Chapter 2
European Colonial Law and Appropriation Practices in the Americas

In response to the discussed generalized claims of intertemporal law advocates, this chapter uncovers the persistent myths about the valid European colonial law during the initial stage of European colonization. Based on the systematic examination of an extensive body of historical literature from various research perspectives, such as intellectual legal history, comparative legal and global history and ethnohistory, the chapter provides a substantial overview about the initial European colonial law, which serves as a starting point to ascertain the lawfulness of colonial appropriation practices in northeastern South America and adjacent islands. For the yet inconclusive period, the chapter examines both research results about the respective European colonial legal writings and insights about the practical application of those legal provisions, which is based on an adapted approach of Anthony D'Amato, who argues that colonial practices are inheriting an "important probative value" in identifying the actually valid European colonial legal provisions at the time.[1] In result, the chapter offers a grounded and differentiated account on the European colonial law, which was valid during the initial European colonization in the Americas and, hereby, identifies *occupation* as a significant, but mainly overlooked, legal means of colonial appropriation and demystifies unsubstantial assumptions about the validity of *terra nullius* and *discovery*.

Many European Laws of Nation

First of all, historians unanimously agree that there was no universal European colonial law in place until the late nineteenth century.[2] Instead, several "laws

1 D'Amato, "International Law, Intertemporal Problems", p. 1234.

2 A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal* 40 (1999) 1, pp. 3–71, at 3–4; B. Clavero, *Freedom's Law and Indigenous Rights: From Europe's Oeconomy to the Constitutionalism of the Americas*, Berkeley: University of California School of Law/Boalt Hall, 2005, p. 86; A. Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities", *Third World Quarterly* 27 (2006) 5, pp. 739–753, at 739; 751; A. Pagden, *The Burdens of Empire. 1539 to Present*, Cambridge: Cambridge University Press, 2015, Preface; A. Pagden, "Law, Colonization, Legitimation, and the European Background", in: M. Grossberg and C. Tomlins (eds.), *The Cambridge History of*

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of nations" emerged in different places across Europe at various points of time. Accordingly, the sixteenth century was dominated by the legal considerations of a Spanish theologian from the School of Salamanca, namely Francisco de Vitoria (*De Indis Noviter Inventis*, 1532; 1537/1539) and *De Jure Belli Hispanorum in Barbaros*, 1532; 1537/1539),[3] who was perceived "as one of the earliest writers on international law",[4] along with his contemporary Alberico Gentili, a Protestant Professor from Oxford University (*De Jure Belli Libri*, 1588/89),[5] whose trilogy had "represented the first comprehensive treatment by an English jurist of the law of war in the new style – that is, in the style known today as the Law of Nations", which Gentili had detached from the theological foundations. Therefore, the Italian "performed important spadework" for the "fully elaborated" account of Dutchman Hugo Grotius.[6] Furthermore, relevant legal considerations emerged in the late fifteenth and early sixteenth century with the papal bulls *Inter Caetera I* and *II* of Pope Alexander VI of 1493,[7] the Treaty of Tordesillas

Law in America, Vol. I, *Early America (1580–1815)*, Cambridge: Cambridge University Press, 2008, pp. 1–31. More precisely, Anthony Pagden indicates that the "laws of nations" of Spaniard Vitoria would have had predominantly emerged in the context of Spain (Pagden, *Burdens of Empire*, Preface), whereas Antony Anghie argues more general "that the Colonial Encounters, far from being peripheral to the making of international law, has been central to the formation of the discipline", the international law would be "a consequence of the imperial expansion" (Anghie, "Finding the Peripheries", pp. 3–4) and the "non-European world" would present "a continuing preoccupation of international law from its Vitorian beginnings" (Anghie, "The Evolution of International Law", p. 751).

3 Williams, *The American Indian in Western Legal Thought*, pp. 93–103; 167–172. See Pagden, *The Burdens of Empire*, p. 1–44; Fitzmaurice, *Sovereignty, Property*, pp. 40–51; 58; Anghie, "The Evolution of International Law", p. 742; Anghie, *Imperialism, Sovereignty*, pp. 13–31; Doyle, *Title to Territory*, pp. 27–33; Gilbert, *Indigenous Peoples' Land Rights*, pp. 9–13; R. Miller, "The International Law of Colonialism: A Comparative Analysis. Symposium about The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organization of American States", *Lewis Clark Law Review* 15 (2012) 4, pp. 847–922, at 860; A. Pagden, *Spanish Imperialism and the Political Imagination: Studies in European and Spanish-American Social and Political Theory 1513–1830*, New Haven: Yale University Press, 1998, p. 16; A. Pagden, "Dispossessing the Barbarian. The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians", in: A. Pagden (ed.) *The Languages of Political Theory in Early-Modern Europe*, Cambridge: Cambridge University Press, 1987, pp. 79–98; A. Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700", in: N. Canny (ed.), *The Origins of Empire*, Oxford: Oxford University Press, 1998, pp. 34–54.

