**Rights of Conquest, Discovery and Occupation, and the Freedom of the Seas and the Genealogy of Natural Resource Injustice**

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Abstract

This paper analyzes the origins of three international law principles – the right of conquest, the right of discovery and occupation, and the freedom of the seas. I argue that each of these rights was established as an international law rule for the purpose of facilitating the colonization of distant peoples, their territories and lands, and for the purpose of the accumulation of their natural resources. The paper discusses how these rights were justified, what set of exclusive powers and immunities they conferred, and how they gave rise to three distinct modern legal regimes of rights over natural space and its resources – territorial sovereignty, private property rights to foreign land, and global maritime commons. While I expose each of these international law principles' morally arbitrary origins reflecting specific conditions and aims of a particular colonial project, I also argue that the regimes of rights over natural resources they institutionalized are convergent in the sense that they enabled a quintessentially unjust appropriation and exploitation of natural resources. The article also points to ways in which the logic and the operation of these regimes continue to shape the unjust use of natural resources to this day.

Key Words

Conquest, settlement, free sea, natural resources, injustice

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This paper focuses on the colonial foundations of three international law principles – the right of conquest, the right of discovery and occupation, and the freedom of the seas. The paper shows how these three distinct rights originated in particular episodes of the imperial and commercial expansion of European states and their colonization of distant peoples and the exploitation and accumulation of natural resources on their territories. The paper discusses how these rights were justified, what set of exclusive powers and immunities they conferred, and how they gave rise to three distinct modern legal regimes of rights over natural space and its resources – territorial sovereignty, private property rights to land, and global maritime commons.

Tracing the origins of these founding international law principles, I emphasize that each of these rights was invented and designed to justify a specific colonial project and that the differences between them reflect efforts to manage the competition between colonizing powers as well as to regulate particular socio-economic conditions and demands of the colonial exploitation of resources. While I expose each of these international law principles' contingent and morally arbitrary origins, I also argue that they all institutionalized a system of quintessentially unjust appropriation and exploitation of natural resources: by imposing sovereign territory through war, the right of conquest turned all material and natural resources within the conquered territory into an exclusive property of the sovereign. The right of discovery and occupation authorized settlers to establish permanent property rights to land through various forms of dispossession of the indigenous land. The freedom of the seas principle inaugurated a liberal regime of free and unlimited use of global maritime commons which facilitated the expansion of a system of global trade based on inequitable trading relationships and coercive monopolies.

Beyond the further contribution to understanding of the ways in which the international law was constituted through colonial encounters of the 16$^{th}$ and 17$^{th}$ centuries, this article aims to suggest that these early modern international law principles arose as regulatory and

justificatory frameworks for the appropriation of natural resources and were followed by the imposition of property regimes which enabled, with varying degrees, the perpetration of several fundamental injustices with respect to nature and its resources: the injustice of violence and its giving rise to legal rights to natural resources, the injustice of the exclusion from the access to basic natural resources or inequality and discrimination in the distribution of opportunities, benefits, and burdens related to the use of natural resources, the injustice of using natural resources for the exclusive benefit of the sovereign and the perpetration of an unjust rule, and the injustice of the unsustainable use of global commons by a few. To lay the groundwork for a critical genealogical analysis of these kinds of natural resource injustice is an underlying aspiration of this paper.

## 1. The right of conquest

The right to impose the political rule over a territory and its inhabitants solely in virtue of war and military victory and regardless of justice or injustice of this violent imposition is one of the oldest customary rules of international relations. As a rule of international law – a rule which fundamentally influenced the scope of modern territorial sovereignty as both a supreme jurisdictional power over the people and an ownership claim to territory and its resources – the right of conquest has to be traced to the early days of the European colonization in the Age of Discovery. Granted by the Pope for the purpose of including infidels into the realm of Christianity and employed to accumulate natural resources in distant territories for the exclusive benefit of the sovereign, the right of conquest took its distinct shape during the Spanish conquest of the Americas. The contingencies of this colonial project and the reflections upon them framed the right of conquest and its scope and also determined the nature and the scope of modern territorial sovereignty, especially with regard to natural resources.

### 1.1. Spanish conquest of the New World – the aims and the justification

At the outset of the 16$^{th}$ century, Spain was an absolutist monarchy seeking to seize external resources to fund wars, consolidate power, and solve problems of economic development while attempting to exclude other European powers from the access to these resources. The conquest of the Americas was inaugurated by Columbus' voyage to India which, like all previous voyages of European explorers and merchants, grew out of the search for routes to Asia, the place of imaginary wealth, and the attempt to secure a direct and exclusive access to gold, spices, and silk whose supply had hitherto been dominated by the Arab traders and the merchants of Venice and Genoa.

The Spanish conquest of the Americas was authorized by the papal bull *Inter Caetera* (1493) which granted Spain an exclusive right of conquest of territories not in possession of another Christian prince west and south of a pole-to-pole line drawn at a hundred leagues west of the Azores and Cape Verde islands. According to this grant, derived from the Pope's universal claim to authority as the Vicar of Christ over all things temporal and hence his power to grant Christian monarchs the right to acquire territory of heathens and infidels, discovered territories were available for acquisition not because they were unoccupied (*terra nullius*) but because infidels who lived in them were to become included in the realm of universal jurisdiction of the Church. The means by which the dominion over them was to be established was the military conquest and the extinguishment of their kingdoms. Owing to the divine sanction and the papal jurisdiction, the conquest and the ensuing imperial domination were formally justified by the extension of Christianity into heathen worlds.

As Sharon Korman emphasizes, the papal donations did not primarily confer the right of sovereignty over new territories but the right to take steps necessary to acquire lands discovered, by conquest or cession. In itself, the grant thus legitimized a war of conquest.[1] The scope and justification of the war of conquest was articulated in the Spanish Royal Proclamation known as *Requerimiento* which had to be read in full upon the arrival in the New World and translated to the natives. The document required the acceptance by those who hear it to acknowledge the universal jurisdiction of the Church, the authority of the Pope, and the sovereignty of the king, and to allow the Christian faith to be preached to them. It left the

[1] Most explicitly, this is reflected in the language of the Bull of the Pope Nicholas V (1452) which accorded to Alphonse of Portugal the right 'to invade, conquer, storm, attack and subjugate' and reduce into perpetual servitude the Saracens, pagans and other enemies of Christ. Pope Alexander VI's Bull *Inter Caetera* likewise envisaged warfare as the means of acquiring that dominion, in order that barbarian nations be subdued and brought under Catholic faith. S. Korman, *The Right of Conquest* (1996), at 44-47.

indigenous inhabitants with two alternatives – they had to accept these authorities and their powers or else suffer forceful subjugation, enslavement, and the destruction or confiscation of their property as a punishment for the resistance which was considered to be an unlawful violation of the right of conquest and hence a just cause of war.[2]

The Spanish conquest of the indigenous polities occurred as a military campaign with no limits imposed on it. It aimed at the total extinguishment of the local sovereigns as well as at the destruction of public and private property and pillaging of resources. The lack of limits concerning the war of conquest, as Korman reminds, reflected the dominant creed of the Christian Church that infidelity is a sin to be punished with fire and fagot in this world and eternal suffering in the afterlife. It also reflected an accepted view of the time that laws of the war are brutal and indiscriminate in character, with no notion of war crimes, enabling killing of civilians, destroying their property, and killing and enslaving prisoners of war.[3] On the other hand, the scope and the content of the right of conquest were shaped by the aims of the Spanish colonial project to accumulate valuable natural resources of foreign territories for an exclusive benefit of the sovereign whose main economic policy had been to secure and enhance wealth by coercive means.

