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

Los derechos de conquista, descubrimiento y ocupación, y la libertad de los mares: una genealogía de la injusticia sobre los recursos naturales

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Abstract: This paper analyzes the colonial 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 legal principle to facilitate 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 are linked 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 particular colonial projects, 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.

Keywords: conquest, settlement, free sea, natural resources, injustice.

Resumen: Este artículo analiza los orígenes coloniales de tres principios del derecho internacional: el derecho de conquista, el derecho de descubrimiento y ocupación, y la libertad de los mares. Argumento que cada uno de estos derechos se estableció como principio jurídico internacional para facilitar la colonización de pueblos lejanos, sus territorios y tierras, y con el fin de acumular sus recursos naturales. El artículo analiza cómo se justificaron estos derechos, qué conjunto de facultades e inmunidades exclusivas conferían, y cómo están vinculados a tres regímenes jurídicos modernos distintos de derechos sobre el espacio natural y sus recursos: la soberanía territorial, los derechos de propiedad privada sobre tierras extranjeras y los bienes marítimos comunes mundiales. En tanto

expongo los orígenes moralmente arbitrarios de cada uno de estos principios de derecho internacional, que reflejan las condiciones y los objetivos específicos de determinados proyectos coloniales, también sostengo que los regímenes de derechos sobre los recursos naturales que estos institucionalizaron son convergentes en el sentido de que permitieron una apropiación y una explotación distintivamente injustas de los recursos naturales. El artículo también señala las formas en que la lógica y el funcionamiento de estos regímenes siguen dando forma al uso injusto de los recursos naturales hasta el día de hoy.

Palabras clave: conquista, asentamiento, mar libre, recursos naturales, injusticia.

I. Introduction

Natural resources have recently been discovered by political philosophy as one of the key distributive goods the allocation of which matters prominently from the moral perspective of justice and distributive equality. A common and uncritically accepted assumption upon which most of the available conceptions rest is that natural resources have the same economically beneficial value for individuals and societies across the globe and therefore ought to be divided equally or redistributed according to some other substantive principle of global distributive justice. Concerned preeminently with the elaboration of normative theories on the basis of transcendent moral principles of distributive justice, these conceptions have not paid sufficient attention to recurring patterns of conflict, violence, harms, and other injustices concerning natural resources which occur in many parts of the world.[1]

I start with a premise that this is a serious omission, and that adding a critical account of injustice to the debate about natural resources and justice is necessary. Why? Injustice is a pervasive feature of the human use of natural resources in the modern age. For much of modern global history starting in the Age of Discovery, seeking, claiming, extracting or otherwise appropriating natural resources has been inextricably linked to wars, territorial conquests, and forcible trading relations and is fraught with violence, genocide, displacement, slavery, and oppressive and imperial forms of political rule.[2] Planting, harvesting, extracting, and trading with natural resources has been connected with highly exploitative, discriminatory, and environmentally harmful socio-economic systems based on racism and other forms of inequality and exclusion (Wolf, 1982; Cronon, 1983; Beckert, 2015). Many of these injustices persist to this day. They share legal, economic, and social characteristics with their predecessors and they obviously raise problems other than global distributive inequalities in resource holdings – they involve human exploitation, authoritarianism, corruption, social and environmental harms, non-recognition of

indigenous rights, and other serious human rights violations (Klare, 2002, 2012; Alao, 2007; Wenar, 2016; Gilbert, 2018).

A systematic critical analysis of the variety of injustices connected to natural resources or facilitated by them is long overdue, such that accounts for them in their own right and in terms of their structure, mechanisms of operation, and forms of institutionalization, not focusing on their being a failure to reflect a normative principle of distributive justice invented by means of a moral philosophical argument. This paper begins to account for the main categories of injustice connected to natural resources and their structure. It does so by looking into the history of the forceful taking of colonial possession of natural resources by European empires and the imposition of distinct regimes of rights over natural space and its resources which have since then become recurrent historical phenomena. Three episodes are in focus – the Spanish conquest of the Americas, the British settlement of North America, and the establishment of the Dutch empire in the East Indies. The paper analyzes how the particular historical setting of each of these colonial projects provided fertile ground for the forging of legal doctrines which in turn facilitated the institutionalization of global regimes of unjust appropriation of natural resources – territorial sovereignty, large-scale foreign land acquisition and enclosures, and an open access regime of global maritime commons.[3]

These three exemplary episodes are selected because they belong to the beginning of the age of dynamic expansion of European states overseas and their imposition of systems of political domination, economic exploitation, and accumulation of natural resources. Secondly, the public justification and the legal reflection on these colonial enterprises initiated the emergence of a set of rules which regulated political and commercial relations between the Europeans and the rest of the world until the end of the colonial era in the late 20th century. Three influential international legal principles emerged or were reinvented out of these colonial encounters – the right of conquest, the right of discovery and occupation, and the freedom of the seas. As I seek to show, these provided legal background for the imposition of regimes of control and accumulation of resources. In this very process, they were also reinforced as international legal doctrines which have since then provided important legal underpinnings for modern regimes of appropriation of natural resources in many parts of the world. The Spanish conquest marked the right to impose sovereignty over a territory by military means, thus framing the nature and scope of territorial sovereignty especially with regard to property claims to natural resources within its boundaries. British settlement in North America reinvented global rules for the settlement and occupation of foreign lands

and paved the way for the universalization of the Western system of private property rights and their imposition. Dutch assertions to freely travel and trade using oceans as a global common realm of navigation facilitated the establishment of free trade colonialism dominated by trading companies. To illuminate these linkages and point to their relevance for a critical understanding of current practices is the main aspiration of this paper.