4 Miller, "International Law of Colonialism", p. 860.

5 Williams, *Western Legal Thought*, pp. 170; 195–199

6 Pagden, *Burdens of Empire*, pp. 139; 153–173; 75–96.

7 Miller, "International Law of Colonialism", p. 859. See Lenzerini, "Sovereignty Revisited", p. 164; Williams, *Western Legal Thought*, pp. 80–81, Fitzmaurice, *Sovereignty, Property*, p. 8.

(1494), the Laws of Burgos (1512), and the well-known Valladolid debate between Bartolomé de las Casas and Juan Ginés de Sepúlveda (1550/1551),[8] while the main law of nations of the seventeenth century was penned by Hugo Grotius (*Mare Liberum*, 1609 and *De Iure Belli Ac Pacis*, 1625), which emerged along with the legal writings of his contemporaries Samuel von Pufendorf (German), Serafim de Freitas (Portuguese)[9] and Englishman John Locke (*Two Treatises of Government*, 1689/90),[10] whose "understanding of property and labour" is commonly treated as "the dominant justification for colonization in America",[11] although his improvement or "agriculturalist" argument[12] was only sparsely practically applied in North America until the second half of the eighteen century,[13] when the Swiss Emer de Vattel (*Le Droit des Gens*, 1758)[14] had promoted the shift from natural to positivist law, which evolved until the Berlin Act of the eponymous Conference of 1884/85.[15]

Despite the most recent arguments of global and comparative legal historians, who had uncovered that "jurisdictional complexities" had prevailed during the initial stage of European colonization "in multiple forms" by including non-European actors in their historical examinations,[16] the majority of intellectual legal historians is still focused on the investigation of European colonial law,

8 Williams, *Western Legal Thought*, pp. 173–175; 83–89; Fitzmaurice, *Sovereignty, Property*, p. 8; Miller, "International Law of Colonialism", p. 859; Doyle, *Title to Territory*, pp. 32–37; Gilbert, *Indigenous Peoples' Land Rights*, pp. 11–12; Pagden, *Spanish Imperialism*, pp. 14–16.

9 Pagden, *Burdens of Empire*, pp. 137; 153–173; Gilbert, *Indigenous Peoples' Land Rights*, pp. 12–13; 23; 45; 59; Doyle, *Title to Territory*, pp. 38; 42–43; Banner, *How the Indians Lost Their Land*, pp. 16; 36; Fitzmaurice, *Sovereignty, Property*, p. 52; Anghie, *Imperialism, Sovereignty*, p. 13.

10 D. Armitage, "John Locke, Carolina, and The Two Treatises of Government", *Political Theory* 32 (2004) 5, pp. 602–627. D. Armitage, *The Ideological Origins of the British Empire*, Cambridge: Cambridge University Press, 2004, p. 97. See Seed, *American Pentimento*, pp. 38–39; B. Arneil, *John Locke and America: The Defence of English Colonialism*, Oxford: Clarendon, 1996; Banner, *How the Indians Lost Their Land*, pp. 39; 43–48; Gilbert, *Indigenous Peoples' Land Rights*, p. 89; Doyle, *Title to Territory*, p. 43; Fitzmaurice, *Sovereignty, Property*, pp. 24–25; P. Corcoran, *John Locke on the Possession of Land: Native Title vs. the 'Principle' of Vacuum domicilium*, Adelaide: University of Adelaide, 2007, pp. 8–9.

11 Fitzmaurice, *Sovereignty, Property*, p. 24.

12 Pagden, "Struggle for Legitimacy", p. 43.

13 Banner, *How the Indians Lost Their Land*, pp. 43–48; 58; 80–81; 152; 157–158; Washburn, "Moral and Legal Justifications", p. 23. Instead, Paul Corcoran refers to the overlooked chapters "on conquest, usurpation and tyranny" to even argue that John Locke is presenting "a robust defence of native rights to lands and possessions, rights that survive to succeeding generations" and would remain even in the case of a "just conquest" (Corcoran, *John Locke*, pp. 3–4).