During the Spanish conquest, characterized by most historians as one of the most appalling chapters in the history of human brutality, millions of indigenous people had died and their ancient cultures perished without a trace while the flood of pillaged gold and silver enriched the Spanish treasury.[4] The controversial nature of the conquest and a great need to publicly justify it had been reflected in the work of Francisco de Vitoria, a Spanish jurist, theologian, and a theorist of emerging international law. Vitoria denied the universal imperial jurisdiction of the Pope as a legitimizing framework for conquest of heathen worlds. However, he did not question the right to wage a 'just war' against indigenous populations. Indians, he insisted, possessed reason and showed the ability to have true *imperium* and *dominium* – sovereignty and

[2] As Hanke shows, this document was read to trees and sleeping villages or from the deck of the ship as Spaniards prepared to send enslaving expeditions whose leaders would shout the traditional Castilian war cry 'Santiago' rather than words of Requirement. L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (1949), at 34.

[3] See Korman, *supra* note 1, at 29-30, 51.

[4] A. Pagden, *Lords of All the World. Ideologies of Empire in Spain, Britain and France c.1500 - c.1800* (1995), at 63.

property. Therefore, they belonged to the realm of universal natural law and were bound by *ius gentium*, the law of nations.[5]

The core precept of the law of nations, according to Vitoria, was the right to travel and sojourn in another country and, correspondingly, the duty of all peoples to welcome traders and travelers. If these rights were violated, the polities which denied them were to be considered enemies and the rights of a just war could be enforced against them. Hence, when American aborigines were unwilling to accept the Spanish rule which purportedly did not aim at interfering with their peace and well-being, the Spanish were justified in making war on the Indians, despoiling them of their goods, reducing them to captivity, deposing their lords and setting up new ones. The universal *ius gentium* Vitoria invoked, as Anghie points out, represented an idealized version of a particular cultural and economic practice of the Europeans – the trade, or more precisely, taking away resources of which there are plenty and which are not used and owned according to standards of European civilization. Under a newly emerging law of nations, the resistance against an imperial incursion thus became a legitimate cause of war and the military conquest of the 'backward' people the ultimate prerogative of the sovereign.[6]

Vitoria's reflections on a just war contributed to the establishment of the right of conquest as one of the first principles of nascent international law which was forged out of the attempt to create a legal system that could regulate colonial encounters and confrontations.[7] By providing a natural law justification for a forceful imposition of the European system of commerce and social, economic, and political norms, Vitoria also anticipated the central justification for colonization in the later centuries. The core of this justification is the view that cultural and economic inferiority and backwardness and the failure to meet standards of western civilization permit forcible imposition of a foreign rule. As Craven pointed out, Vitoria laid foundation of an alternative imperial vision emphasizing the commercial control of

[5] F. de Vitoria, 'On the American Indians', in A. Pagden and J. Lawrence (eds.), *Vitoria: Political Writings* (1991).
[6] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 17-20.
[7] Ibid., at 3.

resources through trade, contractual rights, and private property rather than relying on territorial expansions of sovereignty by war.[8]

In the 16th century's Spain, the sovereign authority and territorial possession, *imperium* and *dominium*, remained inextricably intertwined. As most absolutist monarchies of the time, Spain can be characterized by what Benno Teschke has called 'proprietary kingship' – a heavily centralized and personalized rule by a monarch representing a dynasty and based on a strongly proprietary relationship to the royal realm which had been regarded as the monarch's personal property. The proprietary kingship's rule, Teschke argues, was dictated by the necessity to sustain the absolutist rule in the context of feudal social and economic relations and low economic growth and was therefore driven by the logic of the accumulation of resources and wealth by coercive political means for the exclusive benefit of the sovereign. It was this political logic of the coercive political accumulation which shaped both domestic and foreign policies the early modern absolutist sovereignty and which accounts for the geopolitical strategy of territorial aggrandizement and overseas empire-building for the purpose of securing a direct access to valuable natural resources.[9]

### 1.2. Right of conquest and the origin of sovereignty over natural resources

These socio-political conditions – Spain being an accumulating dynastic state, with feudal social and economic property relations and geopolitical strategies of territorial aggrandizement and resource accumulation – shaped the form and the scope of the right of conquest. What is more, I argue, these conditions also account for the form and the scope of sovereignty imposed on the conquered territory in its aftermath. To some extent, Spanish imperial sovereignty can be conceptualized as analogous to sovereignty exercised at home – absolutist, with little to no constitutional checks and balances, relying economically on the accumulation of surplus essentially by means of political coercion. However, in virtue of the conquest and its particular aim to seize valuable natural resources, the imperial sovereignty manifested an enhanced

[8] M. Craven, 'Colonialism and Domination', in B. Fassbender et al (eds.), *Oxford Handbook of the History of International Law* (2012) 862, at 869.
[9] B. Teschke, 'Theorizing the Westphalian System of States: International Relations from Absolutism to Capitalism', (2002) 8 *European Journal of International Relations* 5, at 7.

proprietary character. It involved, first and foremost, an exclusive proprietary claim to the realm and its natural and, derivatively, human resources.

With native sovereignty and property relations extinguished, indigenous people became vassals of the crown with a very restricted set of rights and immunities. The Spanish embraced a system of an extensive subjugation and exploitation of the indigenous people, culturally via forceful Christianization and economically via systems of forced labor and tribute paid in the form of valuable commodities (cochineal, indigo, cocoa).[10] The Crown claimed subsoil rights to minerals and all potentially valuable natural resources. When large silver deposits were discovered in northern Mexico and the Andes, the mining economy developed based on the system of forced labor and restrictive and exploitative mercantilist economic policies, all aimed at maximizing the colony's economic utility to the mother country.[11] Spanish treasury became heavily dependent on its overseas' extractive industry revenues and used them almost exclusively to finance wars and other military expenditures.[12]

The creation of the Spanish empire can quite unambiguously be considered as the first paradigmatic regime of territorial sovereignty over natural resources. Here are its most fundamental features: in virtue of the right of conquest, the sovereign title to territory and the right to rule within it originates in violence and the destruction of rights of others. Consequently, the territory emerges as a purely arbitrary circumscription of the geographic space, cutting across human societies and environmental systems. The supreme power established within a territory claims authority to make law and, more importantly, to appropriate its natural resources for its own exclusive benefit and the ability to sustain and expand sovereignty. Both jurisdictional rights to rule over the people and ownership rights to resources constitute two fundamental facets of the imperial territorial sovereignty.[13]

[10] Slavery was officially prohibited in the Spanish Empire by a decree from 1542.
[11] The policies included the state monopoly on shipping and trade, strict control of import of silver and agricultural commodities exclusively to the imperial metropole, export of high priced manufactured goods to the colony, tariffs on imports to the colony from other countries, and control of migration. D. Hurley, 'Spanish Colonial Economies: An Overview of the Economy of the Viceroyalty of Peru, 1542-1600', (2011) 1 *Ezra's Archives* 1.
[12] Between 1503 and 1660 more than seven million pounds of silver reached Seville from America. The Crown received about 40% of this amount, either in settlement of American taxes or in payment of the royal fifth levied on all silver production. E. R. Wolf, *Europe and the People Without History* (1982), at 139.
[13] Even if territorial rule was imperfectly legally integrated, the territory had indeed been considered as a proprietary mass to which the sovereign could lay an exclusive property claim. Teschke, *supra* note 9, at 24.