A caveat and a methodological clarification are in order. The caveat concerns the scope of the presented analysis. The point of this investigation into these colonial episodes and their becoming breeding grounds for the invention or reinvention of international legal principles is not to provide a detailed historical account or a novel and complex legal analysis of the respective doctrines. The main aim of this analysis is to suggest that these international legal 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. Imposing sovereign territory in virtue of the right of conquest enabled forceful accumulation of natural resources by the sovereign for the purpose of sustaining domination. The right of discovery and occupation authorized settlers to acquire land on a large scale through various forms of dispossession of indigenous peoples and violation of their rights and livelihoods. The freedom of the seas principle inaugurated a liberal regime of free and unlimited use of global maritime commons which enabled selected few the domination and appropriation of common resources and facilitated the expansion of a system of global trade based on coercive, inequitable and exploitative trading relationships.

These injustices have not disappeared. Valuable minerals and fossil fuels are treated as property of rulers, and sustain repressive rule instead of fueling sustainable development and well-being of the people in too many countries. Large-scale land grabbing in developing countries causes irreversible environmental harms and climatic changes, and endangers people's livelihoods and cultural survival. Global commons are depleted by a few whose unsustainable and harmful overuse brings these domains and their ecosystems to the verge of collapse. This paper suggests that understanding and tackling these endemic and urgent patterns of misuse of natural resources requires a critical global history. Locating the colonial origins of sovereignty over natural resources, land enclosure, and of the notion of open-access global commons lays the groundwork for a critical analysis of the most endemic and recurring forms of natural resource injustice and their continuous global presence. A critical history of the

present, to use Foucault's term, is what is aspired here, in the sense of uncovering the original conflicts and contexts to gain perspective and language for a reevaluation of contemporary phenomena. That is why genealogy is the appropriate method.[4]

II. The Right of Conquest and Sovereignty over Natural Resources

The right to impose political rule over a territory and its inhabitants solely in virtue of a war and military victory and regardless of the justice or injustice of this violent imposition is one of the oldest customary rules of international relations (Teschke, 2003). As a rule of international law – a rule which fundamentally influenced the scope of modern territorial sovereignty as both a supreme jurisdictional power over people and an ownership claim to territory and its resources – the right of conquest has to be traced to the early days of European colonization in the Age of Discovery (Korman, 1996). Granted by the Pope for the purpose of bringing 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 a distinct shape during the Spanish conquest of the Americas. The features 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.

A. The Spanish Conquest of the New World – Aims and Justification

At the outset of the 16th 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 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 a search for routes to Asia, a place of imaginary wealth, and attempts to secure direct and exclusive access to gold, spices, and silk whose supply had hitherto been dominated by 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 military conquest and the extinguishment of their kingdoms. Owing to the divine sanction and papal jurisdiction, the conquest and ensuing imperial domination were formally justified by the extension of Christianity into heathen worlds.

As Sharon Korman emphasizes (1996, pp. 44-47), 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.[5] 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 arrival in the New World and translated to the native inhabitants. The document required those who heard it to acknowledge and accept 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 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 their resistance which was considered to be an unlawful violation of the right of conquest and hence a just cause of war (Hanke, 1949, p. 34).

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 ruin in this world and eternal suffering in the afterlife. It also reflected an accepted view of the time that the laws of war are brutal and indiscriminate in character, with no notion of war crimes, enabling killing of civilians, the destruction of their property, and killing and enslaving prisoners of war (Korman, 1996, pp. 29-30). Moreover, the scope and 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 was 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 died

and their ancient cultures perished without a trace while a flood of pillaged gold and silver enriched the Spanish treasury (Pagden, 1995; Elliott, 2006). The controversial nature of the conquest and a great need to publicly justify it was reflected in the work of Francisco de Vitoria, a Spanish jurist, theologian, and a theorist of the emerging law of nations. Vitoria denied the universal imperial jurisdiction of the Pope as a legitimizing framework for a conquest of non-Christian worlds. Indians, he insisted, possessed reason and showed the ability to have true *imperium* and *dominium* – sovereignty and property. Therefore, they belonged to the realm of universal natural law and were bound by *ius gentium*, the law of nations, and could not be simply dispossessed of their property and lands, either as private citizens or as princes (Vitoria, 1991, p. 246). Vitoria pondered the question whether a just war can be waged against the indigenous population and by what title Christians were empowered to take possession of their territory. In the essay *De Indis* he raised a number of points for and against the war.[6]

