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# *Jurisdictional Colonisation in the Spanish and British Empires: Some Reflections on a Global Public Order and the Sacred*

MÓNICA GARCÍA-SALMONES\* AND LUIS ESLAVA\*\*

## INTRODUCTION

**A** PUBLIC LEGAL order that aspires to be global must involve the possibility of the sacred. The international legal system should thus be open to the sacred if it strives to create order among states in global governance.<sup>1</sup> These claims arise from a reflection on international law in which we have tried to move beyond imperialistic conceptions of order and modern fears about the role of religion in international law. Here we examine the relation between religion and international law by applying a genealogical approach to two important legal international projects for ordering the world: one theological, the other humanist. Two imperial stories of universalism, redemption, conquest and conversion are recounted. The first occurred during the initial conquest of the New World, and its main characters are the Spanish Empire and the indigenous people of South America. The second story concerns the British Empire and European colonisation in North America.

The aim of this article is to sketch some similarities, differences and lessons of the expansion of British and Spanish jurisdictions into the New World. While both these imperial projects relied on the deployment of their law throughout the Americas, the manner in which the exogenous law became implanted in the reality of the new lands and subjects was quite different, due to struggles between the divine and the terrestrial aspects of international governance in contemporary European political thought. Imperial authorities have always used law and space to establish power in a new land: new understandings of the nature of law that were formulated during the rise of modernity crucially affected the manner in which law was applied in the concrete spaces of colonisation and articulated in the daily life of

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<sup>1</sup> Since it is true that religion has no monopoly over ethics or morals, the sacred refers here to the most purely religious categories with no other equivalent in the secular world. See JHH Weiler, 'La tradición judeo-cristiana entre fe y libertad' in J Ratzinger et al, *Dios salve la razón* (Madrid, Ediciones Encuentro, 2008) 191. For other philosophical and moral teachings about world order, see for example, FT Chen, 'The Confucian View of World Order' in MW Janis and C Evans (eds), *Religion and International Law* (The Hague, Nijhoff, 2008).

imperial subjects. In the Spanish Empire, order was produced through law founded in religious belief; for the British Empire, order was derived from the new liberal law of modernity. The decline of the Spanish Empire and the emergence of its British counterpart mark the transition between these two conceptions of law. As the Spanish Empire's power and its theocentric interpretation of international law receded, the remaining competing jurisdictional systems—the British Empire and the Westphalian state system—responded with a secular conceptualisation of law and politics. Our current conception of international law is the legacy of a resistance by European leaders to conceive of a sovereignty that would not incorporate spiritual sovereignty.<sup>2</sup> There is a certain parallel between the Westphalian moment at the beginning of modernity and the nascent era of global governance. In the sixteenth and seventeenth centuries, the scope of activities performed by empires and states had expanded profoundly, not only because of newly discovered territories and peoples, but also because recent acquisition of theological jurisdictions had brought forth substantive and transcendental matters that the theological encompassed. The key question at the beginning of modernity was how to impose a universal order on the relations between distinct territorial units, states and other international actors at a time when the universal language of Rome and its juridical apparatus were no longer valid. Arguably, it was the very posing of this question that inaugurated modernity, and the international legal system continues to be shaped by its structure and implications.<sup>3</sup> Therefore, the enquiry and search for an order in international law (both in practice and theory) is as urgent as when it was first formulated.<sup>4</sup>

Current legal theorists have questioned classical positions on the question of public order, and claim that international law is intrinsically indeterminate.<sup>5</sup> Other theorists regard classic international law as a type of basic constitution, since it supports a legal community of formally equal partners. Here the force of the normative self-understanding of modernity provides the foundation of a procedural constitution that promises order amongst de facto unequal sovereigns.<sup>6</sup> A third line of inquiry has focused on how international law consolidates the status quo and

<sup>2</sup> On the key position of the spiritual sovereignty in the negotiations of Münster for both the United Provinces and Spain, see generally, LM Baena, 'Negotiating Sovereignty: the Peace Treaty of Münster, 1648' (2008) 28 *History of Political Thought* 617.

<sup>3</sup> cf S Felman, *Jacques Lacan and the adventure of Insight* (Cambridge MA, Harvard University Press, 1987) 103.

<sup>4</sup> See especially, R Wolfrum and V Röben (eds), *Legitimacy in International Law* (Heidelberg, Springer, 2008).

<sup>5</sup> M Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 2006). For the fact that Koskenniemi's book has often been cited but rarely challenged, see D Kennedy, 'The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's From Apology to Utopia)' (2006) 7 *German Law Journal*, 982. See also, M García-Salmones, 'The Ethos of the Rule of Law in the International Legal Discourse: Portrait of an Outsider' (2008) 10 *International Community Law Review* 29.

<sup>6</sup> J Habermas, *Der gespaltene Westen* (Frankfurt am Main, Suhrkamp, 2004) 131, 148, 192; B Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599.

thus perpetuates injustice, rather than promoting an emancipatory internationalism. On this view, a fair international order requires the return to international relations structured by national law and national interests.<sup>7</sup> Since Cold War tensions have eased, the simple hard secular view of international law has been shown to be insufficient to address these critiques, and many theorists have demonstrated a new sensibility towards the ethical and the religious.<sup>8</sup> This has been interpreted as a sign of a loss of faith in the secular project of modernity.<sup>9</sup>

The question of political agency has become a key issue in the future of international law, taking precedence over other problems such as the economic structure, the weight of history, the cultural origins and the power of the state.<sup>10</sup> Moving beyond the positive legal materials, it is argued, international law must confront the political question in order to cope with present challenges. Nevertheless, international law as such seems to be endemically ambivalent, between universalism and empire. The duck-rabbit model of international law has been proposed as a way of capturing the sense in which international law contributes to a genuine desire in the powerful to avoid conflict and injustice.<sup>11</sup>

Finally, in an era of global governance, there is a need to rethink notions of democracy so that they might be meaningfully employed in the international legal system. Critical thought is most attuned to the legitimacy of international law when it is expected to establish a terrain between pure normativity and the pure politics of the powerful.<sup>12</sup> This paper shares concerns about a de-territorialised international law with capacity to outlaw the powerless—a version of international law that resembles past imperial practices. We wish to interrogate this legal structure and in doing so take seriously the role played by colonial history in the formation of international law.<sup>13</sup> The outstanding problems and critiques of international law have motivated us to transplant our reflections on global order in late modernity to the era of colonisation in South and North America through the Spanish imperial cities of God and the British rational jurisdictions. In the following two sections, we dissect the complexity of the public orders of the British and Spanish Empires with the purpose of making their imperial legal attributes visible. Following a review of

<sup>7</sup> Wolfrum categorises this position as voicing Schmittian ideas. See R Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations' in Wolfrum and Röben (eds), *Legitimacy in International Law* (n 4) 3; C Schmitt, *Die Kernfrage des Völkerbundes* (Berlin, F Dümmler, 1926).

<sup>8</sup> See especially, D Kennedy, 'Losing Faith in the Secular: Law, Religion, and the Culture of International Governance' in MW Janis and C Evans (eds), *Religion and International Law* (The Hague, Nijhoff, 1999) 311, 312.

<sup>9</sup> *ibid* 316.

<sup>10</sup> B Rajagopal, 'Martti Koskenniemi's "From Apology to Utopia: A Reflection"' (2006) 7 *German Journal of International Law*, 1089, 1090.

<sup>11</sup> For a similar use of this image in a legal issue see A Cockrell, 'The South African Bill of Rights and the "Duck/Rabbit"' (1997) 60 *Modern Law Review* 513. See especially the image of the duck-rabbit in L Wittgenstein, *Philosophical Investigations* (Oxford, Blackwell, 1978 [1953]) 194. See also, E Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 *European Journal of International Law* 379.

<sup>12</sup> JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547, 552.

<sup>13</sup> R Falk, B Rajagopal, and J Stevens, 'Introduction' in R Falk, B Rajagopal and J Stevens (eds), *International Law and the Third World* (London, Routledge-Cavendish, 2008).

the theological grounds that sustained the Spanish imperial project, we examine how the rise of the British Empire in the seventeenth century involved a complex matrix of theological, legal and political transformations. Several conceptual shifts that occurred during this process indelibly coloured the meaning of key notions such as sovereignty and common law, and revised the nature assigned to imperial subjects. The importation and violent application of the two European legal orders, with no previous *topos* in the new territories, required a conversion of new imperial subjects. Although the religious aspect of the British conquest has been largely glossed over, the Spanish and British imperial projects display a striking similarity in this regard.<sup>14</sup> In particular, we consider the ways in which a secular order may become quasi-religious when it requires total allegiance of its subjects.

In the final section, we reflect upon current visions of global public order, using insights drawn from our analysis of the Spanish and British imperial projects. These two legal histories of colonisation focus our attention on the role of the sacred in international law and global order.

## THE IMPERIAL CITIES OF GOD

### Inscribing the Spanish Empire in Land

Unlike the era of settlement by British dissenters in the seventeenth century and its reliance on liberal interpretations of law and order, the nature of government, religion, and social relations appeared uncontroversial during the late fifteenth and early sixteenth centuries. After the Moors' surrender on the Iberian Peninsula in 1492, the Spanish extended their Christianisation programme to the New World, with absolute certainty of the social propriety of their ways and the religious righteousness that justified their goals and means.<sup>15</sup> The Catholic monarchs, Ferdinand and Isabella, conjoined Christianity and Spanish civilisation into a seamless cultural-moral complex that defined all political, religious or cultural alternatives as heretical and odious. Empire-building and social governance were pragmatic extensions of the eschatological narratives of Catholicism.