Imperial sovereignty thus emerges as a quintessential property regime with respect to territory and its resources, structurally equivalent to a liberal private property regime with its typical features – extensive bundle of powers over the property, full autonomy to use a good in a narrow self-interest, the right to permissibly exclude others from the use, and the unlimited right to use and control a good including the right to sell or otherwise gain income from it.[14] These features also make explicit the most fundamental injustices linked to the use of nature in the context of this legal-political regime. Paraphrasing Marx, the first injustice can quite unambiguously be called the injustice of the primitive accumulation of natural resources. It consists in violence and the destruction of sovereign and property rights of indigenous populations and their bestowing a legal title to territory and its resources.[15] The second injustice can be called the political injustice as it follows from the use of natural resources for the exclusive benefit of the sovereign and the perpetration of an unjust rule. Last but not least, there is the injustice of systematic exclusion and inequality in the distribution of benefits arising from the use of natural resources, in colonial economies exacerbated by radical structural inequality and systematic exclusion based on race, ethnicity, and religion.[16]

### 1.3. The material history of territorial sovereignty

In the centuries after the Age of Discovery, Europeans increasingly invoked the language of trade, contract, civilization, and protection to justify their domination and exploitation of the distant places. Discovery, occupation, and cession have become dominant legal doctrines, the latter two the most potent as legal arguments.[17] However, military conquest remained a frequently employed and an effective method of securing and maintaining territorial titles. In the 17th century, territorial sovereignty over distant territories was imposed by conquest in several other instances, for example by the French monarchy in the West Indies. In other cases,

[14] John Christman has likened 'private liberal ownership' to 'sovereignty model of ownership'. J. Christman, *The Myth of Property. Toward an Egalitarian Theory of Ownership* (1994), at 7.
[15] K. Marx, *Capital*, Volume I, (1954), at 667.
[16] Colonialism represents a paradigmatic example of what Iris Marion Young termed 'structural injustice' – a system which puts large categories of persons under domination or deprivation. I. M. Young, 'Responsibility and Global Justice: a social connection model', (2006) 23 *Social Philosophy and Policy* 102, at 114.
[17] A. Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory', in B. Fassbender et al. (eds.), *Oxford Handbook of the History of International Law* (2012) 841, at 841.

conquest was employed as a way of protecting colonial titles established in virtue of the right of discovery and occupation or as a sanction for the breach of contractual rights to property or trade or treaties of cession or protection – for example the Dutch conquest of spice producing islands in the East Indies or the British conquest of India.[18]

International law recognized the right of conquest as a valid title to territory until Second World War, by recognizing the right to a just war on the one hand, and by accepting the fact of imposed sovereignty arising from a military victory and granting the victorious entity all benefits of sovereignty. The justifications of the right of conquest advanced by the classical writers on international law – Grotius, Vattel and Puffendorf – invariably emphasized that the recognition of the right of conquest has a practical value for the maintenance of the international order.[19] 19th century international law reflected this view by establishing the principle of effectiveness according to which an entity is recognized as a sovereign state (and hence entitled to all the powers, rights, privileges, and immunities ascribed to states by international law) if it has an effective control over the population and the territory. Similarly, the principle of prescription had been established according to which a state acquires a title to territory on the ground of a long-held and uninterrupted possession, regardless of the validity of the means whereby the territory was originally acquired.[20]

Much can be discussed concerning international law that recognizes such a right. Robert W. Tucker identified as a characteristic feature of the traditional international system 'the virtually unrestricted operation of the principle *ex injuria jus oritur* and thus the near equation of law with power.'[21] The point I wish to emphasize is that the centuries-long and global practice of extending and establishing sovereignty by war and using it as one of the dominant technologies of territorial domination and accumulation of resources has significantly shaped the form and the scope of modern sovereign territoriality, especially with respect to nature and its resources,

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[18] Examples from 18th and 19th century include Russian conquest of Central Asia, French conquest of Indo-China, and British conquest of Burma. In Africa, the method of colonial acquisition was cession, except the conquest of Madagascar by France in 1896 and Matabeleland and Mashonaland in Southern Rhodesia by British South Africa Company. See Korman, *supra* note 1, at 63-65.
[19] Ibid., at 18-29.
[20] H. Kelsen, *General Theory of Law & State* (2006), at 213-215, 350.
[21] R. W. Tucker, *The Inequality of Nations* (1977), at 12.

and its being the main instrument and the institutionalization of the quintessentially unjust use of nature.

It is the proprietary claim to territory and its resources and the logic of the unlimited accumulation of resources for the exclusive benefit of the sovereign which is inscribed at the heart of this regime and which has also shaped the current system of 'permanent sovereignty over natural resources' (PSONR) created in 1960s during the process of the decolonization. In an attempt to correct the injustice of forceful accumulation of natural resources by foreign states or private companies, the new system allocated supreme jurisdictional and ownership rights to natural resources equally to all 'states' and their 'people'. However, since there are no limits on the sovereign resource prerogative, no conditions of legitimacy and no conditions of domestic and international distributive justice attached to it, PSONR enables illegitimate or illegal governments to usurp and sell their countries' natural resources and use them for the private benefit of ruling elites and to oppress the populations in more or less radical ways. There are countless examples of such corrupt and illegitimate governments in today's world.[22] Fraught with abuse of resources for the perpetration of injustice, permanent sovereignty over natural resources is continuous with its colonial predecessor.

## 2. The Right of Discovery and Occupation

European powers of the 16th century were seeking to imitate the Spanish precedent and get their share of new territories and assets. Without the benefit of the papal donations and the right of territorial conquest it granted, they were compelled to assert rights over foreign territories and their resources on the basis of different principles. Drawing on Roman law and medieval civil and canon law, their legal scholars devised new theories which were meant to legitimize claims to distant places. The right of discovery and occupation is the outcome of these efforts. Formulated to provide an alternative justification for a colonial project and to resolve existing conflicts over exploration, occupation, and property rights, it became another foundational principle of the emerging international law.

[22] For the overview see L. Wenar, *Blood Oil. Tyrants, Violence, and the Rules that Run the World* (2016), at 3-122.

The content and the scope of the right of discovery – the principle that a title to a territory comes from its discovery and its occupation and an effective appropriation of its land and resources – had also been shaped by a particular colonial project, its socio-economic conditions and the strategies of the colonizers, in this case the British monarchy and its colonization of North America. Exactly as the right of conquest, the doctrine of discovery and occupation provided ideological underpinnings of the quintessentially possessive nature of the European empires, this time based on a disingenuous claim to use the land that seemed to belong to nobody or is unused ineffectively and to improve it via agricultural development. It established and justified an essentially dispossessive practice of the appropriation of foreign land for the purpose of its full and effective agricultural development, using property rights as the main method of the appropriation and exploitation of the land and its resources.

### 2.1. British settlement in North America and property rights in land

Britain became the most prominent advocate of the right of the first discovery and began using it to claim the right to settle in North America, based on John Cabot's 1496-1498 explorations and discoveries. The new legal theory, developed mainly under the reign of Elizabeth I in the late 16$^{th}$ century, also echoed long-term attempts of the Roman Catholic Church to establish a worldwide papal jurisdiction and hence right of Christian princes to dominate heathen kingdoms they discover. Additionally, it invoked what medieval legal scholars identified as the Roman law principle of *res nullius* – a principle stating that a thing which belonged to no one could become the property of the first taker.

The British interpretation of these principles involved two important innovations. The first innovation was based on the insight that mere discovery gives only an inchoate title, not sufficient in itself to confer the full title to territory. Challenging extravagant Spanish claims in the New World, Queen Elizabeth's regime argued that turning discovered non-Christian heathen lands into a title requires an actual occupation and possession – the building of forts, the cultivation of the soil, and the establishment of an effective governmental authority.[23] The second innovation concerned the view that not only lands which had been unoccupied but also lands which had actually been occupied but were used in a manner that the discoverers recognized as wasteful and ineffective were available as null and void lands (*terra nullius*) and hence available for a legitimate possession. These innovations guided the British explorers in their efforts to seek out, claim, and colonize lands not possessed by other Christians.