According to Vitoria, the legitimate titles by which the Amerindians could come under the Spanish rule are determined by natural law and the *ius gentium* which is to be based on it (García-Salmones Rovira, 2017). The core of the law of nations were natural rights – the right to travel, trade and sojourn in another country so long as the travelers intend no harm and are innocent of any crime. Corresponding to this right is the duty of all peoples to welcome traders and travelers, treat them hospitably, share things held in common with them, and allow them to engage in trade.[7] If these natural 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 (Vitoria, 1991, pp. 278-290). Hence, when American aborigines were unwilling to accept the Spanish actions 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 (Vitoria, 1991, p. 283). The universal *ius gentium* Vitoria invoked, as Anghie points out, thus represented an idealized version of a particular cultural and economic practice of the Europeans – the trade, or more precisely, taking away of resources, of which there were plenty and which were not used and owned according to standards of European civilization. Under a newly emerging law of nations, resistance against an imperial incursion thus became a legitimate cause of war and the military conquest of "backward" people the ultimate prerogative of the sovereign (Anghie, 2005, pp. 17-20).

Vitoria's reflections on the justice of war contributed to the establishment of the right of conquest as one of the first principles of the emerging international legal system

which was forged out of the attempt to create a set of rules that could regulate colonial encounters and confrontations (Anghie, 2005, p. 3).[8] 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 later centuries. The core of this justification is the view that cultural and economic inferiority and the failure to meet standards of Western civilization permit forcible imposition of a foreign rule. As Craven pointed out, Vitoria thus also laid the foundation of an alternative imperial vision emphasizing the commercial control of resources through trade, contractual rights, and private property rather than relying on territorial expansions of sovereignty by war (Craven, 2012, p. 869).

In the 16th-century's Spain, 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 was 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 an accumulation of resources and wealth by coercive political means for the exclusive benefit of the sovereign. It was this political logic of the coercive accumulation of material wealth which shaped both domestic and foreign policies of the early modern absolutist sovereignty and which accounts for the geopolitical strategy of territorial aggrandizement and overseas empire-building for the purpose of securing direct access to valuable natural resources (Teschke, 2002, p. 7).

B. Right of Conquest and the Origin of Sovereignty over Natural Resources

These socio-political conditions – Spain being a proprietary dynastic state, with feudal social and economic property relations and geopolitical strategies of territorial aggrandizement and natural resource accumulation – shaped the practice of the 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 the sovereignty exercised at home – absolutist, with little to no constitutional checks and balances, relying economically on the accumulation of a surplus essentially by means of political coercion. However, in virtue of

the conquest and its particular aim to seize valuable natural resources, imperial sovereignty manifested an enhanced proprietary character as it involved an exclusive proprietary claim to the overseas territorial 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 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) (Wolf, 1982, pp. 131-140). The Crown claimed royal subsoil rights to minerals and all potentially valuable natural resources in the conquered territories.[9] 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.[10] Spanish treasury became heavily dependent on its overseas extractive industry revenues and used them almost exclusively to finance wars and other military expenditures (Pagden, 1995, pp. 70-71).[11]

Due to the assertion of sovereign mineral ownership and the development of a successful extractivist economy, the creation of the Spanish empire can be considered to represent the first 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 morally arbitrary circumscription of the geographic space which cuts across human societies and environmental systems. The supreme power imposed within this arbitrary political space 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 the sovereign power. Both jurisdictional rights to rule over the people and ownership rights to resources constitute two fundamental facets of imperial territorial sovereignty.

Imperial sovereignty thus emerges as a property regime with respect to territory and its resources, structurally equivalent to a liberal private property regime with its typical features – an 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 use, and the unlimited right to use and control a good including the right to sell or otherwise gain income from it.[12] These features also make explicit the most fundamental injustices

linked to the use of nature in the context of this legal-political regime. Invoking Marx (Marx 1954), the first injustice can be called the injustice of primitive accumulation of natural resources.[13] It consists in violence and the destruction of sovereign and property rights of indigenous populations and asserting a legal title to territory and its resources. The second injustice can be called the injustice of political domination as it follows from the use of natural resources for the exclusive benefit of the sovereign and as the material source of the perpetration of an unjust rule. Last but not least, there is the injustice of systematic exclusion and inequality in the distribution of economic benefits arising from the extraction and trade of natural resources which, in colonial economies, was exacerbated by radical structural inequality and systematic exclusion from access to basic socio-economic goods based on race, ethnicity, and religion.

C. A 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 distant places. Discovery, occupation, and cession became dominant legal doctrines, the latter two the most potent as legal arguments (Fitzmaurice, 2011, p. 841). However, military conquest remained a frequently employed and 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, 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.[14]

International law recognized military conquest as a valid title to territory until the 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 Pufendorf – invariably emphasized that the recognition of the right of conquest had a practical value for the maintenance of international order. Nineteenth 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 a territory and its population. Similarly, the principle of prescription had been recognized, according to which a state acquires a title to territory on the grounds of long-held and uninterrupted possession, regardless of the validity of the means whereby the territory was originally acquired (Kelsen, 2006, pp. 213-215).

Much can be discussed concerning international law that recognizes the right of conquest. 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" (Tucker, 1977, p. 12). 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, and its being the main instrument and basis of the institutionalization of the quintessentially unjust use of nature.