This unity of sovereignty, governance and religion placed particular emphasis on the role of founding cities during colonisation. Cities were the administrative centres of the colony, the reproducers of capital, the seat of ecclesiastical power, and the space for all cultural activities: where education was received, history was written, and humanity advanced. In founding satellite cities, the major secular and theological foundations of the Spanish colonial enterprise came together:

<sup>14</sup> For a summary of historiographical traditions of the British Empire, see A Webster, *The Debate on the Rise of the British Empire* (Manchester, Manchester University Press, 2006).

<sup>15</sup> MD Szuchman, 'The City as Vision—The Development of Urban Culture in Latin America' in GM Joseph and MD Szuchman (eds), *I Saw a City Invincible: Urban Portraits of Latin America – Jaguar Books on Latin America 9* (Lanham, Rowman and Littlefield, 1996) 2.

humanism, Catholicism and a revitalised notion of *jus gentium*.<sup>16</sup> Cities were ideal spaces for the sacred and the human to enter in a perpetual communion. In the foundation and planning of new cities, the Spanish imagination was thrilled by the encounter between divine and civil jurisdictions. Spatial explicitness rather than subtlety was the key mode of this project. The ordering of space according to law enabled an explicit coordination of the experience of being a subject. For both indigenous and European subjects, placement within or around jurisdictional urban clusters materialised their location in the Empire's diagrammatic of power abroad and their positioning in a transcendental order that aimed to approach the sacred.

In a pragmatic reading of Augustine's topographic taxonomy of the world, Spanish colonisers realised that the city of man differed to the city of God.<sup>17</sup> Despite Christianity's designation as the official religion of the Spanish Empire, and the Church as the heart of the city of God, Augustine declared in *De Civitate Dei* that its message was spiritual rather than political. Christianity, Augustine argued, should be concerned with the mystical, heavenly City of Jerusalem (the New Jerusalem), rather than with Earthly politics. The city of man was therefore a platform for crafting the self in order to gain access to the city of God. On this view, the city of man should follow a 'natural order'. Following this interpretation, the Spanish Empire sought to organise their cities according to 'nature', and thus connect Christian subjects (both conquerors and conquered) with a sense of proportion, which itself culminated in understanding the proportions of the greatest work of art: the godlike human body. This cosmology viewed all matter, including people, within a linear and hierarchical world—an order that should be reflected in the order of cities.

In 1573, King Phillip II of Spain crystallised the natural/organic view of urban affairs and its role in the construction of the Spanish Empire in the *Ordinances for the Discovery, New Settlement, and Pacification of the Indies* (the Ordinances).<sup>18</sup> The Ordinances are a paradigmatic piece of urban legislation in which it is possible to read how the Spanish Empire guided the foundation, construction, indoctrination and administration of its colonial communities.<sup>19</sup> While the earliest voyages of

<sup>16</sup> RM Morse, 'Introducción a la Historia Urbana de Hispanoamérica' in F Solano (coordinator), *Estudios sobre la ciudad Iberoamericana* (Madrid, Consejo Superior de Investigaciones Científicas, Instituto Gonzalo Fernandez de Oviedo, 1983) 17.

<sup>17</sup> St Augustine and J Healey (translator) *The City of God* (London, Dent, 1931).

<sup>18</sup> The norms on urban foundation and planning were part of the Ordenanzas de Descubrimientos y Nueva Población y Pacificación de la Indias (1573). These are divided into 148 chapters: the first 31 chapters were dedicated to the discoveries, chapters 32 to 137 dedicated to new populations, and chapters 137 to 148 to the pacification of the Indies. Later in the colony, they were included in Titles V, VI, VII, VIII and XII of Book IV of the 'Recopilación de Leyes de los Reinos de las Indias' (first published in 1681). See G Guarda, 'Tres reflexiones en torno a la fundación de la ciudad indiana' in F Solano (ed), *Estudios sobre la ciudad Iberoamericana* (Madrid, Consejo Superior de Investigaciones Científicas, Instituto Gonzalo Fernandez de Oviedo, 1983) 89–96; and JE Hardoy, 'La Forma de las Ciudades Coloniales en la América Española' in F Solano (ed), *Estudios sobre la ciudad Iberoamericana* (Madrid, Consejo Superior de Investigaciones Científicas, Instituto Gonzalo Fernandez de Oviedo, 1983) 318; J Kinsbruner, *The Colonial Spanish-American City: Urban Life in the Age of Atlantic Capitalism* (Austin, University of Texas Press, 2005).

<sup>19</sup> Previous and subsequent legislation included the 1523 Charter by Charles V, and the Recopilación de las Leyes de las Indias (1680). However, the *Ordenanzas de Descubrimiento y Población* of 1537 is

conquest to the Americas were marked by savagery, by the time of King Phillip's Ordinances the official response was to adopt a soft yet combative adjudication of the New World and its people that fulfilled pragmatic and celestial requests—a combination that profoundly informs the Renaissance understanding of *jus gentium*.

By 1573, the Italian Renaissance had taken hold in Spain, and Spanish humanists and royal advisers had become familiar with Roman urban organisations through the translation of Vitruvius' *De Architectura* (translated into Spanish as *Medidas del Romano*).<sup>20</sup> A normative approach to imperial expansion (grounded in the new interpretation of *jus gentium*) was thus married to a more technical concern with the role of spatial distribution in human affairs. Moreover, while the new norms allowed the conquerors to acquire effective material possession of colonial territories, they also resembled Aquinas' prescriptions for the ideal King.<sup>21</sup> According to Aquinas, the city was the natural vehicle for the fulfilment of Christian ideals, due to the possibility of mastering the self through the mutual dependence, intellectual and common surveillance proper to city life.<sup>22</sup> Following Aristotle, Aquinas envisaged the city as the measure of one's morality. Therefore, the King should be engaged in a constant mission to urbanise the world of man: founding a town was the royal equivalent of the creation of the world.<sup>23</sup> Although his power could only be realised at the material level of the subjects, the King was a terrestrial juncture in a power relationship that extended far beyond human existence.

In the Spanish imperial project, the definitive differentiation between the sacred and the secular that would come to characterise the British colonisation of North America and mark the emergence of a modern international law was a rhetorical partnership that allowed the conqueror to intervene in the world in order to achieve transcendence. The metaphysical dimensions of space and governance were intentionally made indistinguishable in order to achieve sovereign presence across the new lands and subjects. Importantly, the sovereign presence aimed to permeate the mundane and sacred dimensions of daily life.

still the most cited normative document in which Spanish planning ideas are found. See for a critical review of normative sources of colonial Spanish town planning in America, R Martínez Lemoine, 'The classical model of the Spanish-American colonial city' in J Madge and A Peckham (eds), *Narrating Architecture: A retrospective anthology* (London, Routledge, 2006).

<sup>20</sup> The ordinances were inspired by the classical Roman treatise of Vitruvius *De architectura*, which was rediscovered by the Florentine humanist Poggio Bracciolini in 1414. The first known edition of Vitruvius was in Rome by Fra Giovanni Sulpitius in 1486. Translations followed in Italian (1521), French (1547), English, German (1543) and Spanish (1526) and several other languages. The Latin edition of Vitruvius' book, published in 1582 was dedicated to Phillip II. See S Kostof, *The City Shaped: Urban Patterns and Meaning Through History* (New York, Bulfinch Press, 1991) 115.

<sup>21</sup> Kostof, *The City Shaped* (n 20) 108–11.

<sup>22</sup> T Aquinas, *De Regimine Principum*, discussed in RM Morse, 'Introducción a la Historia Urbana de Hispanoamérica' in F Solano (coordinator), *Estudios sobre la ciudad Iberoamericana* (Madrid, Consejo Superior de Investigaciones Científicas, Instituto Gonzalo Fernandez de Oviedo, 1983) 10–53.

<sup>23</sup> Kostof, *The City Shaped* (n 20) 111.

**Marking and circumscribing the sovereign presence**

The material nature of the city was regarded as a suitable instrument to discipline subjects through spatial positioning. Phillip II's Ordinances were issued as part of the Crown's desire to institute a systematic sovereign presence and transcendental authority in the Empire. It was a normative effort to make the colonial enterprise an intelligent carrier of a sovereign spatial economy. In this context, a 'sovereign spatial economy' conveys the sense in which a local jurisdiction acts as a spatial configuration of power, an instrument that expands and contracts in response to its capacity to develop individual subjects and their subjectivities. As such, the Ordinances articulated planning technologies as a pedagogical practice, while theological belief operated as the grounding narrative to approach space and subjects. An example of the triangulation between theological convictions, control of physical space and instruction of new imperial subjects can be delineated in the foundation of cities by the Spanish Empire, during which the performance of liturgical ceremonies materialised the divine and secular forces in the chosen site for a new city. Bogotá, for instance, was founded twice because legal prescriptions were omitted in the initial founding ceremony. Even though Jimenéz de Quesada, widely remembered as the city's founder, established 12 huts on the site of present-day Bogotá in commemoration of the Apostles, and offered the city to the Lord on 6 August 1538, the legally recognised ritual was not completed until 29 April 1539.<sup>24</sup> Here the formality of law ensured the teleological function of both space and subjects.