The expedition which started the first permanent English settlement in Jamestown, Virginia, was financed and organized by a London-based joint-stock company – the Virginia Company. The Virginia Company received its charter from the King James VI in 1606, granting it exclusive rights to settle in the Chesapeake Bay area of the American mainland. The people aboard the expedition ships, mostly noblemen and craftsmen, styled themselves not as conquerors but as planters who sought, first and foremost, to settle and cultivate land elsewhere, not to subjugate and plunder foreign kingdoms. Upon arrival, they settled on the land among indigenous populations, trying to communicate and trade with them as well as to put the land to use in conformity with established agricultural practices at home.[24] Similar enterprises followed. By the summer of 1636, colonies existed in Virginia, Plymouth, Massachusetts Bay, Connecticut, Maine, New Hampshire, and Rhode Island, all of them following a similar pattern of settling.

Except for the Puritan communities,[25] these settler communities were authorized and regulated by royal charters which granted them a geographically demarcated territory to settle on. What the English settlers acquired in virtue of the discovery was not the right to conquer foreign polities and impose an absolutist imperial sovereignty on them. They were authorized by the charters to unilaterally acquire a predetermined territory which had been considered to be available for the occupation on the basis of the discovery claim. Within this territory, settlers

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[23] All major early modern international law thinkers (Grotius, Pufendorf, Vattel) provided conceptions of occupation and possession and argued they substantiate and legitimize colonial claims. See M. F. Lindley, *The Acqusition and Government of Backward Territory in International Law* (1926), at 136-138,140.

[24] J. H. Elliott, *Empires of the Atlantic World* (2006), at 6-10. Pagden, *supra* note 4, at 76-80. See also P. Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640* (1995), at 16-25.

[25] Pilgrims who were driven from England by religious persecution had no recognized claim to territory. They signed a voluntary pact of government before landing by which they formed themselves into a body politic under the authority they established. They had to rely on purchases of land from the natives. A. T. Vaughan, *New England Frontier. Puritans and Indians 1620-1675* (1979), at 104-121.

held legislative and judicial powers over all the inhabitants of the lands ceded to it, rights to distribute property, build fortifications and maintain military and naval forces, and regulate migration and coin money. The colonists also assumed that the Crown held the discovery power over the indigenous tribes and their royal charters authorized them to conduct political affairs and property and commercial transactions with the indigenous nations – to enforce monopolistic trading relations with them and to buy or otherwise acquire their land.

The early North American settler history does not compare to military vanity and ruthless pillage of natural resources which occurred during the Spanish conquest. As Vaughan shows, there were some notable attempts, partly successful in the early years yet marked by the failure in the long run, to deal justly and peacefully with the native tribes.[26] The main task for the settlers was to expand their settlements. The prime constraint on the movement of settlers into the interior was the existence of sparse yet ubiquitous indigenous populations. The extension of property rights to land, not continuous territorial sovereignty with an absolutist proprietary claim over a territorial realm, had become both the main technology of the expansion and an institution facilitating specific material practices of using the land and natural resources. Subjecting land to property rights or its 'enclosure', in Locke's words, had become the main content of the process of expanding settlement.

Locke, directly involved in colonial debates of his day and today widely recognized as having provided a vigorous moral and economic defense of England's right to the American soil,[27] provided the concept of property suited for this task. In the famous chapter On Property in his *Two Treatises of Government*, Locke explains how people come to possess property rights – rights which permissibly exclude others from using the same thing. The central notion Locke develops to account for the origin of private property is labor. Starting with the premise of common ownership of the Earth by mankind, an original state of natural abundance with no private dominion, he proceeds to argue that a man legitimately acquires property by mixing his labor – the natural 'property in his own person' – with commonly held natural resources. 'As

[26] Puritan settlers in New England tried to assimilate the natives by essentially peaceful means of evangelization. According to Vaughan, the failure of their efforts was not due to inherent racism but cultural absolutism and religious fervor. See ibid., at xiii.
[27] See e.g. J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (1993) or B. Arneil, *John Locke and America* (1996).

much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labor does, as it were, enclose it from the common.'[28] For Locke, the enclosure, that is, a property established in virtue of the laborious extension of self-ownership in person into the nature, is a moral imperative: God, when he gave the world in common to all mankind, for their benefit and as a means of subsistence, commanded man also to labor and not leave land uncultivated. Property, however, not only expresses this moral imperative, it also constitutes the foundation of civil and political society created by social contract of autonomous property owners.

Locke's well-known theory of the origin of property is relevant for several reasons in the present context. First of all, Locke describes the natural state in terms of particular socio-historical conditions. As he explicitly states in his work, it is North America and its natives who serve as a socio-historical referent for his notion of the state of nature.[29] In Locke's view – a view which he shared with other natural law thinkers – indigenous folks live in natural state of abundance and their primitive subsistence (hunting, fishing) does not justify the enclosure of commonly held nature by property rights. The labor which does is the agricultural method of Europeans – tilling, crop-growing, and husbandry. This type of agrarian cultivation is a superior kind of labor. For Locke, as Barbara Arneil showed, this kind of labor not only begins and constitutes legitimate property, it also makes the far greatest addition to the economic value of the land.[30] By not recognizing the indigenous economic mode of production as property-appropriating labor and hence misrecognizing indigenous systems and institutions of property rights, Locke thus opens up a path for the dispossession of indigenous land dressed up as the moral imperative of its appropriation by the industrious men from the abundance of the mythical state of nature.

Secondly, by emphasizing the supremacy of agricultural laboring on land, Locke makes the European version of the agricultural development (and the monetized commerce which follows it) the superior material form of a human relationship with nature and the prominent source of

[28] J. Locke, *Political Writings* (2003), at 276.
[29] Ibid., at 281.
[30] B. Arneil, 'Trade , Plantations, and Property: John Locke and the Economic Defense of Colonialism', (1994) 55 *Journal of the History of Ideas* 591, at 603.

a just title to territory, even already occupied foreign territory. Property is both the legitimate method of the appropriation of the natural resources and the acquisition of the territory *and* a specific material way of their exploitation.[31] What kind of property, with what scope and with what powers? In the 17th century British common law, property rights involved an extensive bundle of powers and were based on an inexorable logic of strictly exclusive and efficient use for the sole benefit of the owner. A property owner had the right to permissibly exclude others from the use, the autonomy to decide in a narrow self-interest, and the unlimited right to use and control a given good including right to sell it or otherwise gain income from it (in other words, to commodify it) regardless of any demands of distributive justice and equality. English settlers imposed these spatially and distributively exclusive and unlimited property rights to land in foreign territories, thus turning land into a permanently fixed resource for an efficient economic activity whose benefits can only be enjoyed exclusively by them.[32]

### 2.2. Property, Land, and Injustice

The establishment of a liberal property regime to land in British North America, so vastly different from the indigenous system of property rights which relied on overlapping, non-exclusionary, and spatially shifting usufruct rights,[33] occurred by various means. The mechanisms involved, most frequently, the settlement and land purchases. The land contracts often featured the lack of equality and reciprocity between the contracting parties, the abuse of an unequal bargaining power, the manipulation with consent, the lack of transparency regarding terms and conditions, and restrictive terms of revocability of the contract.[34]

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[31] Locke's property, as Fitzmaurice argues, also effectuates the historical progress of human societies toward developed agricultural state and to commercial society. Fitzmaurice, *supra* note 17, at 3.