It is the proprietary claim to territory and its resources and the logic of an unlimited accumulation of resources for the exclusive benefit of a 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 the 1960s during the process of 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 not very many limits on the sovereign resource prerogative, especially 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. As Wenar demonstrates (2016), there are countless examples of such corrupt, illegitimate, and sometimes illegal governments in today's world. Fraught with the abuse of resources for the perpetration of the injustice of political domination and with the exclusion of large portions of population from benefiting from natural wealth, permanent sovereignty over natural resources is often practiced in ways fully continuous with its colonial predecessor.[15]

III. The Right of Discovery and Occupation, and the Propertization of Land

European powers of the 16th century sought to imitate the Spanish precedent and take their own share of new territories and assets. Without the benefit of papal donations and the right of territorial conquest granted therewith, 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.

The content and the scope of the right of discovery – the principle that title to a territory comes from its discovery and its occupation and an effective appropriation of its land and resources – was also 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 for a quintessentially possessive nature of the European empires, this time based on a disingenuous claim to use land that seemed to belong to nobody or was used ineffectively and to improve it via agricultural development. It established and justified an essentially dispossessive practice of appropriation of foreign land for the purpose of its effective and profitable development, using private property rights as the main method of the appropriation and exploitation of the territory and its resources.

A. British Settlement in North America and the Process of Land Enclosure

Britain became the most prominent advocate of the right of 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 16th century, also echoed long-term attempts of the Roman Catholic Church to establish a worldwide papal jurisdiction and hence the right of Christian princes to dominate the "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 (Miller et al, 2010, p. 17).

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 lands into a title requires actual occupation and possession – the building of forts, the cultivation of the soil, and the establishment of an effective governmental authority. The second innovation concerned the view that not only lands which were unoccupied but also lands which were in fact occupied but were used in a manner that the discoverers regarded as wasteful and ineffective were available as null and void lands (*terra nullius*) and hence available for legitimate possession. These innovations guided the British explorers in their efforts to seek out, claim, and colonize lands not possessed by other Christians (Pagden, 1995, pp. 76-80).[16]

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 King James VI in 1606, granting it exclusive rights to settle in the Chesapeake Bay area of the North 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 from home. 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 settlement (Elliott, 2006, pp. 16-25).

Except for the Puritan communities,[17] 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 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 occupation on the basis of the discovery claim. Within this territory, settlers held legislative and judicial powers over all the inhabitants, rights to distribute property, build fortifications and maintain military and naval forces, and rights to 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 (Miller *et al.*, 2010, pp. 27-30).

The early North American settler history differs from the Spanish conquest in many respects including the terms of the appropriation of natural resources. As Vaughan shows (1979, p. xiii), there were some notable attempts, partly successful in the early years yet marked by failure in the long run, to deal justly and peacefully with the native tribes. The main task for the settlers was to expand their settlements. The prime constraint on the movement of the 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" – had become the main content of the process of expanding settlement.

John 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 (Tully, 1993; Arneil, 1996), 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 a 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 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" (Locke, 2003, p. 276). For Locke, enclosure, that is, property established in virtue of the laborious extension of self-ownership into 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. Locke's notion of property, however, not only expresses this moral imperative, it also constitutes the foundation of civil and political society created by a 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 an original state of nature (Locke, 2003, p. 281). In Locke's view – a view which he shared with other natural law thinkers – indigenous people live in a natural state of abundance and their primitive means of subsistence (hunting, foraging) do not justify the enclosure of commonly held nature by property rights. The labor which does justify it 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 (Arneil, 1994, p. 603). By not recognizing the indigenous economic mode of production as property-appropriating labor and hence ignoring 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 industrious men, from the abundance of the mythical state of nature.

Secondly, by emphasizing the supremacy of agricultural labor on land, Locke makes the European version of agricultural development (and the monetized commerce which follows it) the superior material form of a human relationship with nature and the prominent source of a just title to territory, even already occupied foreign territory. Private property is both the legitimate method of the appropriation of natural resources and acquisition of a territory as well as a specific material means of their exploitation. What kind of property, with what scope, and with what powers? In the 17th-century British common law, private 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 its use, the autonomy to decide in a narrow self-interest, and the unlimited right to use and control a given good including the right to sell it or otherwise gain income from it regardless of any demands of distributive justice and equality. English settlers imposed these spatially exclusive and unlimited property rights onto land in foreign territories, thus turning land into a permanently fixed resource for efficient economic activity whose benefits could only be enjoyed exclusively by them (Blackstone, 2016; Koskenniemi, 2017).

B. Private Property, Land, and Injustice

The establishment of a liberal property regime over 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,[18] occurred by various means. The mechanisms involved, most frequently, settlement and land purchases. Land contracts often featured a lack of recognition of equality and reciprocity between the contracting parties, abuse of an unequal bargaining power, manipulation of consent, lack of transparency regarding terms and conditions, and restrictive terms of revocability of the contract.