The process of sovereign deployment through urban planning, and the relationship between these and the manifestation of the sacred in the everyday life of imperial subjects, may also be perceived in the selection and circumscription of land urban settlement, and the subsequent distribution of property rights. Ordering to possess and the localisation of subjects according to colonial rights and obligations were one of the fundamental roles of urban planning. The colonial purpose fostered through the Ordinances was not to dominate the land, nor to convert natives immediately to Christianity. Pacification by Catholic missionaries would ultimately complete the task of discovery and conquest initiated by urban planners.<sup>25</sup> The purpose of planning was to arrange space in a way that Christianisation and its cosmological imaginary were visible on the landscape, a configuration that would be later confirmed in the interior self of the imperial subjects.

There are many examples of how the process of selection, circumscription and distribution of land functioned, but here we would only like to mention the criteria that guided the process of land selection. According to the Ordinances, new cities

<sup>24</sup> R Londoño, 'En las nubes de Bogotá' (2006) [www.bogotacomovamos.org/scripts/contenido.php?idCnt=1](http://www.bogotacomovamos.org/scripts/contenido.php?idCnt=1). See also, D Ramos Pérez, 'La Doble Fundación de Ciudades y las "Huestes"' in F Solano (ed), *Estudios sobre la ciudad Iberoamericana* (Madrid, Consejo Superior de Investigaciones Científicas, Instituto Gonzalo Fernandez de Oviedo, 1983) 131–38; M Lucena Salmoral, 'Bogotá y las tres Huestes: Estudio comparativo del reparto de oficios concejiles y encomiendas' in F Solano (ed), *Estudios sobre la ciudad Iberoamericana* (Madrid, Consejo Superior de Investigaciones Científicas, Instituto Gonzalo Fernandez de Oviedo, 1983) 139.

<sup>25</sup> See especially; MM del Vas Mingo, 'Las Ordenanzas de 1573, sus antecedentes y consecuencias' (1985) 8 *Quinto Centenario* 83–101.



60 *Mónica García-Salmones and Luis Eslava*

were to be founded next to indigenous towns, ‘populated by Indians and natives to whom we can preach the Gospels since this is the principal objective for which we mandate that these discoveries and settlements be made.’<sup>26</sup> As noted above, the initial act of possession was formalised by the deployment of legal formulae in which a transcendental experience was married to an urban planning rationale that defined the urban space as Spanish in opposition to an indigenous fringe. The indigenous did not come initially to the colonial town; the colonial town came to the indigenous.

The positioning of indigenous as cartographic outsiders was complemented by instruction in commerce and the distribution of urban land property. The distribution of land was straightforward: as the indigenous population were physically outside the city’s limits, they were excluded from the city’s internal distribution of property rights. Following the Roman use of the grid as the official urban order, the Ordinances specified a square central plaza where the main authorities were to be situated. The rest of the city’s chessboard was distributed according to social and religious importance, and citizens were permitted rural possessions in the same order and proportion to their properties in the city. The indigenous, from the point of view of the coloniser, were outside the city’s geography, and were thus both topographically and semantically the *other*, an object for instruction and exploitation. Forced labour was in this manner also organised around this relocation. During the first century of the colony, indigenous people were required to pay tributes in urban, rural, or mining form,<sup>27</sup> which were enforceable due to the proximity of indigenous settlements to the cities. The spatial relationship between the city and the indigenous population obscured the original indigenous ownership of the land and made their place in the colonial economic structure explicit.

Even as the indigenous people of South American became outsiders in their own land, they occupied a key role in the political economy of the colonial city. Indigenous bodies were understood to be capable of labour and silent carriers of God’s voice. As a result, the initial command of the Ordinances was pragmatic, yet also visionary. According to Article 5, conquerors were to ‘[l]ook carefully at the places and ports where it might be possible to build Spanish settlements without damage to the Indian population’,<sup>28</sup> and if there was an unexpected encounter with natives, they should always use commerce and ransom, instead of combative preaching. Commerce and ransom were supposed to be intelligible to the Indians; the gospel, on the other hand, had to be administered once the indigenous body was immersed in the early capitalist system of the Empire. The revelation of the sacred in the Empire’s order was only achievable through the incremental cancellation of

<sup>26</sup> A Mundigo and D Crouch (translators), ‘Ordinance for New Discoveries, Conquests and Pacifications’ (1573) Chapter 36; reprinted by The New City with permission from ‘The City Planning Ordinances of the Laws of the Indies Revisited, I’ (1977) 48 *Town Planning Review* 247–68, The University of Miami, School of Architecture [www.arc.miami.edu/Law%20of%20Indies.html](http://www.arc.miami.edu/Law%20of%20Indies.html).

<sup>27</sup> The indigenous forced labour was divided into rural work, mining work and urban work. In 1657, the required urban tribute amounted to one month every two years, mining to one year every three years, and term of rural work was between six months to one year every three years. See Pedro F Simón, *Noticias Historiales de la Tierra Firme en las Indias Occidentales* (Bogotá, Biblioteca Banco Popular, 1982).

<sup>28</sup> Mundigo and Crouch, ‘Ordinance for New Discoveries, Conquests and Pacifications’ (n 26).

the indigenous body and territory, which in turn required the reconfiguration of space and instruction in the normative premises of Spanish imperial law. The Ordinances, epitomising these laws, operated under the central tension of the Spanish colonial enterprise: how to ensure the Empire's presence in the New World, how to guarantee a sufficient labour force for the colonial economy, and, at the same time, how to protect and Christianise the native population.

### **Cultivation of Subjectivities, the City, and the Emergent International Law**

The corporeality of the *imperial subject* (both indigenous and coloniser) and her subjectivity occupied the whole mind of the planner. The individual was a subject of the monarch not only because of her physical presence within the kingdom; she was also, and primarily, a subject of the monarch due to that inner space in which the natural symmetry between the monarch and God was identified and made real within the city. All the city's inhabitants lived under this redeeming logic, and they were all the potential subjects of salvation. Here it is possible to see how the almost-human yet flawed nature of the indigenous subject, as theorised by Francisco de Vitoria, was accommodated into the urban order. The city was the place in which indigenous culture, its ideas of property and governance, was realigned with the Empire's order—the embodiment of a universal natural law. Following Anghie's critical reading of Vitoria, the indigenous personality was conceived along two axes by the Spanish Empire:<sup>29</sup> 'First, the Indians belong to the universal realm as do the Spanish and all other humans beings because ... they have the facility of reason and hence a means of ascertaining *jus gentium* which is universally binding.'<sup>30</sup> However, in Vitoria's reading of the New World, 'the Indian [is] very different from the Spanish because the Indian's specific social and cultural practices are at variance with the practices [the normative foundations of *jus gentium*] which are applicable to both Indian and Spaniard.'<sup>31</sup> In other words, focusing on the cultural practices of each society and assessing them in terms of the universal *jus gentium*, Vitoria demonstrated 'that the Indians are in violation of universal natural law. Indians are included within the system only to be disciplined' and to 'save the Indians from themselves.'<sup>32</sup>

*Jus gentium*, the natural law that was supposed to regulate the relations between sovereigns and the recognition of reason in all human beings motivated the development of urban practices that would close the inconvenient cultural gap between the indigenous and Spanish populations of colonial cities. Phillip II's pragmatic use of urban development law emulated Vitoria's pragmatic take on *jus gentium*. Establishing an urban order based on the assumption that both indigenous and colonisers were ordered by a natural/sacred schema, Phillip II's Ordinances reintroduced divine law in the governance of colonised territory as a technical

<sup>29</sup> A Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social & Legal Studies* 321.

<sup>30</sup> *ibid* 327.

<sup>31</sup> *ibid*.

<sup>32</sup> *ibid* 331.

62 *Mónica García-Salmones and Luis Eslava*

matter. The form of this reintroduction was, as Phillip II realised, more durable and effective than any kind of combative preaching. It was the promotion of a divine order through secular activities such as settling, travelling and trading.

Following the foundation of a colonial city, urban planners aspired to synchronise the city with an ideal space in which subjects were industrious and politically compliant. Territory and inhabitants, land and human flesh, were the raw materials in the project to propel each city and its citizens towards the idealised space where the sovereign signalled. This space might even be described as Utopia, a politically commanding concept that means non-space but has nonetheless served as the transactional spatial totem around which the monopoly of violence is exercised. Utopia recreates, according to this argument, a sacred meta-space that fulfilled the application of authority with transcendence, salvation and development.

The symbolic energies that lie behind the city were thus a symptom of a grand redeeming project of 'bringing the marginalised into the realm of sovereignty, civilising the uncivilised and developing the juridical techniques and institutions necessary for this mission.'<sup>33</sup> Characteristic of this early encounter between the nascent disciplines of international law and urban planning law is the existence of another, the indigenous, who requires the protection of a transnational sacred order.