[32] W. Blackstone, *Commentaries on the Laws of England,* Book II (2016), at 1-9. See also M. Koskenniemi, 'Sovereignty, Property, and Empire: Early Modern English Contexts', (2017) 18 *Theoretical Inquiries in Law* 355, at 374.

[33] Indigenous system of property, as Cronon shows, did not imply rights of exclusive use of a demarcated space and broad bundle of rights such as right to prohibit trespassing or right to derive rent from the property. It involved rather a concrete set of rights which shifted and overlapped spatially and temporally with the ecological use. Their system of rights of use of natural resources relied on usufruct rights and overlapping territorialities and overlapping uses by different groups. W. Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (1983), at 54-80.

[34] Ibid., at 63-65. See also S. Belmessous (ed.), *Native Claims: Indigenous Law against Empire*, 1500-1920 (2011).

Another form through which European settlers wrested control of lands of indigenous peoples, first in America and later across wide stretches of Africa and Oceania, involved the establishment of the commons (e.g. for cattle grazing) which significantly interfered with the native people's usufruct rights to nature and its resources and with their relation to territories based on spiritual attachment.[35] As a response to ceaseless expansion which undermined the indigenous subsistence practices, their use of nature for symbolic purposes, and their territorial rights, the native inhabitants resisted. Their often violent resistance provided a classic pretext for more forceful and violent forms of their elimination from the land – forced displacement, military conquest, and genocide.[36]

To acquire land by these dispossessive means and restricting native peoples' internal and international political and commercial powers had become the key prerogative of the settlers under an emerging legal doctrine of discovery. According to Robert J. Miller's summary, the right of discovery and occupation conferred a specific bundle of rights and powers on the settlers. First of all, the colonists automatically acquired sovereign jurisdiction over lands they settled and occupied, including powers to determine property rights within it. This right implied the loss of the full native title to land and territory. In other words, indigenous nations living in the area of settlement were considered to have lost full sovereignty rights and property rights to their lands, only retaining occupancy and use rights. Second, the right of discovery also implied the so called 'preemption right' (also called 'European title') which implied the exclusive right of the settlers to buy land from the indigenous tribes, preempting other European powers from doing so. The preemption right was limited by the native right to continue to occupy and use their lands, but it also meant that natives lost full property rights in their lands, especially right to sell the land to whomever they wished. The right of discovery

[35] A. Greer, 'Commons and Enclosure in the Colonization of North America', (2010) *American Historical Review* 365, at 368, 370-372.

[36] Hixson documents the almost continuous history of settler colonial ethnic cleansing from the early 17th century till post-revolutionary USA. These brutal campaigns involved slaughtering of women, children, and elderly and were organized by official military forces or unauthorized settler vigilantes. W. L. Hixson, *American Settler Colonialism. A History* (2013).

also implied the right to wage a just war against native populations in certain circumstances and acquire their territories by the military conquest.[37]

The allocation of these rights and prerogatives to settlers, needless to say, occurred without the knowledge or consent of the natives who already occupied and used the discovered lands, basically by virtue of walking ashore and setting up a shelter.[38] This form of settler colonialism was also justified by religious, racial, and ethnocentric ideas of the Christian superiority over other peoples and religions. However, settler colonialism's primary objective had not been to Christianize the natives but to acquire and cultivate their land. North American colonial expansion was driven and justified by the moral, political, and economic imperative to cultivate a seemingly available, unused land and to put it to an effective use. The dominant organizing logic is agricultural and the ideology of the justification of the acquisition of the foreign land is the ideology of the (agricultural, extractive) development. Not being Christians and, more importantly, not having adequate socio-economic institutions and subsistence practices, indigenous people were deemed not to have the same rights of sovereignty, self-determination, and property.

Relying predominantly on property rights in land, British settler colonialism had come to represent a different version of a unilateral and unjust imposition of a legal property system over natural space and its inhabitants. Three fundamental issues of injustice can be identified in this colonial formation. As in the case of sovereign territoriality imposed by the right of conquest, the first injustice concerns violence and dispossession in the process of acquiring legal titles to land. Property rights to land arose either directly from the dispossession and forceful displacement or from inequitable or deceptive contracts, both based on the violation of indigenous territorial and occupancy rights and their usufruct rights to natural resources and the misrecognition of their autonomy to make decisions about their lands and territories.

The second injustice, particular in the settler colonial context, concerns environmental disruption and drastic changes of human ecology. Recently thematized by critical settler

[37] Robert J. Miller et al, *Discovering Indigenous Lands. The Doctrine of Discovery in the English Colonies* (2010), at 19-22.
[38] Ibid., at 2.

colonial studies,[39] the environmental injustice of settler colonialism resulted from massive changes in land tenure systems and from a thorough transformation of the environment, usually by introducing new agricultural practices. Settlement and its forceful expansion and the environmental impact which followed it disrupted economic and ecological practices of land use and the symbolic relationships to nature, thus violating the indigenous inhabitants' rights of long-term occupancy, collective self-determination, and the preservation of their identity.

Finally, there is a profound distributive justice issue arising in this context. Settler colonialism's land acquisition and the scope of property rights in land represent a paradigmatic case of an unjust system of the allocation of rights to natural resources which denies certain marginalized and discriminated groups the access to essential natural resources – the land. Since land is the key to economic subsistence and cultural survival of indigenous groups and hence to the fulfillment of the most basic existential needs, the lack of the access to this essential resource is profoundly unjust. In the colonial context where indigenous people were denied whole range of rights on the basis of their race, religion, and socio-economic status, this injustice acquired a systematic and structural character, defining the very core of the injustice of settler colonialism.

### 2.3. The global history of foreign land grabbing

In the early Age of Discovery, France's explorers also claimed and acquired vast tracts of territory on the American continent on the basis of the right of discovery. Unable to settle their conflicting discovery claims, France and England ultimately fought the Seven Years War. In the treaty that ended the war in 1763, France transferred its discovery claims in Canada and east of the Mississippi River in America to England and granted its discovery claims to lands west of the Mississippi River to Spain. By that time, British North America included thirteen colonies along the Atlantic Coast, from Georgia to Maine, plus Newfoundland, Nova Scotia and the Rupert's Land around Hudson Bay in today's Canada. In line with the doctrine of discovery's basic tenets, all colonies enacted numerous laws exercising this delegated authority to purchase indigenous

[39] See e.g. K. Whyte, 'Settler Colonialism, Ecology, and Environmental Injustice', (2018) 9 *Environment and Society: Advances in Research* 125.

lands, to protect their exclusive right of preemption to buy these lands, to grant titles in lands to others even while the indigenous populations were occupying and using their lands, and to exercise limited sovereignty over tribes and their commercial and foreign powers.[40]

In 1823, in an influential case *Johnson v. M'Intosh*, the Supreme Court defined the right of discovery in terms mentioned above, thus turning discovery and its baseline principles into a legal doctrine which has since then determined how the United States deals with its native inhabitants and their lands, governments, and affairs in its post-revolutionary history. The Court based much of its analysis on how England and its settlers had always dealt with the natives of North America. The Court held that Discovery had become the American law after already being the English colonial law. It confirmed that discovery automatically implied sovereignty and property rights over the non-Christian inhabitants occupying discovered lands (the Court held it is an 'absolute ultimate title'), along with the exclusive right to buy land from the natives (whenever they 'consented' to sell) or conquer it militarily, limited governmental and sovereign powers over their affairs, especially over their commercial and foreign prerogatives.[41] The same principles also regulated settlement in Canada, Australia and New Zealand where, like in the USA, the doctrine of discovery continues to shape the relationship to indigenous people to this day.