14 Doyle, Title to Territory, pp. 43–44; Gilbert, *Indigenous Peoples' Land Rights*, p. 23.

15 Fitzmaurice, *Sovereignty, Property*, pp. 28–29; 276–284; Doyle, *Title to Territory*, pp. 52–56.

16 Benton, *Search for Sovereignty*, p. 36.

which legally bounds the practices of European colonial actors, but logically *not* Indigenous Peoples *prior* to a successful implementation of the respectively valid legal colonial means of appropriation in areas outside of Europe. In general, the main focus of the scholarly attention is, hereby, concentrated on three main legal doctrines, namely *terra nullius*, discovery, and conquest, which are, hereafter, examined in their original meaning and practical application in the light of their identified counterparts of treaty making, occupation, and "conquest" based on an "unjustly" waged war.

Terra Nullius vs. Treaty Making

The doctrine of *terra nullius* in the sense of "land without owners",[17] "vacancy (*vacuum domicilum*)" or "absence of ownership"[18] constitutes the most persistent legal myth in the story of European colonization, as both Francisco de Vitoria and Hugo Grotius in the sixteenth and seventeenth century had – in contrast to the common contemporary perception – actually dismissed the doctrine and its variants as lawful means of European colonial appropriation. Accordingly, intellectual legal historians *nem con* agree[19] that Francisco de Vitoria had never applied *terra* or *res nullius* as legal means of European appropriation, but had in 1532 instead introduced the term *fera bestiae* to establish the opposite argument, namely that Indigenous Peoples had already taken the lands by occupation in the Americas, wherefore the Spanish appropriation based on the assumption of *res nullius* is unlawful.[20] Furthermore, Vitoria clearly indicated that Indigenous Peoples "were rightful rulers [. . .] and must be treated as such", while they also "undoubtedly possessed [. . .] true dominion, both public and private, as any Christians".[21] Correspondingly, Grotius also rejected the mere assumption of *res nullius* as legal means of appropriation by arguing that the appropriation of

17 L. Benton and B. Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice", *Law and History Review* 28 (February 2010) 1, pp. 1–38, at 1.

18 Armitage, *Ideological Origins*, p. 97.

19 A. Fitzmaurice, "The Genealogy of Terra Nullius", *Australian Historical Studies* 38 (2007) 129, pp. 1–15, at 6; Fitzmaurice, *Sovereignty, Property*, p. 49; A. Fitzmaurice, "Moral Uncertainty in the Dispossession of Native Americans", in: P. Mancall (ed.), *The Atlantic World and Virginia, 1550–1624*, Chapel Hill: University of North Carolina, 2008, pp. 383–409 at 384; Pagden, "Dispossessing the Barbarian", p. 80; Doyle, *Title to Territory*, p. 28; Gilbert, *Indigenous Peoples Land Rights*, p. 9; Williams, *Western Legal Thought*, p. 100.

20 Fitzmaurice, "Genealogy of Terra Nullius", pp. 6–7.

21 J. Capizzi, "The Children of God Natural Slavery in the Thought of Aquinas and Vitoria", *Theological Studies* 63 (2002), pp. 31–52, at 39.

property based "on the notion that merely because somebody takes something [implies that] it becomes hers or his" does present "theft", wherefore legal colonial appropriation consequently requires the consent of Indigenous Peoples thereto by the conclusion of agreements and *treaties*. Consistently, Grotius had in 1609 clearly recognized that "the East Indies were in the possession of their native rulers" and were, therefore, not [sic!] *res nullius*.[22] Afterwards, the term *res nullius* was mainly applied in this "spirit" until the nineteenth century[23] and manifested as "a common concept in the law of nations" during the eighteenth century.[24]

Those legal foundations are to be carefully distinguished from the application of the term *res nullius* by English colonists to justify their (unlawful) practices, who – most notably in breach with the contemporary colonial law and by twisting the original legal meaning – attempted to justify their settlements in North America based on the unsubstantial claim that the respective area would have been "uninhabited" or "vacant land" during the seventeenth century,[25] such as for example in the case of New Jersey.[26] Those justificatory practices had served as the foundation for (unsubstantial) claims that *res nullius* "was widely alluded to by the English during the sixteenth and seventeenth centuries"[27] and had taken some intellectual and comparative colonial law historians to the retrospective reasoning that the English would have had *in general* "legitimize[d] their settlements" based on variants of *res nullius*,[28] or to even draw the conclusion that the English would have had "developed" the doctrine.[29]