THE RISE OF THE BRITISH EMPIRE'S SOVEREIGNTY: FROM PROVINCIAL  
LOCALISM TO EMPIRE

**The Rule of Law in the Empire: Moving away from Theological Foundations**

In spite of the wilderness of the new spaces and the foreignness of the new cultures that they encountered, common law accompanied the British colonists on their journeys abroad. Common law offered the colonists protection and comfort, insofar as it was able to reproduce home without bringing the anxieties left behind. The colonists' identity was, to a large extent, preserved by the guarantees of the rights and liberties of an Englishmen before the common law. Initially, the government of the colonies was founded on the basis and traditions of a common law territorial jurisdiction: this was a selective law that did not create legal spaces, but followed British citizens wherever they were. That the Empire was carried within the coloniser's body had clear repercussions for the indigenous people encountered by the British, who were thus radically excluded from British legal and political institutions. The diagrammatic of power of the British Empire operated, in principle, in the subject's conception of himself, i.e. in the internal space that made him subject to the common law.

The province of New York, captured from the Dutch in 1664, provides an instructive example of how the British dominated their colonies in the North and defended them against competing European interests. The struggle for sovereignty between King and Parliament in England meant that the sovereign presence receded

<sup>33</sup> *ibid* 333.

into the background of the British management of colonial affairs. For a long period, the province of New York was thus allowed to remain provincial. This came to an end with the rise of the sovereignty of the British Empire (c 1688–1750), which was marked by a renewed universalism and a deliberate attempt to withdraw matters of interest to the metropolis, such as trade and security, away from local governments.<sup>34</sup> Importantly, however, both the local and imperial models of British territorial administration lacked the ideal of the transcendental that characterised the Spanish imperial expansion in the South. In the imperial framework, the story of the provinces in the North concerns trade, European settlers, land grants, common law, the new rule of law and, finally, the way in which virtual imperial legislation stood hopelessly for the sovereignty of the British Empire in those territories.

The juridical basis and external justification for the British Empire were a matter of argumentation and study among legal philosophers and politicians of the time. Agricultural arguments given in the seventeenth century were considered sufficient to justify the British *dominium* over the colonies,<sup>35</sup> although they would not satisfy the justification of the *imperium*, with its distinctive system of public law and government.<sup>36</sup> Due to its own rejection of the Pope's authority to attribute to the Spanish Crown dominion over the New World—'the gift of the empire', as Hobbes called it—the British Empire realised that it would soon be ensnared by the same criticisms being levelled at the Spanish colonial expansion.<sup>37</sup> When the Spanish Crown's arguments for America's colonisation were called into question even by Spanish subjects,<sup>38</sup> the Protestant kings promptly took up and reformulated the discussion about the legality and legitimacy of colonial enterprises.<sup>39</sup> The British desire to avoid the controversy surrounding Spanish colonisation is exemplified in a conciliatory debate of the Council of the Virginia Company in 1607–08, on the need to document the Company's activities to reassure investors. According to the decision, it was more dangerous than not to produce such a report. One of the members of Company present at the Council summarised the recent experience of the Spanish Empire:

<sup>34</sup> See generally, RN Clinton, 'The Proclamation of 1763: Colonial Prelude to two Centuries of Federal-State Conflict Over the Management of Indian Affairs' (1989) 69 *Boston University Law Review* 329.

<sup>35</sup> J Tully, 'Aboriginal Property and Western Theory: Recovering a Middle Ground' (1994) 11 *Social Philosophy & Policy* 153.

<sup>36</sup> D Armitage, *The Ideological Origins of the British Empire* (Cambridge, Cambridge University Press, 2000) 98.

<sup>37</sup> T Hobbes, *Behemoth or The Long Parliament* (Chicago, University of Chicago Press, 1990) 12.

<sup>38</sup> The changing sequence of legislation and of language in Spain during the 16th century is attributed to a large extent to a perceived lack of legitimacy in the colonial expansion. See especially, J Medina Rivaud, 'La invención de la ciudad Americana: Convenio entre la realidad y la imaginación. Lectura yuxtapuesta' in IM Zavala (ed), *Discursos sobre la "invención de América"* (Amsterdam, Rodopi, 1992). Rivaud cites as an example a well-known text of the beginning of the colonisation by 'el pedra Hontesions': 'With which right have you started an atrocious war against those peoples who lived peacefully in their territories? You killed them each day when you want them to bring their gold to you; and what is your care to instruct them in our religion? Are they not men? Do they not have reason, soul? Should you not love them as yourselves? Be sure that under the present conditions you do not have more possibilities of salvation than a Turk or a Moor', 283. (translation by the authors).

<sup>39</sup> Armitage, *The Ideological Origins of the British Empire* (n 36) 94.

64 *Mónica García-Salmones and Luis Eslava*

When after 50 years his fryars [of the Spanish Crown] declyn'd him from that sever and unjust course and he labourd by men of all learning to provide himse of a more acceptable title, all y[e] reasons, which were prepared to him, by men of discourse, from y[e] Indians transgressing y[e] Law of Nature; from his Civilians for their denying commerce: from his Canonists by y[e] Donation: and from his Devines, by propagation of religion ... can be gathered for him no title, of Dominions or Property, but only a Magistracy, and Empery, by which he is allowed to remove such impediments, as they had against y[e]) knowledge of Religion.<sup>40</sup>

Despite their strong desire to avoid global censure of their colonial expansion, the British anxiously sought meaning and a constitution for their empire. By 1573, the Spanish had stopped using the term 'conquest' in the official language of imperial politics. In his Ordinances, Philip II presented the legal basis for colonisation and attempted to rationalise the imperial expansion, drawing on solutions offered by lawyers and theologians of the day. The primary aim of Spanish colonisation after 1573 was to found as many territorial *asentamientos* as possible. According to the text of the Ordinances, neither commerce nor conquest would be a priority for the Spanish Empire in the American colonies.<sup>41</sup> Spatial presence, and the civility involved in the materialisation of this performance, became the public policy of the Empire. On paper, at least, the plan for the Spanish Empire was therefore clear: secular and theological aspirations were to be merged in the foundation of *asentamientos* and their pedagogical rationale. By contrast, the grounds of the British Empire were founded in Protestantism, and its commitments against the principle of medieval dualism of Church and government, and in commerce.<sup>42</sup> The geographical spatiality of the British Empire and its physical materialisation were downplayed in order to condense the Empire's presence in the identity of its subjects.

### Englishmen in the Provinces and Later Ethnocentric Geo-Legal Spaces

The British Empire bestowed its colonists in North America with one of the few certainties that had survived the tumultuous seventeenth century in Britain: the common law. While the colonists thus enjoyed the traditional rights and liberties of Englishmen, the British colonial enterprise lacked a uniform imperial design or public policy. Without a public policy, neither the British colonists, nor the Native Americans that they encountered, were capable of making transactions of this precious good.<sup>43</sup> In particular, the status of indigenous people was described in the

<sup>40</sup> DB Quinn 'Reasons against the publishinge of the Kinges title to Virginia' in DB Quinn (ed) *New American World: A Documentary History of North America to 1612* (New York, Arno Press, 1979). Vol III 418–19; quoted by Armitage, (n 36) 93.

<sup>41</sup> MM del Vas Mingo, 'Las Ordenanzas de 1573, sus antecedentes y consecuencias' (n 25) 84–94.

<sup>42</sup> Armitage, *The Ideological Origins of the British Empire* (n 36) 98.

<sup>43</sup> To the high value attached by the colonists to common law, see generally DJ Hulsebosch, *Constituting Empire. New York and the Transformation of Constitutionalism in the Atlantic World, 1644–1830* (Chapel Hill, University of North Carolina Press and American Society for Legal History, 2005) 104.

colonial laws in different ways, since they were not automatically considered to fall under British sovereignty. According to Mark D Walters, friendly Indian nations were described as ‘being at “peace” or in “amity” with, “tributary” to, “allied” to, under the “protection” of, or “subjected” to particular colonial governments’. They were ‘either subjects of the Crown or alien friends’. Other Indian nations were termed ““strange,” “foreign,” or “remote,” or as enemies’.<sup>44</sup>

The structure of a typical North American province was based on an ancient system of territorial jurisdiction, the county palatine, with a proprietor as ‘the true Lord’ of the land.<sup>45</sup> The particularities of the territory, density and heterogeneity of population shaped the peculiar features of the transplantation of common law. For instance, when the English arrived to New York, the original Dutch population was promised that they would be allowed to maintain their legal relations as they were at the moment of the conquest. A peculiar mixture of legal traditions emerged. When colonists invoked common law, they referred to a selection of British rights and liberties that suited their particular situation and to which they felt entitled.<sup>46</sup> Empire was a subjective experience of rational membership, activated through the invocation of the common law. The spatial fragility of the British presence was thus compensated by the requirement for a colonist’s strategic self-recognition as a subject of the incoming British Empire. A liberal conception of imperial presence at the individual level became the conduit of the Empire in the overseas colonies.

After the *Calvin* case, it was clear that only the English and Scots could have access to the protection of English jurisdictional courts.<sup>47</sup> However, Hulsebosch cites a Member of Parliament concerned by the implications of the *Calvin* case:

... it might give a dangerous example for mutual naturalizing of all nations that hereafter fall into the subjection of the king, although very remote, in that their mutual commonalty of privileges may disorder the settled government of every of the particulars.<sup>48</sup>

At this early stage, England used common law principles to protect herself from the cultural and political uniformity of a virtual empire that was physically remote and

<sup>44</sup> MD Walters, ‘*Mohegan Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America*’ (1995) 33 *Osgoode Hall Law Journal* 785, 793.