The legacy of settler colonialism goes beyond this context. Settler colonialism represents a historic origin of a dynamic global process of extensive and environmentally consequential changes of land tenure and land use in the name of an effective and profitable agricultural development, cash crop planting, mineral resource exploitation, and real estate development. Despite regional and historical variations, there is a continuous global history of acquiring large tracts of supposedly under-exploited yet occupied land by companies and private entrepreneurs, foreign governments, and investors. The process of foreign land grab relies on the original settler colonial ideology of the moral and economic imperative to use land effectively and profitably, as well as on the legal technology of property rights in land which enable, very much like sovereign territoriality, spatially and distributively exclusive and unlimited use of natural resources for the benefit of the owner. In this process, which only

[40] Miller et al, *supra* note 37, at 28.
[41] Ibid., at 3-9.

intensified in recent years with Asian countries and Gulf states acquiring millions of hectares of fertile land in Africa, the key injustice committed is the same as it has always been: the misrecognition of historically marginalized, discriminated, or otherwise disadvantaged groups' legitimate claims to land – indigenous groups, rural communities, subsistence farmers, ethnic minorities, or women. (Mis)allocation of land rights (and rights to other resources or benefits arising from their use, for that matter) which disproportionately affects marginalized and disadvantaged groups remains one of the most profound distributive injustices arising in domestic contexts.

## 3. The freedom of the seas and the 'free' trade

The principle according to which the seas are a non-excludable resource domain accessible and freely available to all nations for the navigation and fishing is yet another founding principle of international law. The invention of the freedom of the seas principle is again inexorably linked to a colonial project, this time to commercial overseas empires pursuing 'free' trade. Invented by Hugo Grotius at the very beginning of the $17^{th}$ century, the freedom of the seas was vigorously asserted by European commercial powers, especially by the United Provinces of Netherlands. At the time of its origin, the freedom of the seas represented the first attempt to define a global non-sovereign area in terms of its natural resource uses and to suggest an order for this global resource domain. The set of principles concerning the access and the use of marine resources mirrored the emerging global order of the overseas trade and the rules of the establishment and maintenance of trading monopolies. Freedom of the seas and the commercial colonialism of the 'free' trade thus emerge as two interrelated normative orders of commerce and navigation – the former expressing the logic of free and unlimited accumulation of common resources on the first come first serve basis, the latter crystalizing as a system of the coercive imposition of trading monopolies and inequitable trading relations in distant places.

### 3.1. Grotius' *Mare Liberum*

Freedom of the seas is a distinct colonial invention, with no precedent in ancient or medieval law and practice. Until the emergence of the system of global overseas trade in the 17th century, maritime powers had always attempted to exert exclusive rule over the pelagic space. Greek historians wrote of the hegemonic control of the sea – a *thalassocracy*. The Romans asserted their *mare nostrum* (our sea) over the entire Mediterranean around 67 BCE to protect grain shipments. The Hanseatic League controlled trade in the Baltic region between 1300-1600. Republican city-states of Monaco, Genoa, Pisa, and Florence competed for control of the Tyrrhenian sea. Genoa made effective claims to Ligurian Sea and Venice rose to the hegemonic power in the Mediterranean world.[42] Venetian and Genoese claims over the sea, referred to as seignory, royalty, full jurisdiction, or even empire, were acknowledged by the Holy Roman Empire and the Papacy. Since the Middle Ages, most coastal polities also asserted claims to ocean spaces in proximity to their land territories. They included territorial claims to adjacent bodies of water, right to collect fees and tolls, the procurement of licenses for navigation through particular ocean areas, the control of fisheries and the conduct of maritime ceremonials.[43]

Until the Age of Discovery, there was no discourse on the subject of the freedom of the seas, neither in practice, nor in the literature. As Craven points out, the boom of explorative and colonial enterprises and the ensuing expansion of overseas trade logically raised awareness of its spatial and logistical conditions, such as the availability and feasibility of navigation routes and the access to trade networks, and hence to the legal and political status of the seas.[44] Given the expansive and highly competitive geopolitical context, the general tendency which marks the birth of the principle of the freedom of the seas is the same as in the previous two cases – it is a tendency to secure access to and carve out new territories, assets, and resources, to manage effectively conflicts over them, and to facilitate the pursuit of essentially possessive economic and political interests.

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[42] For an overview of these claims, see C. R. Rossi, *Sovereignty and Territorial Temptation. The Grotian Tendency* (2017), at 39.
[43] D. J. Bederman, 'The Sea', in B. Fassbender et al (eds.), *Oxford Handbook of the History of International Law*, (2012) 360, at 364.
[44] Craven, *supra* note 8, at 872.

As it is well known, the particular conflict from which the principle of the freedom of the seas emerged concerned the dispute between Portugal and the Dutch Republic regarding the access to trading networks in the East Indies. Portugal, relying on the Papal donation of 1493 and the agreement with Spain about the division of the earth along a meridian 370 leagues west of the Cape Verde Islands known as the Treaty of Tordesillas, insisted on exclusive territorial rights and a near-monopoly authority over trade in spices and other products from the East Indies. The Portuguese sought to exclude all competing merchants from accessing the trading networks, especially the Dutch who established the East India Company (VOC) in 1602 exactly for this purpose. In February 1603, a Dutch squadron captured a Portuguese carrack *Santa Catarina* which carried a large cargo of valuable goods. The vessel was brought to Amsterdam as a prize.[45] Then a twenty year old Dutch jurist Hugo Grotius was hired by the VOC to provide an opinion on the legality of the capture and the possibility to claim it as a booty in a just war. Grotius' resulting work, written in 1604–1605, was a treatise later known as *Commentary on the Law of Prize and Booty*. One chapter of this piece was published contemporaneously (and anonymously) under the title *Mare Liberum*.

The main thesis developed by Grotius in *Mare Liberum* is that ocean areas are immune from claims of *dominium* (ownership) and that freedom of navigation is a natural right of peoples and nations. Grotius first deconstructs the Portuguese claims of the exclusive access to the East Indies, arguing that these claims can be based neither on the right of discovery, nor on Papal grant or the right of conquest. To defend the idea of free navigation, Grotius develops what could be called the first global commons notion of the world's oceans. Drawing on his own version of natural law, the core of which is an emphasis on fundamental laws of self-defense and self-preservation and their realization via possession, use, and ownership, Grotius argued that land and sea are resource domains incommensurable in terms of the possibility of possession and use and hence in terms of the permissibility of the exclusive ownership. *Dominium*, he asserted, can only be derived from the use based on physical possession which

[45] When its contents were sold in Amsterdam, they grossed more than three million guilders, a sum equivalent to just less than the annual revenue of the English government at the time and more than double the capital of the English East India Company. R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999), at 80. See also P. Borschberg, 'The Seizure of the *Sta. Catarina* Revisited', (2002) 33 *Journal of Southeast Asian Studies* 31, at 35.

transforms them; and only those things capable of both being possessed and used could be appropriated from their pristine state of natural community, subject to the proviso that no other person should be harmed by the act of the appropriation.[46]

