval foundations for the use of force (the 'just war' doctrine). From then onwards and until the founding of the League of Nations and subsequently the United Nations, the use of force would be seen exclusively as an attribute of sovereignty that resided with the reigning monarch.

The Battle of Lepanto also took place within the context of the so-called 'Eastern Question',<sup>27</sup> or what we nowadays call the 'clash of civilizations'. Indeed, East-West relations are one of the classical topics for analysis in international law, governed from the earliest time by capitulations, which date

<sup>22</sup> See the analysis by Y. Ben Achour, *Le rôle des civilisations dans le système international. Droit et relations internationales*, Collection de Droit international (Editions Bruylant, Brussels, 2003), 117 et seq.

<sup>23</sup> B. Bowden, "The colonial origins of international law: European expansion and the classical standard of civilization", *Journal of the History of International Law*, (2005) 1, 1-23.

<sup>24</sup> J. Fisch, "Power or weakness? On the causes of the worldwide expansion of European international law", *Journal of the History of International Law* (2004), 21-26.

<sup>25</sup> See C. Tyerman, *Las guerras de Dios. Una nueva historia de las cruzadas* (Crítica, Barcelona, 2010), at 47.

<sup>26</sup> *Ibid.*, at 77.

<sup>27</sup> See, for example, S. Tchirkovitch, *La protection de l'individu et des minorités nationales d'après les traités diplomatiques du début du XVIII siècle à nos jours* (Université Paris, 1947-48); J. Ancel *Manuel historique de la question d'Orient (1792-1923)* (Paris, 1923), and E. Driault, *La question d'Orient. 1918-1937. La paix de la Méditerranée* (Librairie Felix Alcan, Paris, 1938).

back to the times of Sultan Muhammad and later Saladin, King of Egypt, who entered into agreements with a number of Italian republics. In 1251 France concluded a treaty with the Sultan, the first to stipulate the rights of Christians in the Ottoman Empire.<sup>28</sup> Capitulations such as these have a long and very rich history: through them France ensured freedom of worship for Catholics and a number of privileges for the Catholic communities in Muslim territory. In modern times, the capitulation granted by Suleiman the Magnificent to Francis I of France in 1535<sup>29</sup> removed French subjects living in Turkey from the jurisdiction of Turkish courts and granted France the right to protect Christians and their Holy Places. This charter was not a treaty but a concession granted by the Sultan that was successively confirmed and modified in 1581, 1597, 1604 and 1740; it would also serve as the basis for other capitulations granted to England, Holland, Austria, Russia, Sweden, Denmark, Prussia and Spain. This signified the establishment of relations between a Christian state and an infidel state, a position that Francis I attempted to justify in a letter to the Pope in which he propounded the oneness of mankind, Christian and non-Christian alike, which clearly ran contrary to the interests of the Catholic Church. As a result, he was excommunicated. These events reveal that as the rules of the game changed the Papacy was progressively to lose its prescriptive and legislative authority; a further example of this would be provided by the Treaty of Westphalia, condemned by a papal bull, *Zel Domus*, issued on 26 November 1648, since it eroded the authority of the Pope and confirmed the rule of '*cuius regio eius religio*'.

## (C) THE SPANISH EMPIRE AND HUMAN RIGHTS: AN AMBIVALENT BALANCE

### (1) The new universalism

The Spanish Empire provided a good opportunity to construct, contrary to all expectations, some notions that would subsequently serve as the foundations of an international framework of human rights. What made this possible, as Elliott has pointed out, was the discovery not only of new territories but also of mankind. The conquest of America would raise, to a much greater extent than that of the Canary Islands, legal issues of enormous significance for human rights. Contemporary jurists, amongst them Francisco de Vitoria and Suárez, are acknowledged as the founders of modern international law on the basis of the answers they gave to some of the questions posed by the new situation.

The universalism propounded by the Spanish jurists of the time came as a response to a practical question of how to expand the international community to non-Christian peoples, transcending the medieval mindset, in the context of the new scenario that arose in the sixteenth and seventeenth

<sup>28</sup> See A. Rechid, "Les droits minoritaires en Turquie dans le passé et le présent", RDIP (1935) XLII, 293-311, and A. Mandelstam, "La protection des minorités", RCADI (1923) I, 367-517.