<sup>45</sup> The British Crown employed two agencies in the work of colonisation: the corporation and the proprietor. See generally, HL Osgood, ‘The Proprietary Province as a Form of Colonial Government’ Part I (1897) 2 *American Historical Review* 644. HL Osgood, *The American Colonies in the Seventeenth Century* (New York, Columbia University Press, 1904) Volume II Part III Chapter VI; HL Osgood, ‘The Corporation as a Form of Colonial Government’ (1896) 11 *Political Science Quarterly* 259.

<sup>46</sup> They could not, however, invoke a precedent that was non-existent in the province. See for instance, E Moglen, ‘Settling the Law. Legal Development in Provincial New York’ (unpublished dissertation, 1998) <http://moglen.law.columbia.edu/publications/stl> 19.

<sup>47</sup> Robert Calvin, a Scot born after the accession of James to the English throne, sued for the recovery of land in England that he claimed to have inherited. The decision held that those Scots born after James became King of England were not aliens, despite the fact that they were not under the authority of English Parliament and they lived under separate law in Scotland. On the important consequences of the *Calvin* case for the colonies, see especially, B Black, ‘The Constitution of Empire: the Case for the Colonists’ (1976) 124 *University of Pennsylvania Law Review* 1157.

<sup>48</sup> DJ Hulsebosch, *Constituting Empire. New York and the Transformation of Constitutionalism in the Atlantic World, 1644–1830* (Chapel Hill, University of North Carolina Press and American Society for Legal History, 2005) 21.

detached from English traditions. Conversely, there was also a generally accepted 'jurisdictional conception of law' in the provinces, such that a New Yorker was always entitled to a local legal forum. Overseas common law constitutionalism offered further means for establishing a protected legal space, a defence against invasive legislation of the British Parliament.<sup>49</sup>

In contrast to Spanish colonisation of the South, the British did not aim to create legal geographical spaces as such. Nevertheless, both the British Empire and its colonies were ethnocentric in their aspirations.<sup>50</sup> For example, the British Empire only intervened in legal or political conflicts with the Native Americans when they involved a British subject. There were exceptions to the legal exclusion of indigenous people. The *Mohegan* case originated in a dispute over land between the province of Connecticut and the Mohegan Indians. In 1704, through their English 'guardians', the Mohegan Indians petitioned the Crown that certain transactions regarding their land had been made illegally. In its defence, the province of Connecticut claimed that the Native Americans were subject to colonial law and colonial courts.<sup>51</sup> The Crown established in this case a Royal Commission to decide over the dispute. For the Royal Commissioner, the Natives were a distinct people, thus subject to the law of nature and the law of nations. The hearing of such international disputes fell under the jurisdiction of Royal Commissions, and not of local courts.<sup>52</sup> Evidently the solution on this particular question determined the extension of the autonomy of the provinces and therefore, neither the Crown nor the colonies wanted to deliver their legal position on it.

Under common law, the King had the dominium of the land, and as such controlled every purchase of land from the Natives through the governors.<sup>53</sup> This was particularly striking because, properly speaking, not only the territory belonged to the Native Americans, but culturally they belonged to the territory, and the

<sup>49</sup> *ibid* 36.

<sup>50</sup> Clinton speaks of 'the characteristic ethnocentric British failure to understand Indian political and legal structures'; although the British did not seek to govern the political structure of the Aboriginal people, 'they nevertheless profoundly affected Indian life through trade and diplomacy': Clinton, 'The Proclamation of 1763' (n 34) 363.

<sup>51</sup> In 1640 the Mohegan chiefs ceded to English settlers all their lands except a reserve for farming and hunting. In 1659 they ceded to Major John Mason the reserved land and his heirs in trust for the whole Mohegan tribe 'as their Protector and Guard'. The next year Mason transferred the lands to the colonial government under the condition that it would reserve sufficient land to the Mohegan when open to settlement. The Mohegan claimed that the transaction was invalid because they had not participated in it. During almost a century, in successive appeals to the Crown the Mohegan and Mason's heirs claimed that the latter held the reserved land in trust for Mohegan use. In 1705 the Crown through an appointed commission invalidated the transaction. After appeal by the colony in 1743, a commission of review overturned the decision of 1705. The Mohegan Indians appealed this decision to the Privy Council. In 1772, without written reasons the Privy Council reported to the Crown that the decision of 1743 be affirmed. In 1773 the Crown confirmed the decision of the Privy Council. See MD Walters, '*Mohegan Indians v. Connecticut* (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America' (n 44) 803–805.

<sup>52</sup> Clinton, 'The Proclamation of 1763' (n 34) 336.

<sup>53</sup> DJ Hulsebosch, *Constituting Empire. New York and the Transformation of Constitutionalism in the Atlantic World, 1644–1830* (Chapel Hill, University of North Carolina Press and American Society for Legal History, 2005).

jurisdiction over it was and is held in trust by the chiefs.<sup>54</sup> Despite ‘the strong self-interest of colonial government’, British law increasingly sought to assure the Native Americans of a continued right of occupancy of their lands.<sup>55</sup> With the French in the north and west, and to a lesser extent the Spanish in the south, competing for trade, land and influence over the Native Americans, the security of the Empire—as reports of the Board of Trade show—was decisive in later efforts to protect Native Americans and to establish a uniform policy in relation to them.<sup>56</sup> Aggressive settlers in the marshland were always on the verge of offending and violating the rights of the Native Americans, opposing the interests of the Native Americans and the Empire. Thus the delicate question of the legality of land grants or de facto settlements also divided the Empire and the provincials. The British in the metropolis were willing to acknowledge a de facto control of parcel and purchase of land by the Native Americans. The pace of settlement, much to the displeasure of the provincials, was thus determined by the geopolitics of the Empire.<sup>57</sup>

Following 150 years of British colonial experience in North America, the Royal Proclamation of 1763 established a boundary line ‘for the present’—that is, without prejudice for future unilateral changes—dividing the territories of Native Americans and the European Colonies. It was the first legal demarcation of the British exclusive settlement and of domains reserved exclusively for the occupancy of the western Native American tribes.<sup>58</sup> These were now geographical legal spaces. But they retained their ethnocentric character: the geo-legal space created by the British, in which the Natives were cartographic outsiders, was to be governed by the imperial rule of law. The Native Americans were permitted certain self-government within their temporal spaces, although the Crown contemplated the possibility of imperial agents living among them.<sup>59</sup> The possibility of controlling the Native Americans from the inside was essential for the security of the Empire. However, the colonists did not respect the segregated spaces of the indigenous tribes and the Empire, and the Empire—concerned with other immediate interests than the Indigenous affairs after the peace with France—did not pursue an effective implementation of the Royal Proclamation.<sup>60</sup> In less than 15 years, the War of Independence had begun.

<sup>54</sup> J Tully, ‘Aboriginal Property and Western Theory: Recovering a Middle Ground’ (n 35) 164.

<sup>55</sup> Clinton, ‘The Proclamation of 1763’ (n 34) 331.

<sup>56</sup> In view of the dispute with France over control of trade with the Five Nations Iroquois Confederation, the Board of Trade reported to the Queen in 1709 that ‘it is absolutely necessary for the security of the Province of New York, and the rest of your Majesty’s Dominions in that part of America that the five Nations of Indians be preserved and maintained in their subjection to the Crown of Great Britain as formerly.’ Quoted by Clinton, ‘The Proclamation of 1763’ (n 34) 337.

<sup>57</sup> Hulsebosch, *Constituting Empire* (n 53) 100–101.

<sup>58</sup> Clinton, ‘The Proclamation of 1763’ (n 34) 356.

<sup>59</sup> At different moments this was proposed by the imperial agents in the province of New York, for example by William Johnson, and contemplated by the Board of Trade in a report to the Crown in 1764; see Clinton, ‘The Proclamation of 1763’ (n 34) 353, 358–59.

<sup>60</sup> *ibid* 360.



### Who Is Sovereign? The Re-Design of an Imperial Order and the Dawn of Modernity in the British Realm

The incoherent origins of the British Empire's presence in North America were a reflection of England's internal political strife. This was fuelled by the existence of two conflicting official versions of the constitutional theory of the British Empire: on the one hand, assertions of royal prerogative and, on the other, sovereign claims by the Parliament. Within the British Realm, the royal prerogative was evidently limited after the Glorious Revolution of 1688. However, this did not prevent the king from issuing royal proclamations for the colonies until the very last days before the revolution in North America (1775). Consciousness of a parliamentary sovereignty in the realm gradually increased during the eighteenth century. This was evident once the Crown became dependent on Parliament for its financial and military resources, prompting Parliament to exercise its rights to make law for the colonies.<sup>61</sup> But whether the law was presented as royal or parliamentary, it was imperial, and thus increasingly identified with a new liberal imperial order.