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 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 land based on spiritual attachment (Greer, 2010). As a response to ceaseless expansion of the settlers 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 also genocide.[19]

To acquire land by these dispossessive means and restrict native peoples' internal and international political and commercial powers had become the key prerogatives of the settlers under the emerging legal doctrine of discovery. Miller *et al.* (2010) show that 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 land they settled and occupied, including powers to determine property rights within it. This right implied a corresponding loss of the full native title to land and territory. 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 included the so called "preemption right" (also called "European title") which implied an 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 the right to sell the land to whomever they wished. The right of discovery also implied the right to wage a just war against native populations in certain circumstances

and acquire their territories by military conquest (Miller at al., 2010, pp. 19-22).

The allocation of these rights and prerogatives to settlers – basically by virtue of walking ashore and setting up a shelter – needless to say occurred without the knowledge or consent of the natives who already occupied and used the discovered lands. This form of settler colonialism was also justified by religious, racial, and ethnocentric ideas of 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 seemingly available, unused land and to put it to effective use. The dominant organizing logic behind the acquisition of the foreign land was based on the ideology of agricultural or extractive development. Not being Christian 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 and their land was deemed available for those who were willing to put it to a more effective use.

Relying predominantly on the acquisition and propertization of land, British settler colonialism had come to represent a different version of the 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 stems from violence and dispossession being the basis of the process of acquiring legal titles to land. In the given historical context, property rights to land arose either directly from a forceful displacement and the confiscation of land or from contested contracts, both based on the violation of indigenous territorial and occupancy rights and their usufruct rights to natural resources and the non-recognition of their autonomy to make decisions about their lands and territories.[20]

The second injustice, particular to the settler colonial context, concerns environmental disruption and drastic changes of human ecology. Recently thematized by critical settler colonial studies (e.g., Whyte, 2018), the environmental injustice of settler colonialism resulted from massive changes in land tenure systems and from a thorough transformation of the environment caused by the imposition of new agricultural practices and the introduction of new crops and animals. Settlement and its forceful expansion and the environmental impact which followed it disrupted the pre-existing economic and ecological practices of land use, of the system of usufruct rights in various resources (hunting and foraging), and the native peoples' symbolic

relationship to nature, thus violating the indigenous inhabitants' rights of occupancy, territorial control and collective self-determination, and the preservation of their identity (Cronon, 1983, pp. 54-80).[21]

Finally, there is a serious 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 discriminated groups access to the most essential natural resources – the land. Since land is the key to economic subsistence, livelihood sustenance and cultural survival of these groups and hence to the fulfillment of the most basic existential needs, the lack of access to this essential resource is profoundly unjust. In the colonial context where indigenous people were denied a whole range of the most basic 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.

C. Global History of the Grabbing of Foreign Land

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 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 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 such lands, and to exercise limited sovereignty over the tribes and their commercial and foreign powers (Miller *et al.*, 2010, p. 28).

In 1823, in the influential case *Johnson v. M'Intosh*, the US Supreme Court defined the right of discovery in terms mentioned above, thus turning discovery and its baseline principles into a legal doctrine which has shaped 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 the doctrine of discovery had become American law after already being the English colonial law. It confirmed that rights of discovery automatically implied sovereignty 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, and limited governmental and sovereign powers over native peoples' affairs, especially over their commercial and foreign prerogatives. The same principles also regulated settlement in Canada, Australia, and New Zealand where, like in the USA, the doctrine of discovery continues to exert influence concerning indigenous people to this day (Miller *et al.*, 2010, pp. 3-9).[22]

The legacy of settler colonialism goes beyond this context. British settler colonialism represents a historic origin of a dynamic global process of extensive and environmentally consequential changes of systems of land tenure and land use in the name of 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 and used land by companies and private entrepreneurs, foreign governments, and investors. The process of foreign land-grabbing 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 has only intensified in recent years with Asian countries and Gulf states and companies acquiring millions of hectares of fertile land in Africa, the key injustice committed is the same as it has always been: the non-recognition of historically marginalized, discriminated, or otherwise disadvantaged groups' legitimate claims to land based on their rights of long-term occupancy, attachment, cultural identity, and their claims to sustain livelihood – groups such as indigenous peoples, rural communities, subsistence farmers, ethnic minorities, or women. Misallocation of land rights which disproportionately affects these groups remains the central injustice arising in this context.[23]

IV. Freedom of the Seas and the Colonialism of Free Trade

The principle according to which the seas are a non-excludable resource domain accessible and freely available to all nations for 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 an empire pursuing commerce and free trade. Invented by Hugo Grotius at the very beginning of the 17th century, the freedom of the seas was vigorously asserted by the United Provinces of Netherlands. At the time of its origin, it 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 common resource domain. The set of principles concerning the access to and the use of marine resources mirrored the emerging global order of overseas trade and the rules of the establishment and maintenance of trading monopolies. The freedom of the seas and the commercial colonialism of free trade thus emerge as two interrelated normative orders of navigation and commerce – the former expressing the logic of a free and unlimited accumulation of common resources on a first-come, first-served basis, the latter crystalizing as a system of coercive imposition of trading monopolies and inequitable trading relations in distant places.