<sup>29</sup> In this regard, Professor Antonio Truyol y Serra cites an essay by Zeller ("Une légende qui à la vie dure: les capitulations de 1535", *Revue d'histoire moderne et contemporaine* (1955) in which the author dates the first capitulations (in the true sense) between the Porte and France to 1569. See Truyol Serra, *supra* n. 15, at 54.

centuries.<sup>30</sup> Spanish doctrine helped to lay the theoretical foundations of universalisation and a secular international order from the twin standpoints of rationalist natural law and human rights. The new era preserved the duality of natural law vs. positive law, although both were grounded in natural law, which in turn was grounded in natural reason and the social nature of man who, as a social being, has a natural tendency to live in community. The idea of a non-Christian mankind arose, accompanied by an order based on natural reason;<sup>31</sup> this new substantiation, the idea of globality and a natural and positive law of nations with a universal scope led to the acknowledgement of the international legal personality of non-Christian political communities and their legal equality, as Truyol has pointed out.<sup>32</sup>

Christendom was being replaced by the human race, in a new vision of the international community in which the religion professed by its members was no longer a reason for exclusion. In this regard it is interesting to note that Suárez defines the international community as “humankind, albeit divided into various peoples and kingdoms, but with a unity that is not only specific but also quasi-political and moral, which indicates the natural precept of mutual love and compassion that extends to all, even to strangers and those of any nation (...) those communities are never individually so self-sufficient as not to need some form of mutual help, society and communication (...) and for this reason they need some kind of law by which they can be rightly governed and organised in this type of community and society”.<sup>33</sup>

A world order presupposed a firm belief in the unity of humankind. This universal vision, as Verdross has pointed out, was resuscitated (after Cicero or Seneca) by Spanish Catholic theologians who replaced a united Christendom with humankind in general. Natural law was in turn part of universal morality, with the result that the foundations of the law of nations were grounded in the latter. This conception of natural law was maintained in international law doctrine, which would become progressively more secular with time. Thus, Vitoria’s idea of an *Orbis* that extends to the whole of humankind regardless of religion was a purely human vision of the law of nations that, as Boegner has noted,<sup>34</sup> paved the way for the so-called secularisers of international law.

A multi-centred and universalist vision of this kind was an essential requisite for an international law that was expanding to include new territories in other parts of the world. Some authors, according to Koskenniemi, consider that Vitoria and his successors were the initiators of the

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<sup>30</sup> See C. del Arenal “La visión de la sociedad mundial en la Escuela de Salamanca”, in A. Mangas Martín (ed.), *La Escuela de Salamanca y el Derecho internacional en América. Del pasado al futuro* (Salamanca, 1993), 27-48, and A. Truyol Serra, *La sociedad internacional* (Alianza Universidad, Madrid, 1991), 30-35.

<sup>31</sup> G. Peces-Barba, *Tránsito a la modernidad y derechos fundamentales* (Editorial Mezquita, Madrid, 1981), at 137; G. Peces-Barba and E. Fernandez (coords.), *Historia de los derechos fundamentales, t. 1. Tránsito a la modernidad. Siglos XVI-XVII* (Instituto de Derechos Humanos Bartolomé de las Casas UC3M, Dykinson, Madrid, 1988).

<sup>32</sup> A. Truyol Serra, “El derecho de gentes como orden universal”, in Mangas Martín, *supra* n. 30, 17-25, at. 24.

<sup>33</sup> *De Legibus*, Lib. II, Chap. 19, 9. Translated from the Spanish version published in Truyol y Serra, *supra* n. 15, at 62.

<sup>34</sup> M. Boegner, “L’influence de la réforme sur le développement du Droit international”, *RCADI* (1925) I., at 303, and J.A. Carrillo Salcedo, “Aportación de Francisco de Vitoria a los fundamentos filosóficos de los derechos humanos”, in Mangas Martín, *supra* n. 30, 49-54.