The outcome of the power struggle between King and Parliament would ultimately give Parliament absolute sovereignty over the British Empire. Among the strategies adopted by the Parliamentarians, characterising the common law as a law formed by a de-localised set of transcendental principles that nonetheless admitted change over time was especially favoured.<sup>62</sup> Common law was transformed into a barrier against absolutism and also into a lingua franca of the Empire.<sup>63</sup> Through their reasoning, lawyers would breathe life into and take custody of these fundamental laws.<sup>64</sup> In the ancient legal and religious tradition of England, the claims of an absolutist king were not only illegal but also against God.<sup>65</sup> While Philip II was crafting his godly cities for men in South America, the equally active Reformation was fragmenting this ideal in the northern European geography. Rather than entrenching power through cartographic presence, the British Empire inaugurated modernity and the mechanics of modern imperial expansion by unfolding law's scope.

From the reign of Henry VIII, the potential for legal challenges by external jurisdictions was nullified. Henry had denied the universal jurisdiction of the Pope, defying the summons to Rome because 'the King may lawfully disobey the citation.'<sup>66</sup> He instructed his agent in Rome to argue according to the principles of Roman law that no jurisdiction could be exercised over the king by an organ *extra territorium*: 'a king who does not recognise a superior is free from any outside

<sup>61</sup> E Moglen, *Settling the Law. Legal Development in Provincial New York* (unpublished dissertation, 1998) <http://moglen.law.columbia.edu/publications/stl.pdf> 270.

<sup>62</sup> See JGA Pocock, 'Burke and the Ancient Constitution – A Problem in the History of Ideas' (1960) 3 *Historical Journal* 125.

<sup>63</sup> Hulsebosch, *Constituting Empire* (n 53) 29.

<sup>64</sup> cf JGA Pocock, 'Burke and the Ancient Constitution', (n 62) 125.

<sup>65</sup> '*Ipse autem rex non debet esse sub homine, sed sub deo et sub lege, quia lex facit regem*', which is the formula of Bracton's conception of kingship. See E Lewis, 'King Above law? "Quod Principi Placuit" in Bracton' (1964) 39 *Speculum* 240, 265–67.

<sup>66</sup> W Ullmann, 'This Realm of England is an Empire' (1979) 30 *Journal of Ecclesiastical History*, 186–87.

jurisdiction.<sup>67</sup> The external battle against Rome was won, but the consequences of establishing independent jurisdiction and power over the political and the ecclesiastical were radical. By the mid-eighteenth century, the British Parliament acting in its legislative capacity had assumed the position of absolute sovereign.<sup>68</sup>

### Hobbes and the Introduction of Self-interest

Thomas Hobbes's recommendation in *Leviathan* was that governments should not only tame the clergy, but also control the religious expression of citizens through law. The sovereign's civil authority, the authority of the *Leviathan*, would rest in the citizens through the constitution of the commonwealth. According to Hobbes, the civil sovereign would be the authority in religious questions, and the authority in civil matters would, in turn, emanate from the citizens constituted in an assembly. In short, the complete jurisdiction over the divine is effectively transferred to the hands of the *Leviathan*:

I conclude therefore, that in all things not contrary to the Morall Law, (that is to say, to the Law of Nature,) all subjects are bound to obey that for divine law, which is declared to be so, by the Lawes of the Commonwealth.<sup>69</sup>

Ahead of his time, Hobbes proposed a liberal system of the rule of law that united the previously separate theological and civil jurisdictions. His text was nevertheless attuned to the new post-revolutionary legal and intellectual environment of Interregnum England (1648–60), which was marked by a firm belief in the subordination of ecclesiastical authority to state power and by the promotion of religious tolerance and religious scepticism.<sup>70</sup>

A key issue for the transformations envisaged by Hobbes was the re-definition of the 'relationship between the corporate church and the modernising English state.'<sup>71</sup> Another concern was who or what would occupy the position left by a universal divine experience. In post-Restoration England, the Anglican Church would be safely identified with the English nation and thus with her political organisation. However, the first attempts at building a cosmopolitan Empire in which religious diversity—if only Christian diversity—prevailed, suggested that a greater free rein of authority was at the disposal of the rulers of the Empire than to the rulers of England. Indeed, in the absence of an imperial Church, the British Empire during the seventeenth and eighteenth centuries embodied the ideal situation depicted in *Leviathan*, in which the temporal sphere dominates the

<sup>67</sup> *ibid* 187.

<sup>68</sup> Black, 'The Constitution of Empire' (n 47) 1210–11; Hulsebosch, *Constituting Empire* (n 53) 39.

<sup>69</sup> T Hobbes, E Curley (ed) *Leviathan* (Indianapolis, Hackett Publishing, 1994) 199.

<sup>70</sup> JR Collins, *The Allegiance of Thomas Hobbes* (Oxford, Oxford University Press, 2005) 48.

<sup>71</sup> *ibid* 205; A Orford, 'International law and the Making of the Modern State: Reflections on a Protestant Project' (2008) 3 *In-Spire: Journal of Law, Politics and Societies* 5.

70 *Mónica García-Salmones and Luis Eslava*

former spiritual jurisdictions.<sup>72</sup> Accordingly, the transcendental experience in legal formulae disappeared and law became a metaphysical, self-sustaining law.

By rejecting the role of religious faith in government, Hobbes introduced a new dogma to political philosophy: the credo of self-interest.<sup>73</sup> Following Hobbes, the notion appears as a foundational element in philosophical and political theory and in the practice of a commercial and secular Empire. Famously, Hobbes declared that a commonwealth is generated through a causality of interests. Building a commonwealth is the only way that human beings have to defend themselves against invasion by foreigners and attacks upon each other, and the only way to secure the production of industry and farming. The introduction of ‘that restraint upon themselves’, in which ‘we see’ human beings ‘live in Commonwealths’ is ‘the foresight of their own preservation, and of a more contented life thereby’.<sup>74</sup> To protect their interests, they ‘may reduce all their wills, by plurality of voices, unto one Will’.<sup>75</sup>

In a Hobbesian commonwealth, the reason to obey is protection. If protection ceases, the self-interest of the individual makes her free to turn to self-protection.<sup>76</sup> Contrary to the opinion of Aristotle, who sustained that there are two regimes, one for the advantage of the ruler and another to the advantage of the subjects, Hobbes claimed that ‘all the advantages and disadvantages of the regime itself are the same for ruler and subject alike and are shared by both of them.’<sup>77</sup> The ‘first and greatest advantage’ that Hobbes alludes to in this passage is ‘peace and defence, and it is the same for both’. In the specific question of taxes, to which tradition attributes the loss of the colonies in North America, Hobbes thinks that if the ruler extracts ‘only what the administration of government requires, *that is equally advantageous* for himself and the citizens for their common peace and defence.’<sup>78</sup> The psychology of self-interest made Hobbes personally prefer the monarchy because private and public interests more easily coincide in the person of the monarch than in the members of an assembly:

The King must be carefull in his politique person to procure the common interest, yet he is more, or no less carefull to procure the private good of himselfe, his family, kindred and friends; and for the most part, if the interest chance to crosse the private, he prefers the

<sup>72</sup> Strong explains that the Anglican Church maintained a strict partnership with the state until the constitutional revolution of 1828–32. By the 1840s, the ‘fundamental Episcopalian identity for an imperial Anglicanism was more readily achievable once the Church of England had adopted a new self-directing identity, initiated at the metropolitan centre, and taken up also in the colonial peripheries, which no longer looked to the old paradigm of a partnership with the state, which had prevailed until then.’ R Strong, *Anglicanism and the British Empire, c. 1700–1850* (Oxford, Oxford University Press, 2007) 290.

<sup>73</sup> About the position of Hobbes as part and leader of a tradition see A Cromartie, ‘Harringtonian Virtue: Harrington, Machiavelli, and the Method of the Moment’ (1998) 41 *The Historical Journal* 987.

<sup>74</sup> Hobbes, *Leviathan* (n 69) 117.

<sup>75</sup> *ibid* 120.

<sup>76</sup> *ibid* 153.

<sup>77</sup> S Moller Okin, ‘The Sovereign and His Counsellours: Hobbes’s Reevaluation of Parliament’ (1982) 10 *Political Theory* 49, 69.

<sup>78</sup> T Hobbes, R Tuck (ed) and M Silverthorne (ed) *On the Citizen – Cambridge Texts in the History of Political Thought* (Cambridge, Cambridge University Press, 2007) 116–17 (*emphasis added*).

private: for the Passions of men are commonly more potent than their Reason. From whence it follows that where the publique and private interest are most closely united, there is the publique most advanced.<sup>79</sup>

What is remarkable about this passage is Hobbes' substitution of theological language by a language of interests.

By the mid-eighteenth century, the rule of law in the British Empire had already acquired one notably modern characteristic: representation was neither derived from the divine body of the king nor was it any longer conceived along traditional geographical principles. The new law was based in the abstract representation assumed to exist through de facto authority and the universality of self-interest.<sup>80</sup> Its imperial dimension was not based on the peoples of the different territories, although England and its colonies did possess representative assemblies in the traditional sense. Rather, the representation of the Empire increasingly adopted the model proposed in the *Leviathan*:<sup>81</sup> a covenant by which the English citizens of the Empire had entered the polity of the Empire for reasons of self-interest.<sup>82</sup> In this way, the law was based on the authority of the sovereign and sovereignty was based on the law of the Empire. In spite of all the elaborate theories about the origin of the commonwealth by Hobbes and subsequent liberals, the subjects and society of this model have no *telos*. The earlier Christian and humanist language of perfection was replaced by an obscure secular version of transcendental order. Self-interest replaced the need to materialise perfection in spatial terms. Self-interest became the credo of a new civil religion and the new intangible, yet resilient, universal for the Empire.