A. Grotius' *Mare Liberum*

The 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 an exclusive rule over pelagic spaces. Greek historians wrote of the hegemonic control of the sea – a *thalassocracy*. The Romans asserted their doctrine of *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 and 1600. Republican city-states of Monaco, Genoa, Pisa, and Florence competed for control of the Tyrrhenian Sea. Genoa made effective claims to the Ligurian Sea and Venice rose to hegemonic power in the Mediterranean world (Rossi, 2017, p. 39). 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, the right to collect fees and tolls, the right to issue licenses for navigation through particular ocean areas, the control of fisheries, and the conduct of maritime ceremonials (Bederman, 2012, p. 364).

Until the Age of Discovery, there was no discourse on the subject of a free or common use of the seas, neither in practice, nor in the literature. As Craven points out (2012, p. 872), the boom of explorative and colonial enterprises and the ensuing expansion of

overseas trade logically raised awareness of their spatial and logistical conditions, such as the availability and feasibility of navigation routes and access to trade networks – and hence to the legal and political status of the seas. 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, to gain exclusive control over assets and resources, to manage conflicts over them, and to facilitate the pursuit of essentially possessive economic and political interests.

As 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 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 had established the East India Company (VOC) in 1602 exactly for this purpose. In February 1603, a Dutch squadron captured a Portuguese carrack, the *Santa Catarina*, which carried a large cargo of valuable goods. The vessel was brought to Amsterdam as a prize.[24] 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 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 all peoples and nations. Grotius first deconstructs the Portuguese claims of 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 rights 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 exclusive ownership. *Dominium*, he asserted,

can only be derived from use based on physical possession which transforms a domain; 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 appropriation (Grotius, 2004, pp. 25-30).

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, as Susan Buck put it (1988, pp. 5-6), are its most fundamental features. 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 humankind, allowing free navigation and fishing. Borrowing substantially from the writings of Fernando Vázquez y Menchaca, a Spanish jurist (1512-1569) who refuted Venice and Genoa's claims to dominion over parts of the Mediterranean, 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 unimpeded access to Asian trade (Van Ittersum, 2006).

B. Freedom of the Seas and the Empire of Free Trade

The notion of the freedom of the seas formulated in *Mare Liberum* cannot have more arbitrary origins. On the one hand, Grotius consciously misconstrued the 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 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 a fundamental principle of international law which, unlike its relatives discussed in the previous sections, continues to determine the rules of using some natural resources in the global oceans to this day.

What is to be emphasized here, given the attempt to trace back the genealogy of natural resource injustice, is that the 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 typical for other common property regimes. According to recent critics, Grotius' free sea is thus not a regime which could be meaningfully defined as a regime of common ownership. Rather, the global order of the free sea implied in Grotius' conception is an order of unlimited freedom to accumulate resources on the first-come, first-served basis, with no heed being paid to limits on the use of common resources and equality of opportunity to use them.[25]

A truly common ownership regime of the maritime space and its resources would have to include not merely the right to use common 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 (2012), is that all co-owners have an equal opportunity to use collectively owned resources to be able to satisfy their basic needs. The key to a notion of common ownership is an equal moral status of the co-owners and, correspondingly, the equal opportunity of all to use the commonly owned resources. Equal opportunity then requires rules and limits of the common 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 nature of 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, that of highly exploitative and coercive trading relations pursued by chartered companies in the East Indies and later elsewhere. Both of these normative orders – the order of free navigation and that of overseas trade

– are infused with interrelated and mutually constitutive concepts of freedom, rights, enemy, war, and legal and material methods of pursuing, claiming, and accumulating resources.

The Dutch East India Company (VOC) on whose behalf the regime of the free seas 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 of 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, to 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 the company an actor under international law very much like a sovereign state (Rossi, 2017 p. 57). VOC utilized all these various legal, administrative, military, and commercial powers which amalgamated into a patchwork of coercive political and commercial domination (Ward, 2009).

The preferred methods through which VOC intruded into the 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.[26] 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 parties 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 (Stapelbroek, 2012, pp. 350-351).

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 an expansion of control and

the establishment of more direct political rule, often relying on the imposition of territorial sovereignty. As a more effective legal-political technology of control and protection of trading relations, territorial sovereignty was extended by a 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. A 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 an alliance of Bandanese polities – VOC executed their leaders, exiled local populations, 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 (Ward, 2009, p. 75).

VOC's politically-backed commercial dominance in the East Indies represents a paradigmatic example of a colonial form pursued as coercive trade and enabled by free navigation, the core freedom protected by the emerging international legal regime of global oceanic commons. By the mid-18th century, a number of other overseas trading companies had been established with the similar purpose of gaining trading privileges protected by political domination. 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 trading 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 non-free mercantilist trade for the purpose of an exclusive enrichment of the merchants and their respective states (Craven 2012, p. 872). Rather than territorial conquest and settlement, forcible trading relations and contracts defined by a logic of unequal exchange and coercion and backed by privatized sovereign violence – an empire of free trade – had become the main instrument of imperial domination (Ormrod, 2003).

C. The Legacy of the Grotian Tendency to Appropriate

The 18th century witnessed two developments that would reinforce the twin imperial

paradigm of free seas and 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 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 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 (Wallerstein, 1974).