In contrast, Anthony Pagden points out that the doctrine "was never formally adopted by the Crown",[30] whereas the legal insufficiency of the mere claim of *res nullius* is likewise confirmed by the English acquisition practice of concluding purchase agreements with Indigenous Peoples in North America, which are well-documented by the illuminating study of colonial legal historian

22 D. Armitage, "Introduction", in: D. Armitage (ed.), *Hugo Grotius. The Free Sea*, Indianapolis: Liberty Fund, 2004, pp. xi–xxi, at xv. See also Doyle, *Title to Territory*, p. 42; Pagden, "Dispossessing the Barbarian", pp. 80–81; Fitzmaurice, *Sovereignty, Property*, pp. 98–99.

23 Fitzmaurice, "Genealogy of *Terra Nullius*", pp. 8–9.

24 Fitzmaurice, *Sovereignty, Property*, p. 256.

25 Fitzmaurice, "Genealogy of *Terra Nullius*", pp. 8–9.

26 Miller, "International Law of Colonialism", p. 903.

27 Pagden, *Burdens of Empire*, p. 135.

28 Pagden, Lords of All the World, p. 76. Alternatively, it was claimed that "(f)rom the 1620s to the 1680s in Britain, and then in North America, Australia and Africa well into the nineteenth century [*res nullius* became] a standard foundation for English [. . .] dispossession of Indigenous Peoples" (Armitage, *Ideological Origins*, p. 97).

29 Miller, "International Law of Colonialism", p. 864.

30 Pagden, *Burdens of Empire*, pp. 135.

Stuart Banner for both the seventeenth and eighteenth century, such as in the cases of John Cotton (1634), the visiting Royal Commission (1665) in Massachusetts, William Penn in Pennsylvania (1681), and William Cosby in New York (1701, 1733, 1774 and 1790).[31] In the landmark ethnomethodological account of Francis Jennings determined as "deed game",[32] the first codified *written* English purchase practice was carried out in Massachusetts in 1634,[33] which was followed by written purchase agreements concluded with Indigenous Peoples in Connecticut (1644, 1662),[34] New Plymouth (1647),[35] New York (since 1664),[36] Carolina (1663),[37] Pennsylvania (1685), and New Jersey (1687)[38] and adopted from the Dutch, after a dispute with the same in the early 1630s,[39] since the Dutch had concluded a first purchase agreement with the Lenape of Manhattan already in 1626.[40] This was based on the instruction of the West India Company (WIC) in 1625, which had ordered the Dutch in North America "that Indian claims to land should be extinguished by persuasion or purchase", since "*such contracts upon other occasions may be very useful to the Company*".[41] The Dutch then continued to conclude purchase agreements with Indigenous Peoples, such as the well-

31 Banner, *How the Indians Lost Their Land*, p. 33; 44–45; 116; 303, footnote 44.

32 Jennings, *Invasion of America*, p. 128.

33 Banner, *How the Indians Lost Their Land*, p. 27.

34 Ibid., pp. 34; 60. This refers to the sale of an area in the vicinity of the Connecticut river by Chief Bucksham (ibid., p. 60), whereas another purchase agreement relates to an area between the Connecticut and Massachusetts rivers included "more than three hundred square miles" (ibid., p. 34). In this context, Stuart Banner emphasizes that the agreement itself "says nothing about whether, from the Indians' point of view, the transactions were voluntary in any meaningful sense, or whether the Indians interpreted the sales the same way the English did, or whether the Indians were sometimes defrauded by individual settlers or even by colonial governments, or whether the prices were fair" (ibid., p. 12). Moreover, Stuart Banner likewise refers to the many cases of purchase agreements, which were concluded without [sic!] the consent of the Chief Sachem of the respective Indigenous People (ibid., p. 75).

35 Jennings, *The Invasion of America*, p. 133.

36 Banner, *How the Indians Lost Their Land*, pp. 24–25.

37 Ibid. By contrast, Francis Jennings points out that "(e)ach colony experimented in its own way and at its own rate of progress" (Jennings, *Invasion of America*, p. 132).