In the year of *Leviathan's* publication, the laws that became the foundation of the commercial identity of the Empire were passed. The Navigation Acts, which aimed to control the Empire and its commerce, contained protective measures for fostering English shipping during times of peace: all the commerce of the colonies was required to pass through England and take place solely on English ships—a system that lasted until the nineteenth century.<sup>83</sup> The issue was no longer sovereignty of the seas, but

<sup>79</sup> Hobbes, *Leviathan* (n 69) 131; S Moller Okin, 'The Sovereign and His Counsellours: Hobbes's Reevaluation of Parliament' (1982) 10 *Political Theory* 49, 51–53. Like other supporters of popular rights in the 17th century, Hobbes did not claim sovereignty for the Parliament—something that, paradoxically, demonstrates signs of modernity in his doctrine. Cf J Neville Figgis, 'Political Thought in the Sixteenth Century', in AW Ward, GW Prothero and S Leathes (eds), *The Wars of Religion* (Cambridge, Cambridge University Press, 1904) 748–49.

<sup>80</sup> Q Skinner, 'Hobbes on Representation' (2005) 13 *European Journal of Philosophy* 155.

<sup>81</sup> Black pinpoints the shift in theory through which the Parliament became supreme authority to the mid-eighteenth century, while Goebel, like many others, signals the Glorious Revolution of 1688, and some others to the Commonwealth Act of 1649. Black, 'The Constitution of Empire' (n 47) 1210–11. What we have tried to show here is that the seed was already planted by 1651, with the modern notion of law offered in the *Leviathan* and even in some of Hobbes's previous works.

<sup>82</sup> A fact, which might explain the loss of the North American colonies, since as Moglen explains, they and the Empire had strikingly opposed interests. See E Moglen, *Settling the Law. Legal Development in Provincial New York* (n 46).

<sup>83</sup> RG Marsden, 'Early Prize Jurisdiction and Prize Law in England' (1911) 26 *The English Historical Review* 34, 39.

72 *Mónica García-Salmones and Luis Eslava*

monopoly of trade and effective policing of the sea.<sup>84</sup> What is remarkable is that the English Parliament inaugurated a legal system for all the territories of the Empire designed for times of peace with enforcement capability to prosecute offenders of any nation in violation of the Acts. Self-interest and absolute authority over divine and civil jurisdictions, embodied in trade and independence, provided the new coordinates for the order of the Empire.

## REFLECTIONS ON EMPIRE, PUBLIC ORDER AND THE SACRED

### Humanism, Empire and International Law

An analysis of the legal and political projects of colonisation in North and South America reveals a desire by European sovereigns to create a new public order in the new continent. As is characteristic of imperial projects, both empires were compelled by a redemptive idea.<sup>85</sup> In the complicated terrain of faith and governmentality in the sixteenth and seventeenth centuries, Spain and England each played a crucial role in the inauguration of modernity. For them, the New World was the revolutionary extension of the Old World's territory, a place where it was possible to implement their political projects and to create the foundations of an international law that made sense of their world views and their ideas of order.<sup>86</sup> In both the North and South, robbery, pillage, slavery and abuses of indigenous people and colonists alike were accompanied by the ideal of starting anew, of a governmental system that must improve on the existing systems in Spain and England. These new spaces were a great studio in which to experiment with new political ideas: in the South, godly cities for men; in the North, rational jurisdictions of liberty and commerce. The desire for renewal that inflamed European minds is evident in the way in which the colonisation of the New World took place.

Although material goods typically flowed one-way from the colonies to Spain and England, the empires perceived a transaction to be taking place. In their view, the order brought to the colonial reality was a gift: precious knowledge that had been acquired painfully at home. Spain, in the midst of the counter-reformation, aimed to create godly cities of men. England, after bitter struggles for power between rival political and religious factions, transmitted to America the revolutionary ideal that worldly affairs should take precedence over ecclesiastical and religious matters.

In both Spanish and British colonies, subjects participating in the new imperial order were obliged to convert. The indigenous people in the South and the Spanish imperial subjects that administered the colonies required a conversion to enter the

<sup>84</sup> WG Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden, Nomos, 1988) 343–45. See also, TC Wade, 'The Roll De Superioritate Maris Angliae. The Foundations of the Stewart Claim to the Sovereignty of the Sea' (1921–1922) 2 *British Yearbook of International Law* 99.

<sup>85</sup> Jouannet, 'Universalism and Imperialism' (n 11) 383.

<sup>86</sup> See on the role of colonies in the imperial pursue of order, M Foucault, 'Des Espaces Autres' (1984) *Architecture, Mouvement, Continuité* 46 [www.foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html](http://www.foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html).

city. In the North, the indigenous people had to give up everything they had previously owned—beliefs, culture and material goods—if they wanted to participate in the life of the British colony. British colonists who entered the new order of the Empire also had to convert to the new liberalism and commerce of the government. However, the necessity of conversion represents a weakness of the imperial orders, and of the law produced by them. The requirement for conversion makes it apparent that neither empire dominated the law. Neither the Spanish nor the British empires were masters of the law, in the sense that they were unable to craft a superior law that would accept the plurality of their imperial subjects.

The Atlantic slave trade, an issue which connected the activities of the English and the Spanish from the mid-1500s,<sup>87</sup> exemplifies the theoretical tensions and internal ambiguities of both imperial projects; or to put it in another way, the public order they created was sustained to a large extent by power, rather than by internal coherence. The Spanish Empire believed that order could be created through the design and construction of theological-legal spaces. Even though they were imagined as utopias, these spaces were also mundane arrangements to organise the economy that lubricated the Empire. The desire by the new English order to become absolute sovereign over the secular and the divine produced a liberal Empire under the rule of law. The rise of the English Parliament in the seventeenth century to sovereign of the Empire offered influential social groups the possibility of preserving their economic interests, and to promote free trade, even in human beings. For this reason, the Atlantic slave trade escalated dramatically in the early eighteenth century.<sup>88</sup> The Spanish, for whom the slave trade conditioned to a great extent the pursuit of the Empire, were actively engaged in this commercial enterprise with the English.<sup>89</sup> In dark contrast to the ideal of the imperial cities of God and to the pursuit of human flourishing through representation without subjection to a superior being, the slave trade demonstrates that both the Spanish and the British Empire denied the practicability of their own legal orders.

Despite the theological tenor of the Spanish project, the British and the Spanish empires' expansive territorial ventures heralded the great anthropocentric shift that occurred in the political philosophy of modern Europe. The antipathy towards the notion of considering God as an agent of human history is made explicit in the secularisation programme pursued by the British Empire.<sup>90</sup> The absorption of the religious into the civil jurisdiction at the beginning of the British Empire eventually confined the religious to the private conscience, and erased all references to the sacred from the public sphere. As we have seen, there was some hesitancy about the way in which sovereignty would be implemented during the shift of authority's locus from King to Parliament. From the outset, however, the British clearly

<sup>87</sup> See generally, JA Rawley and SD Behrendt, *The Transatlantic Slave Trade: A History* (Lincoln, University of Nebraska Press, 2005) 55.

<sup>88</sup> See especially, WA Pettigrew, 'Parliament and the Escalation of the Slave Trade, 1690–1714' (2007) 26 *Parliamentary History* 12.

<sup>89</sup> Rawley and Behrendt, *The Transatlantic Slave Trade* (n 87) 5.

<sup>90</sup> C Taylor, *A Secular Age* (Cambridge MA, Belknap Press of Harvard University Press, 2007) 270.

favoured a secular imperial public order. In the Spanish conquest, the rejection of divine agency was more subtle, but nonetheless apparent in the planners' aim to supplant God's role.

The colonisation of the New World demonstrates that both empires drew strength from humanism. The notion of humanism invoked here embraces both transcendent humanism, which transferred the power of God to human beings as divine agents that would construct terrestrial cities of God, and immanent humanism that adhered to the new philosophy of self-interested universalism.<sup>91</sup> This does not mean that humanism is a bad thing, or that humanism is equivalent to empire, but rather that the two imperial legal expansions examined in this article can be identified as humanist projects. As argued by Koskenniemi, the most imperialist aspect of international law is its humanist civilising mission.<sup>92</sup>

In a recent article based on a psychoanalytical interpretation of international law, Jouannet traces the long tradition of imperialist search for a universal in international law to the common view that locates human nature between passion and reason.<sup>93</sup> This dualist interpretational grid of human nature has been a constant in Western philosophy dating back to Plato's commitment to the attainment of our highest state in a condition beyond the body, which is viewed as a hindrance that must be controlled and disciplined in this life.<sup>94</sup> Drawing on the work of Nathaniel Berman on the relationship of international law and the psychoanalytical study of human nature, Jouannet argues that the constitutive ambivalence of human identity is mirrored in the ways that international law has sought to mask the hegemonic passions latent in actions taken by the League of Nations and the United Nations: from Upper Silesia to Saarland, and more recently in places such as Kosovo, Palestine and Bosnia. On the other hand, the rational has more often appeared in the form of the authoritarian approach to a crisis, like the recent war of Iraq, with a claim to the objectivity of the rules of international law and the legal discourse deployed during the invasion.<sup>95</sup> Jouannet's analysis reflects important imperial tendencies of the past and current searches for order in international law, some of which we have identified in this paper.