European mission to civilise other nations, imposed by successive European empires,<sup>35</sup> an opinion with which we are unable to agree, due to the differences between the various doctrines. Anghie, for his part, also considers that we live in a kind of continuous empire and that the ideal of universality was used as a form of domination and exclusion of all non-Western values. Both of these theses, we believe, to some extent serve to revive the anti-Spanish 'Black Legend'. We concur with some aspects put forward by these authors, such as imperialism being a constant feature and, of course, that Spanish scholarship legitimised the conquest and domination of new territories. However, this was done on a basis of reasoning that was neither racist nor xenophobic, in contrast to the legitimisation of the division of the African continent in the nineteenth century between the majority of other European countries, particularly Great Britain, Belgium, France and Germany. Darwinism applied to the social sciences brought with it deplorable consequences for Africa that would later be reflected in Europe itself, reaching their nadir in Hitler's Europe.

## (2) Human rights in the time of Cervantes

The historical role played by Spain in protecting human rights has been the subject of much debate and controversy. In his last will and testament Bartolomé de las Casas wrote that as a result of the deeds perpetrated in the conquest of the New World "God shall vent upon Spain His wrath and His fury".<sup>36</sup> These and other similar words would serve as the basis for the 'black legend' that was to be constructed regarding Spain's role, promoted by Anglo-Saxons and Protestants.

In the period spanning the fifteenth to the seventeenth centuries, the context in which Miguel de Cervantes' life took place, the most noteworthy aspect was the shaping of Spain as a unified nation, at the cost of religious and cultural diversity; the same would later occur in other European countries, particularly France. The construction of a unified Spanish nation was carried out in a context of religious unity from which Moslems and Jews were excluded. In 1492 their Catholic Majesties breached the terms of the capitulations made on the taking of Granada, under which the uses, customs and religion of population would be respected.<sup>37</sup> At the beginning of the sixteenth century Spain was home to approximately one million Arabic-speaking Moslems who were superficial converts to Christianity, known as 'Moriscos'. An edict was issued in 1567 requiring them to learn Spanish and forbidding the use of Arabic, which led to a mass uprising. Although Moriscos were initially deported to regions in the interior of the country, the order decreeing their final expulsion from Spain was given in 1609.

<sup>35</sup> M. Koskenniemi, "Colonization of the Indies. The origins of international law?", in Y. Gamarra (coord.), *La idea de América en el pensamiento iusinternacionalista del siglo XXI*. Colección Actas Derecho (Institución Fernando el Católico, Diputación de Zaragoza, 2010), at 43.

<sup>36</sup> B. de las Casas, *Brevísima relación de la destrucción de Indias* (Ed. Cátedra, Letras hispánicas, 15 ed., 1982, 2007), 25, note 30.

<sup>37</sup> Kamen, *supra* n. 4, at 47 *et seq.*

As Fernando de los Ríos pointed out, modern Spain identified religion with nationality and the homeland with religion, a state of affairs which would lead to the merging of Church and State<sup>38</sup>; in such conditions non-Catholics were repressed and Protestantism failed to take root. The only sectors of the population amongst whom the humanist ideas of Erasmus to some extent flourished were the converted Moslem and Jewish minorities, the ‘new Christians’. Minorities were subjected to the continuous vigilance of the Inquisition and became the victims of discrimination. Society was divided into ‘old’ and ‘new’ Christians, with racial purity or ‘purity of blood’, which was an essential requisite for a large number of posts, having to be proved by going back three generations to a person’s great-grandparents. With the secularisation of authority that commenced in the late fifteenth and early sixteenth centuries, the Church started to lose its power, although the Spanish monarchs, as Blázquez has pointed out, retained the gift presented by medieval theology to the secular powers by basing their authority, at least in part, on its divine origin.<sup>39</sup>

In the case of the Jewish minority the edict expelling all Jews from Castile and Aragon, issued on 31 March 1492, stated that “we order all Jews and Jewesses of whatever age they may be, who live, reside and exist in our said kingdoms and lordships to depart from them”. It was the greatest episode of ethnic cleansing the world had ever seen and gave rise to what is known as the Sephardic Diaspora.

One minority that was not expelled, but nevertheless continued to be the victims of discrimination and exclusion, were the Gypsies, or Roma. Miguel de Cervantes himself provides direct evidence of this in his novella *The Little Gypsy Girl (La Gitanilla)*,<sup>40</sup> in whose first paragraph they are described in the following terms: “Born of parents who are thieves, reared among thieves, and educated as thieves, they finally go forth perfected in their vocation, accomplished at all points, and ready for every species of roguery. In them the love of thieving, and the ability to exercise it, are qualities inseparable from their existence, and never lost until the hour of their death”.