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 World War II. With the establishment of the system of "permanent sovereignty over natural resources", states gradually started seeking broader control over maritime areas adjacent to their coasts and claiming 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. A 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 an 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 the 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 (2017, p. 71), an enclosure of natural resources as epic as the Treaty of Tordesillas.

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 the oceans' territorialization, however, precluded the

possibility to reinvent the liberal regime of free seas into a truly common global resource domain. Living resources in what has been left of the free sea, beyond EEZs, have been governed by the regime of open access. Despite many attempts at the regulation of high sea fishing, there are large-scale high-tech fishing corporations from a few countries which catch fish in large quantities, even in coastal waters of poorer states with no capacity to stop them, thus depleting this global living resource along with the marine environment.[27] Due to changing circumstances (environmental changes as well as technological possibilities of a much higher subtraction and hence rapidly shrinking availability of resources), the unrestricted freedom of use which has been at the heart of the regime of the free seas and the Grotian vision of common oceans has led to significant depletion of resources and destruction of the marine environment. In the circumstances of scarcity of resources, 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.

The 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 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 political violence. The 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 linked to severe injustices such as child labor, modern slavery, armed groups violence against local populations, police repression, and the above mentioned forms of displacement and dispossession which lead to poverty, food insecurity, and economic marginalization.[28] These issues result not only from failures of states to regulate resource extraction and to determine resource benefits allocation in accordance with basic requirements of procedural and distributive justice. They are equally a result of multinational corporations' strategies and global financial institutions' logic of operation which reinforce a lack of accountability and transparency, and enhance their ability to pressure weak governments and local producers. Yet, natural resources extracted or produced under such unjust conditions smoothly flow into global supply chains where they are commodified and turned into profits for all but those who are entitled to them (Africa

Progress Report, 2013).

V. 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 the imposition of a regime of appropriation and distribution of natural resources: the right of conquest turned natural resources into property of the sovereign by imposing a 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 injustice of exclusion in distribution of opportunities, benefits, and burdens related to the use of natural resources, and the injustice of inequitable and unsustainable use of global commons. The exposure of these regimes in their historically paradigmatic forms, as well as the injustices which are inherent in them is meant to contribute to the development of a critical framework accounting for the ongoing injustice which is deeply and inextricably embedded in the modern human use of nature and its resources.

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Notes

1 Contemporary distributive justice conceptions focus almost exclusively on global inequality of resource holdings and on unequal distribution of the benefits natural resources provide, which are considered as problems mirroring a moral ideal of an egalitarian global distribution (Beitz, 1979; Steiner, 2011; Armstrong, 2017).

2 In using the term injustice I rely on what I consider uncontroversial assumptions underlying an intuitively plausible moral understanding of wrongness of arbitrary power exercise and the perpetration of violence such as torture or aggressive war, the moral impermissibility of slavery and forced labor, and other forms of pervasive and systemic racial, ethnic, and religious discrimination, and underlying them, the exclusion from the most basic goods, rights and opportunities as moral wrongs. Invoking these unambiguous moral wrongs, contemporary political theorists have recently provided a long overdue moral critique of the past forms of domination, colonialism, and imperialism. See especially Vittorio Bufacchi's critique of colonialism in terms of the arbitrary exercise of violence and its role in maintaining relationships of domination, racial discrimination, and radical inequality (Bufacchi, 2017).

3 For a similar argument about three different colonial conceptions of the redistribution of the spatiality and natural resources of the world, see García-Salmones Rovira (2019). She focuses on the conceptions of natural rights in the work of Vitoria, Grotius, and Locke, showing how they were constructed as key instruments for the justification of a highly contested appropriation of earth spaces and natural resources in newly constructed domains of international society, common space of the oceans, and common land in the state of nature. Unlike García-Salmones Rovira, I am concerned here with three specific colonial projects and how they initiated and shaped influential legal doctrines which determined a long and ongoing process of the appropriation of natural resources on the globe.

4 What Foucault has termed a critical history of the present essentially means using history as a means of a critical engagement with the present, in other words, as a source for developing the terms of a critical analysis designed to address a contemporary problem. For Foucault, genealogy is the method of writing such a critical history. It does not involve reading present day arrangements back into history but rather revealing their descent and emergence out of specific contexts, struggles, conflicts, and exercises of power and uncovering how the contingencies of these processes continue to shape the present (Foucault, 1981).

5 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 (Korman, 1996, pp. 44-45).

6 Vitoria lists several unjust titles for war against "the barbarians". He rejects the notion that either the emperor or the pope is master of the whole world. He argues that discovery, which can only apply to unoccupied or deserted land or property, is not a justification for conquest. He also denied that refusal to accept the Christian faith could serve as a pretext to conduct a just war against them. He also rejected that war could be declared on the basis of their mortal sins like cannibalism or incest. Finally, neither voluntary submission nor a special gift from God could justify the conquest (Vitoria, 1991, pp. 252-277).

7 Other possible just titles for the war against Amerindians include the protection of converts and the defense of the innocent against tyranny (Vitoria, 1991, pp. 278-291).