Land, according to Grotius, can be physically circumscribed, transformed by human labor, and its products can therefore be rendered private by their use. The ocean, by contrast, is like air – fluid and ever-changing, limitless, it cannot be possessed and used because it and its resources such as fish are apparently inexhaustible. Non-excludability and non-subtractiveness, in other words, are its most fundamental features.[47] The sea must therefore remain common by nature, subject to neither *dominium* nor *imperium*, disallowing both sovereignty and property claims. Invoking the Roman principle of *res communis*, Grotius defines seas in terms of common non-excludable use by the humankind, allowing free navigation and fishing. Borrowing substantially from the writings of Fernando Vázquez y Menchaca, a Spanish jurist (1512-1569) who refused Venice and Genoa's claims to dominion over parts of the Mediterranean,[48] Grotius maintained that he was explicating the 'primary' or 'first' law of nations based on Roman law foundations and humanist traditions and their coalescing around the idea of common use of maritime space. The universal natural rights which had supposedly been implied in these traditions and were now defended as core tenets of the law of nations – the right of free navigation and free trade – had of course reflected VOC's aggressive attempts to secure an unimpeded access to Asian trade.[49]

### 3.2. Freedom of the seas and the empire of trade

The notion of the freedom of the sea formulated in *Mare Liberum* cannot have more arbitrary origins. On the one hand, Grotius consciously misconstrued purportedly immutable law of nations and its first or primary principles, ignoring completely what may have been called an emerging customary practice among European polities (Genoa, Venice, England, and Denmark, to name just a few jurisdictions) with regard to the ocean space. On the other hand, the book of

[46] H. Grotius, *The Freedom of the Seas* (1916), at 22-33.
[47] For the characterization of resource domains in these terms, see S. Buck, *The Global Commons* (1988), at 2-4.
[48] Rossi, *supra* note 42, at 39.
[49] M. J. Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (2006).

which *Mare Liberum* was a part was written at the behest of the VOC and provided moral justification for the very conditions of the pursuit of their global commercial interests. Paradoxically, the principle of the freedom of the seas had been successfully translated into a legal doctrine and became the fundamental principle of international law which, unlike its 'relatives' discussed in the previous sections, continues to determines the rules of using global natural resources in the oceans to this day.

What is to be emphasized given the attempt to trace back the genealogy of natural resource injustice is that common ownership of oceans Grotius advocated is not a progressive moral concept endorsing the pursuit of openness and commonality in the use of the global seas. Grotius' free sea is defined by natural rights of its users, freedom of navigation and trade being the most fundamental ones. It emphasizes only liberties of access and use or, to put it differently, immunity rights of the purported co-owners not to be hindered in pursuing these rights. By giving oceans a particular legal status defined by natural liberties of its users, Grotius subjected oceans to a crudely liberal regime defined by a set of prerogatives rather than rules of a collective use. According to recent critics, the free sea is not a regime which could meaningfully be defined as common ownership. Rather, the global order of the free sea implied in the Grotius's conception is the order of unlimited freedom to accumulate resources on the first come first serve basis, with no heed being paid to the limits on the use of common resources and the equality of opportunity to use them.[50]

A truly common regime of ownership of maritime space and its resources would have to include not merely the right to use the resources freely, the only limitation pertaining to the impermissibility of the exclusion of other co-owners. The core idea of a common ownership, as for example Mathias Risse proposed it, is that all co-owners have an equal opportunity to use collectively owned resources to be able to satisfy their basic needs.[51] The key to a normative notion of common ownership is an equal moral status of co-owners and, correspondingly, the

[50] According to Rossi, Grotius was not a progenitor of liberal international order but a supporter and facilitator of a long-standing tendency of states to lay a sovereign claim to resources. The free sea is meant to become, above all, an avenue allowing the able and the powerful to gain an unhindered access to newly accessible resources and to maintain the hegemonic command of the commons. Rossi, *supra* note 42, at 26, 49-51.

[51] M. Risse, *On Global Justice* (2012), at 112. Quite paradoxically, Risse claims his notion is a reformulation of Grotius' thesis of the common ownership.

equal opportunity of all co-owners to use commonly owned resources. Equal opportunity then requires rules of the common use of resources and limits on the use so that those who are technologically or materially advantaged do not overuse or deplete. These limits must then be defined and redefined on the basis of changing circumstances – the availability of common resources, the technology to subtract the resources, and on the basis of the material ability of all to use the commonly owned resources.

Grotius' freedom of the seas, however, remained fundamentally shaped by the economic and political goals of colonialism and imperialism of the 17th century. The emphasis on a set of liberties reflects a distinct logic of competitive mercantilist trade and commercial colonialism based on trade. It has to be seen as a mirror reflection of the emergence of yet another colonial order, this time of exploitative and coercive trading relations pursued by chartered companies in the East Indies and later elsewhere. Both of these normative orders of free navigation and seaborne trade, to paraphrase Schmitt, are infused with interrelated and mutually constitutive concepts of freedom, rights, enemy, war, and legal and material methods of pursuing, claiming and accumulating resources.[52]

The Dutch East India Company (VOC) on whose behalf the regime of the free sea was installed serves as an exemplary case of this type of colonialism. VOC was founded for the purpose of asserting itself into profitable trading networks within Asian societies, especially those involving the fabled spice islands in the Indian Ocean, and to dominate the trade with nutmeg, cloves, cinnamon, and black pepper. Despite being a commercial company, its charter contained the legal conditions of possibility for its transformation from a trading company to an imperial political sovereign. It granted the company domestic and international political rights and prerogatives, most importantly the right of legislation within its domain (on ships and within the settlements) and rights to engage with foreign powers by making treaties, negotiate and enforce terms of trade, make diplomacy and engage in war and conquest. The mandate to conclude treaties with Asian rulers and wage war against them made it an actor under international law very much like a sovereign state. VOC utilized these various legal,

[52] C. Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (2006), at 172.

administrative, military, and commercial powers that amalgamated into a patchwork of coercive political and commercial domination.[53]

The preferred methods through which VOC intruded into the vibrant grid of trading networks in the East involved the establishment of trading sites (factories, forts, trading posts) and making of contracts and treaties to secure monopoly on spice trade.[54] Local rulers and traders were forced into making or renewing these contracts mostly against their will. These contracts were designed to establish an exclusive and unlimited access to valuable resources, either by granting VOC a trading monopoly on them or securing the payment of tribute in the form of these resources in exchange for military assistance and protection against enemies. The contracts, as Stapelbroek points out, were highly inequitable and hollowed out the political and commercial autonomy of the other party by claiming extensive and asymmetrical rights for the VOC, including the right to punish violations of VOC's monopoly by conquest. Commercial profit was thus secured by quintessentially coercive political means and its pursuit turned VOC into a de facto state.[55]

The intensification of trade and settlement, the growing resentment of indigenous polities concerning the assertive Dutch presence, and the pressures of competition from other European trading enterprises necessitated the expansion of control and the establishment of more direct political rule, often by territorial sovereignty. As a more effective legal-political technology of control and protection of trading relations, territorial sovereignty was extended by military conquest for which the trading contracts were stepping stones. The military campaign started with the conquest of Portuguese fortresses and settlements in the Moluccas on the clove-producing island of Ambon in 1605. Few years later, VOC built its own fortress in the nutmeg archipelago of Banda on the island of Neira in an attempt to enforce a monopoly trade in that valuable spice. In the next 15 years, as Ward documents, VOC used its own soldiers and Asian mercenaries to defeat the alliance of Bandanese polities – VOC executed

[53] K. Ward, *Networks of Empire* (2009), at 51-55.
[54] Monopolies of trade depended on having textile from India to exchange for the valuable spices. Therefore, VOC also invaded Coromandel and Bengal costs in India to secure access to textile. The VOC's military assault on the Asian trade diaspora also included attempts to exclude Gujarati traders from Southeast Asian ports.
[55] K. Stapelbroek, 'Trade, Chartered Companies, and Mercantile Associations', in B. Fassbender et al (eds.), *Oxford Handbook of the History of International Law* (2012) 338, at 350-351.