Other pages of Spanish history, such as that of slavery,<sup>41</sup> appear to have been overlooked to a greater extent. The legal and political reality is that during Cervantes’ time scarcely any voices were raised against the slave trade. The conquest of the Indies initially brought with it the enslaving of the native population, but in 1513 the Crown granted licences for the trading of negroes, carried out through the ports of Cartagena de Indias, Veracruz and Santo Domingo.

This was the beginning of the first process of globalisation backed by commercial capital, one that included Europe, the Americas and Africa. It is one of the most neglected chapters of Spanish history, although some good research has been done on the subject, such as the PhD thesis published by

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<sup>38</sup> F. de los Ríos, *Religión y Estado en la España del siglo XVI*, a lecture given at the University of Columbia on 6 October 1926, published in F. de los Ríos, *Obras completas*, II, Libros, (ed. Teresa Rodríguez de Lecea, Fundación Caja Madrid, Madrid, 1997), 397–510.

<sup>39</sup> D. Blázquez Marín, *Herejía y traición. Las doctrinas de la persecución religiosa en el siglo XVI* (Instituto de Derechos Humanos Bartolomé de las Casas-Uc3M, Dykinson, Madrid, 2001), and H. Kamen *Los desheredados. España y la huella del exilio* (Aguilar, Madrid, 2007).

<sup>40</sup> M. de Cervantes, *La gitanilla* (Ed. Alba, Madrid), 39. English translation by Walter K. Kelly.

<sup>41</sup> See, for example, J.A. Piqueras, *La esclavitud de las Españas. Un lazo transatlántico* (Catarata, Madrid, 2011), and R. Fernández Durán, *La Corona española y el tráfico de negros. Del monopolio al libre comercio* (Ed. del Economista, Madrid, 2011).

George Scelle in 1906.<sup>42</sup> Between 1513 and 1595 the Spanish Crown granted licences or royal authorisations in exchange for the receipt of import-export duties (*almojarifazgo*) or sales and brand rights (*alcabala*)—the latter literally in the form of a seal branded on the skin to confirm that the importation and ownership of a slave was fully legitimate. From then onwards slaving was governed by the awarding of contracts ('asientos') or monopolies for a given period of time, providing the Crown with income and authorising a fixed number of slaves to be transported to the Americas from Cabo Verde.

Asientos with Portugal were entered into as from 1595; in 1701 a Treaty of Alliance was signed between Spain and Portugal, supplemented by an adjustment signed on the same day. This asiento was transferred to France shortly afterwards, and under the Treaty of Utrecht (1713) was granted to Great Britain for a 30-year period. At the end of the eighteenth century the Crown purchased Fernando Pó and other enclaves for use as slave factories, and under Charles III and his successor Charles IV, a time when the first criticisms of slavery were being voiced, Spain entered into the slave trade.

To conclude, it should be noted that Miguel de Cervantes was himself held prisoner in Algeria for five years, enduring all manner of calamities in the territories of the Barbary Coast, which nowadays would be referred to as 'failed states'. These experiences would be recounted in Chapter 39 of *Don Quixote*, which bears the title "Wherein the captive relates his life and adventures". During the sixteenth and seventeenth centuries North Africa (principally Algeria and Morocco) was under the sway of the Barbary pirates, who took thousands of captives. There was a direct correlation between the rise of the former and the support given by the House of Austria to the ransom missions carried out to liberate the prisoners, mainly by the Mercedarian and Trinitarian Orders.<sup>43</sup> Such a situation reflected the limits of European public law, in confines that fell outside the authority of any formal state and lay outside the boundaries of the rule of international law at that time.

<sup>42</sup> G. Scelle, *La traite négrière aux Indes de Castille* (Paris, L. Larose & L. Tenin, 1906).

<sup>43</sup> J. A. Martínez Torres, *Prisioneros de los infieles. Vida y rescate de los cautivos cristianos en el mediterráneo musulmán (siglos XVI-XVII)* (Colección Alborán, Barcelona, 2004).