### A Global Public Order?

Teitel describes the increasing constructive international rule of law, which she identifies with the merger of the laws of war and human rights legal systems, as 'a

<sup>91</sup> *cf* with M Hardt and A Negri, *Empire* (Cambridge MA, Harvard University Press, 2000) 91–92.

<sup>92</sup> See for example, M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge, Cambridge University Press, 2002) and Jouannet, 'Universalism and Imperialism' (n 11) 403.

<sup>93</sup> Jouannet, 'Universalism and Imperialism' (n 11) 403–407.

<sup>94</sup> Taylor, *A Secular Age* (n 90) 276. See of Plato's idealism and dualism, H Kelsen, 'Platonic Justice' (1938) 48 *Ethics* 367; For an explanation of Kelsen's own legal theory in Platonic philosophy, see G Edel, 'Kantianismus oder Platonismus? Hypothesis als Grundbegriff der Philosophie Cohens' (1991) 1/2 *Il Camochiale. Revista di studi filosofici* 59.

<sup>95</sup> Jouannet, 'Universalism and Imperialism' (n 11) 403–405. See also, N Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework' (1992) 33 *Harvard International Law Journal* 353.

shift of paradigm in international law'.<sup>96</sup> She claims that a depoliticised legalist language of rights and wrongs, which has gradually supplanted the previous discourse centred on state interests, consensus and deliberation, has been effectively extended by new bodies of the judiciary type through penetration of existing legal sovereign entities. This phenomenon can be compared with the situation under imperial law, when the law of nations understood itself as extraterritorial law, and assumed that it was capable of influencing or cancelling local politics.

Beyond the recurrent appearance of hegemonic politics in the international order, there have been new sources of inspiration to rethink the concept of international law. Previous notions of the international legal system have shown how it is insufficient, unless it can be renovated by attempting to include deliberative democracy as a primary value in international governance. The argument that international law has moved beyond pure bilateralism is convincing.<sup>97</sup> In this context, enhancing the legitimacy of international law means, for example, the strengthening of national parliaments' influence over foreign relations, an area traditionally monopolised by heads of government.<sup>98</sup> These arguments make clear that a public order, which aims to be global, and therefore not imperialistic, must incorporate a methodology and an ideology of democratic participation.

In an era of globalisation, the aspiration for a public global order remains—despite doctrinal differences—an important common goal. We argue that the re-thinking of international law and of a global public order should not seek to revive redemptive imperial plans, but instead acknowledge the proliferation of pseudo-juridical relations on a global scale, all of them interacting in a state of quasi-anarchy. In the absence of a purposive common good in international society, with the political division of the world in more than 200 states, the very notion of a global public order may very well function as a *common* good.<sup>99</sup> The attribute of commonness in this good is neither irrelevant nor incidental. The notion of commonness contains also an ideal of tolerance, of accepting something as common and consenting to something that may offend individual interests.<sup>100</sup> In short, it means adopting the opposite attitude that the empires took in their creation of public order. The imperial position in the production of order was to silence (through action or omission) the dissenting voice. Today, it is hard to imagine even the skeleton of a global public order without a spirit of tolerance for diversity.

Legal efficiency should also give way to an attitude of tolerance to what is idiosyncratic in the foreign. Von Bogdandy has noted that to postulate utopian ideas—that is, laws without a locus in space—as legal principles, harms the

<sup>96</sup> See generally, RG Teitel, 'Humanity's Law: Rule of Law for the New Global Politics' (2002) 35 *Cornell International Law Journal* 355.

<sup>97</sup> B Kingsbury, *The International Legal Order* (NYU Law School, 2003, Public Law Research Paper No 01-04; IILJ Working Paper No 2003/1) <http://ssrn.com/abstract=692626> or DOI: 10.2139/ssrn.692626.

<sup>98</sup> Wolfrum and Röben, *Legitimacy in International Law* (n 4) 23.

<sup>99</sup> J Klabbers, 'Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law' (2008) 5 *No Foundations. Journal of Extreme Legal Positivism* 84, 102 para 6. [www.helsinki.fi/nof](http://www.helsinki.fi/nof). In this regard, Wolfrum considers that international law has developed its own system of values: Wolfrum and Röben, *Legitimacy in International Law* (n 4) 24.

<sup>100</sup> JHH Weiler, *Una Europa Cristiana* (Madrid, Ediciones Encuentro 2003) 136.



normativity of law.<sup>101</sup> To put it differently, tolerance of non-Western, non-secular principles that have a *topos* in large territories and communities would promote the strength of international normativity. As we have seen, the imposition of utopian ideals by force and the destruction of indigenous principle within colonised territories was the way for the British and Spanish Empires to protect their validity of law. In this regard, current critiques of the anti-pluralism of a supposedly international order are meaningful and rich: at present, there is a risk that important pieces of international legislation will remain insignificant speeches to the greater part of the world's population, which does not share the liberal values and aspirations that are promoted by the prevailing international order.<sup>102</sup> Along the same vein, there is an urgent need in global jurisprudence to give greater weight and consideration to international affairs that do not involve one of the superpowers: commonness means also common interest.<sup>103</sup>

Although there are several territorial international unions of states with an important level of interaction between their members, such as the African Union, the Commonwealth and the Organization of American States, there is also reason to encourage the study of *publicness* in the European Union experience. The European Union has produced a wealth of legal principles concerning the relationship between the Union and its member states, which could enrich the core of a global public order in international law. Moreover the European Union has often managed to organise and channel public authority over private interests and powers.<sup>104</sup> However, it is suggested here that in two particular important features of a global public order, inspiration should be sought in other places. First, there should be a serious interrogation about the role of the sacred in the European public sphere, and secondly about the notion of reason on which the European Union normative tradition is based. In his exploratory essay *Un'Europa Cristiana*, Weiler highlights the importance of learning the spirit of tolerance, which was conspicuously absent in 'the imperial constitutional politics' that surrounded the drafting of the treaty for a Constitution of Europe.<sup>105</sup> An important reason for this is that in the European constitutional tradition, the sacred has been judged by modern reason to lie outside rational discourse and therefore relegated outside the public sphere.<sup>106</sup> The key expression in this latter sentence is 'modern reason', whose genesis lies in the consolidation of the Spanish and British Empires. We suggest that a broader notion of reason than the one offered by modernity may be

<sup>101</sup> A von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 *German Law Journal* 1909, 1913.

<sup>102</sup> See H Charlesworth, 'The Challenges of Human Rights for Religious Traditions' in MW Janis and C Evans (eds), *Religion and International Law* (The Hague, Nijhoff, 1999).

<sup>103</sup> cf, eg, the wealth of scholarly literature regarding the International Court of Justice's decisions on *Military and Paramilitary Activities and Oil Platform* cases, where the United States was a party, to the scant attention received by *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, B Kingsbury and J Weiler, 'Preface: Studying the *Armed Activities* Decision' (2008) 40 *New York University Journal of International Law and Politics* 2.

<sup>104</sup> von Bogdandy, 'General Principles of International Public Authority' (n 101) 1909, 1916.

<sup>105</sup> Weiler, *Una Europa Cristiana* (n 100) 50.

<sup>106</sup> JHH Weiler, 'La tradición judeo-cristiana entre fe y libertad' in J Ratzinger et al *Dios salve la razón* (n 1) 196.

useful for the consideration of a global public order. Modern reason might at this juncture make room for a reason that is able to deal with the transcendental, a sacred order that does not cancel difference, diversity or dissent. In legal philosophy, modern reason has attempted to substitute the sacred by ideals embodied in reason, passions, economy and humanity.<sup>107</sup> Each of these has been integrated in previous paradigms of international public law, even though each of them arises periodically in constant struggle with each other.<sup>108</sup> A possible way to avoid legal absolutism is to admit a notion of reason that is free from the need to worship the inanimate.

The global public sphere would be better represented by a broader conception of publicness in which the sacred is possible. This can occur only when the public order does not aim to integrate the civil and the theological jurisdictions into one. The experiences of the Spanish and British Empires demonstrate that integration results in one of the two jurisdictions thriving at the expense of the other: the English and the Spanish took an either/or position on this question, and used religion instrumentally as a legitimising or delegitimising factor of previous legal orders. In both cases, imperial subjects were required to convert in an un-free total acceptance or total rejection of the sacred in the public sphere. It is doubtful that similar imperialistic positions can be maintained today. Only a global public order that is open to the sacred (perhaps through dialogue as endless contingency) has resonances of what we would accept as truly democratic.

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<sup>107</sup> J Milbank, 'Geopolitical Theology. Economy Religion and Empire after 9/11' 27, [www.theologyphilosophycentre.co.uk/papers.php](http://www.theologyphilosophycentre.co.uk/papers.php).

<sup>108</sup> Another way to put this idea is to refer to the fragmentation of International Law, see ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission* (United Nations, A/CN.4/L.682, 2006).

78 *Mónica García-Salmones and Luis Eslava*

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80 *Mónica García-Salmones and Luis Eslava*

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