their leaders, exiled local population, and introduced slave labor from other parts of the archipelago to work on Dutch controlled plantations. The result was a complete political subordination of the economy of the spice producing islands as far as it was technically possible by the VOC.[56]

VOC's politically-backed commercial dominance in East Indies represents a paradigmatic example of a coercive trade enabled by the free navigation, the core freedom protected by the emerging international legal regime of global oceanic commons. Until mid-18th century, a number of other overseas trading companies were established with the similar purpose of domination over trade. The Dutch East India Company and the British East India Company stand out in their ability to dominate and subordinate local trading networks and production systems to their exclusive economic and political interests. Based on an innovative set of linkages between the public and the private, sovereignty and monopoly, power and profit, coercion and the market, these companies had become the prime agents of colonization. A new form of commercial colonialism developed which delegated sovereign power to private commercial entities and which engaged in competitive yet quintessentially unfree mercantilist trade for the purpose of an exclusive enrichment of the state and the merchants.[57] Rather than territorial conquest and settlement, forcible trading relations and contracts defined by logic of an unequal exchange and coercion and backed by privatized sovereign violence had become the main instrument of imperial domination.[58]

### 3.3. The legacy of the Grotian tendency to appropriate

The 18th century witnessed two developments that would reinforce the twin imperial paradigm of the free sea and the free trade. Britain, France, Portugal, and Spain continued to seize and accumulate raw materials for their domestic needs and attempted to exclude their economic rivals or competitors from accessing those resources. More global trading networks and empires were established and solidified. The commercial and then industrial revolutions in

[56] Ward, *supra* note 53, at 75.
[57] Craven, *supra* note 8, at 872.
[58] D. Ormrod, *The rise of Commercial Empires. England and the Netherlands in the Age of Mercantilism, 1650-1170* (2003), at 4.

Europe opened up more global peripheries and supply chains and integrated them into an expanding global imperial system of trade. Under the mercantilist doctrine with its highly restrictive economic policies, the freedom of the seas facilitated the establishment of a global economic system of a fierce competition among national commercial empires which relied on the spheres of either direct political domination and accumulation of natural resources or a commercial system of highly inequitable trading relations between the European centers and the peripheral zones where producers were coerced to produce high-value commodities at very low costs.[59]

As regards the modern history of the law of the sea, the classical law of the sea and its freedom of navigation and fishing persisted until well after the World War Two. With the establishment of the system of the 'permanent sovereignty over natural resources', states gradually started seeking control over maritime areas adjacent to their coasts and claim natural resources in what was until then *res communis*. Prompted by the discovery of offshore oil and gas deposits and by efforts to control and harvest the living resources of the sea, states extended their sovereign rights from three to twelve nautical miles from the coast over the seabed, its subsoil, and superjacent water column. New legal regime defined by the United Nations Convention on the Law of the Sea (UNCLOS) also created the so called contiguous zone which extended coastal states' police powers additional twelve nautical miles seaward. The most fundamental change involved the creation of exclusive economic zones (EEZs) which extended sovereign rights for the purpose of exploring and exploiting, conserving, and managing both living and nonliving natural resources, as well as the seabed and its subsoil out to 200 nautical miles from the shore. Embracing about one-third of the marine environment today, with vast majority of known oil and gas reserves and nine-tenths of the world's fish catch, the creation of EEZs represented, in Rossi's words, an enclosure of natural resources as epic as the Treaty of Tordesillas.[60]

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[59] I. Wallerstein, *The Modern World-System. Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (1974), at 128-129.
[60] Rossi, *supra* note 42, at 71. B. H. Oxman, 'The Territorial Temptation: A Siren Song at Sea', (2006) 100 *American Journal of International Law* 830, at 839.

The extension of sovereign control over resources of the seas and oceans was based partially on claims of every coastal state to an equal opportunity to explore and exploit, as well as on claims to an effective utilization, conservation, and protection of natural resources. The process of oceans' territorialization, however, precluded the possibility to reinvent the liberal regime of free sea into a truly common global resource domain. Living resources in what has been left of the free sea, beyond EEZs, are still freely available. Despite attempts at the regulation of fishing, there are large-scale high-tech fishing corporations from few countries which catch fish in large quantities, even in coastal waters of poorer states with no capacity to exclude them, thus destroying this global living resource along with the marine environment.[61] Due to changing circumstances (environmental changes as well as technological possibilities of a much higher subtraction and hence shrinking availability of resources), an unrestricted freedom of the use which has been at the heart of the regime of the free sea and the Grotian vision of common oceans has led to the depletion of resources and the destruction of the marine environment. In the circumstances of scarcity, unequal distribution of the ability to subtract, and environmental vulnerability, the unrestricted freedom of the use of global maritime commons generates distributively and environmentally unjust outcomes.

Contemporary system of global trade has likewise continued to reproduce the structural imbalance and the inequality of the distribution of the benefits and burdens generated by the resource extraction and production. In the colonial world trade system established in the 17th century, the imperial centers extracted resources and tributes in the peripheral areas using extra-economic coercion and colonial domination – direct political control, enforced monopolies of trade, or coercive labor practices backed by sovereign violence. Contemporary global economic system no longer relies on extra-economic methods of forging and sustaining international trading relations and commercial transactions. But the global structural imbalance and inequality in the distribution of benefits and burdens arising from the exploitation of natural resources persist. In many countries, the use and the extraction of natural resources is

[61] At current rates of fishing, it is projected that stocks of all species which are currently fished for food will have collapsed by 2048, with very serious implications for ocean ecosystems more broadly. C. Armstrong, *Justice & Natural Resources. An Egalitarian Approach* (2017), at 207. See also https://worldoceanreview.com/en/wor-2/fisheries/state-of-fisheries-worldwide/

linked to severe injustices such as child labor, modern slavery, political authoritarianism and repression, illegitimate and corrupt decision-making about resource extraction, and to distributively unjust forms of resource benefits allocation (poverty, marginalized groups' lack of access to resources). These issues arise in an intra-state context and result from illegitimate or illegal exercises of power or from the failures to regulate the resource extraction and to determine resource benefits allocation in accordance with basic requirements of procedural and distributive justice. Yet, natural resources extracted or produced under such unjust conditions smoothly flow into global supply chains and trading networks where they are capitalized and their benefits are appropriated by all but those who are entitled to them.

## Conclusion

This paper has traced the historical and socio-economic origins of three traditional international law principles – the right of conquest, the right of discovery and occupation, and the freedom of the seas. I argued that each of these rights was established as an international law rule for the purpose of facilitating the colonization of distant peoples, their territories and lands, and for the purpose of the accumulation of their natural resources. Each of them, I showed, had led to an imposition of a regime of appropriation and distribution of natural resources: the right of conquest turned natural resources into a property of the sovereign by imposing sovereign territoriality regime, the right of discovery and occupation justified turning indigenous land into private property of the settlers, and the freedom of the seas created a non-sovereign common ownership of the oceans which enabled an unlimited use of marine resources and the establishment of coercive and inequitable trading contracts. These property regimes, I showed, facilitated and institutionalized forms of quintessentially unjust appropriation and exploitation of natural resources – the injustice of accumulating and using natural resources for the sake of the perpetration of an unjust rule, the injustice of land dispossession, the distributive injustice of exclusion in distribution of opportunities, benefits, and burdens related to the use of natural resources, and the injustice of unsustainable use of global commons. The exposure of these regimes in their historically paradigmatic forms, as well as injustices which are inherent in them is meant to contribute to the development of a critical framework accounting for injustice which is deeply and inextricably embedded in modern human use of nature and its resources.