8 The debate on the justice of the Spanish conquest of the Indies was complex and involved other scholars of the School of Salamanca – an intellectual movement involving a group of theologians in sixteenth- and seventeenth-century Spain and Portugal. Vitoria, however, is considered the founding father of the school and his views loomed large in the debate of the time, cementing the consensus on the basic precepts of the law of nations and some natural rights being enforceable by war. Only Bartolomé de Las Casas stands out in this context as an ardent defender of the Amerindians and their rights (Hanke, 1949, pp. 28-74, Izbicki and Kaufmann, 2019).

9 Supreme royal rights to precious metals and subsoil minerals were asserted in Spain since 1525 and this prerogative applied to new gold and silver mines overseas and also to old Spain's mining districts. In an attempt to maximize the revenue collection and control over mining, King Philip's 1559 new mining law drastically centralized mineral ownership and control, expropriated certain private mines and authorized royally-sanctioned miners (*concessionaires*) to explore widely (Scott, 2008, p. 195).

10 The policies included a state monopoly on shipping and trade, strict control of the 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 (Hurley, 2011).

11 According to estimates, 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. Silver accounted for 20-25% of the revenues and 80-90% of the exports from the Indies (Bakewell, 1971, Elliott, 1966, p. 180).

12 In international law, a conceptual analysis of territorial sovereignty in terms of property is still relatively uncommon. Lauterpacht's study *Private Law Sources and Analogies of International Law* pointed to the analogy between sovereignty and property. The object theory of territorial sovereignty which Lauterpacht advanced holds that the relationship of the State to its territory is "identical with or analogous to the private law right of property" (Lauterpacht, 1927, p. 55). Koskenniemi also mapped how the imperial sovereign power was derivative from and supplementary to claims about private property, albeit in the context of the British Empire and English legal thought (Koskenniemi, 2017).

13 Marx employed the term primitive accumulation to account for the first and originary act of accumulation of resources by violent, extra-economic means for the purpose of creating capital and initiating a more regularized process of capitalist reproduction. I use the term more broadly to describe the process of the violent appropriation of natural resources which has been a recurrent element in most episodes of the imposition of colonial and imperial domination.

14 Examples from the 18th and 19th centuries include the Russian conquest of Central Asia, the French conquest of Indo-China, and the 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 the British South Africa Company (Korman, 1996, pp. 63-65).

15 According to Wenar, the key mechanism which reinforces the connection between political injustice and natural resources is the defective rule of an international trading system which allows illegal or illegitimate actors who simply have enough power to control the resources to sell them to buyers who treat them as legitimately purchased goods. This odious "might makes right" rule must be invalidated if justice in using natural resources is to be served (Wenar, 2016, p. 77).

16 All major early modern international law thinkers (Grotius, Pufendorf, Vattel) provided conceptions of occupation and possession and argued they substantiate and legitimize colonial claims (Lindley, 1926, pp. 136-138).

17 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. As Vaughan shows (1979, pp. 64-70), they mostly relied on purchases of land from the natives.

18 The indigenous system of property, as Cronon shows (1983, pp. 19-33), did not imply rights of exclusive use of a demarcated space nor a broad bundle of rights such as a right to prohibit trespassing or a 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 of the land. Their system of rights of use of natural resources relied on usufruct rights and overlapping territorialities and overlapping uses by different groups.

19 Hixson (2013) 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.

20 These rights have been recognized and defined as such by the indigenous populations themselves. Andrew Fitzmaurice describes the conflict between English settlers and the Powhatans and their tributaries and the way the Powhatans asserted their rights against the settlers' encroachments. Attachment, taking possession and occupation, and the exercise of political jurisdiction were named as the most important sources of land rights of Powhatan tribes (Fitzmaurice, 2011, p. 86).

21 Whyte shows how settler colonial domination represents a form of ecological violence and environmental injustice. This occurs via different forms of encroachment into peoples' habitat and livelihood practices or by displacement. Settlement expansion undermines the continuance of collectives for which a reciprocal and interdependent relation to the environment is a central feature of existence (Whyte, 2018).

22 For a broad account of the continuity of territorial and commercial expansion in American foreign policy which goes back to the early history of the British settlement, see Kagan's *Dangerous Nation* (2007).

23 There is a wealth of literature criticizing land-grabbing along these lines (for example, De Schutter, 2011; Cotula, 2013; Liberti, 2013; Edelman *et al.* 2016). De Schutter is especially vocal in showing how the new global enclosure movement undermines livelihoods of land users in rural areas through the destroying of commons and pricing out land owners from emerging international commodities markets.

24 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 (Tuck, 1999; Borschberg, 2002).

25 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, 2017, pp. 49-51).

26 Monopolies of trade depended on having textile from India to exchange for the valuable spices. Therefore, VOC also invaded the Coromandel and Bengal coasts 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 (Ward, 2009).

27 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 (FAO, 2018).

28 Global Witness has been monitoring the trade in valuable natural resources and the ways it funds abuses, armed conflict and how it causes social and environmental harms in all parts of the world. See https://www.globalwitness.org/en/

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