38 Banner, *How the Indians Lost Their Land*, pp. 24–25.

39 Jennings, *Invasion of America*, p. 133–134; Banner, *How the Indians Lost Their Lands*, p. 19.

40 Banner, *How the Indians Lost Their Land*, p. 75.

41 WIC, "Instructions of 1625", in Jennings, *Invasion of America*, p. 132. See J. Schiltkamp, "On Common Ground. Legislation, Government, Jurisprudence, and Law in the Dutch West Indian Colonies: The Order of Government of 1629", *De Halve Maen* LXX (1997) 4, pp. 73–80, at 78.

known agreement with "the grand sachem of the Pequot Indians" for the upper Connecticut Valley in 1633.[42]

Likewise, the English had already entered non-written treaties with Indigenous Peoples, such as the well-known peace agreement between the Wampanoag and the Mayflower Pilgrims of March 1621[43] and the Algonquian and the English colonists of Jamestown (1607),[44] which was based on Sachem Powhatan's allowance to the English colonists to settle in peace, who had, according to a jurist of a House of Commons in 1614, stated that "Why should you bee offended with them as long as they hurt you not, nor take any thing away by force, they take but a little waste ground, which doth you nor any of us any good". Thereupon, his successor Opechanacanough, in line with the completely overlooked qualification inserted in the European colonial law of Hugo Grotius (chapter 8), Francisco de Vitoria (chapter 3), and the English Common Law of Blackstone in 1765, namely that the European practices of occupation and land purchase by agreement had just legally acquired property, but not sovereignty or jurisdiction, lawfully continued to exercise sovereignty in areas settled by the English, although the Virginia Company in London in 1622 (Barkham case) disliked the "savage emperor' s authority to control the company's land sales".[45] This resonates with Francis Jennings, who highlighted that "Indian jurisdiction" remained, where land was purchased by the Dutch as property.[46] Finally, the English concluded treaties and purchase agreements in New Zealand,[47] most notably by the famous Treaty of Waitangi (*Te Tiriti o Waitangi*) with the Māori in 1840, not however in Australia,[48] which Stuart Banner determines as an "anomalous" case.[49] Nonetheless, based on the secret order to James Cook in 1768, the colonial appropriation practice was still based on the consent requirement of Grotius, since Cook was instructed to "endeavour by all proper means to cultivate a friendship and alliance with them" and "*with the consent of the natives* to take

42 Jennings, *Invasion of America*, p. 134.

43 Banner, *How the Indians Lost Their Land*, p. 21.

44 Ibid., pp. 55; 23–24.

45 Williams, *Western Legal Thought*, pp. 208–220. At the same time, the Virginia Company likewise recognized her "inchoate prerogative rights" of the English, since the English "had repeatedly failed to bring the king' s perpetual infidel enemies in Virginia under subjection" (ibid.), which was predated by Pohwatan's coronation with a "copper crown" (1607–1609), the kidnapping of his daughter Pocahontas and a truce agreement resulting in her marriage to an English colonist (1613) (ibid.).

46 Jennings, *Invasion of America*, p. 132.

47 Banner, "Why Terra *Nullius*?", pp. 111; 102.

48 Miller, "International Law of Colonialism", pp. 868; 876.

49 Banner, "Why Terra *Nullius*?", p. 95.

possession of convenient situations in the country in the name of the king of Great Britain", but "not to seize the land if it was inhabited",[50] although Anthony Pagden likewise with reference to a James Cook order of 1768, but without any original citation, asserts that the English claimed Australia on *res nullius*.[51] However, this appears also unlikely in the light of the purchase agreements intended to be concluded in the 1780s to establish a "penal colony" on the "island of Lemaone, 400 miles up the Gambia River" or "Das Voltas Bay, on the southwestern coast of Africa, in present-day Namibia", which was finally established in Australia.[52] Instead, the term *terra nullius* was not introduced in Australia before the twentieth century,[53] since historian Ernest Scott used it for the first time in 1940,[54] whereupon the term re-emerged in 1977/78,[55] although the International Court of Justice (ICJ) had clarified in the context of the boundary dispute between Pakistan and India in 1968 that the absence of a boundary would not "imply that the disputed territory was *terra nullius*"[56] and the ICJ landmark decision of the Western Sahara in 1975 had emphasized agreements "rather than recognizing original title obtained by occupation of *terra nullius*"[57] and highlighted that "a

50 Royal Society, "Secret Instructions to James Cook", 1768, in Banner, "Why Terra *Nullius*?", p. 97, wherein the president of the Royal Society "reasoned that 'No European Nation has a right to occupy any part of their country, or settle among them without their voluntary consent. Conquest over such people can give no just title'" (J. C. Beaglehole [ed.], *The Journals of Captain Cook on His Voyages of Discovery*, Cambridge: Cambridge University Press, 1955–1974, p. 1: 514, in Banner, "Why Terra *Nullius*?", p. 97).

51 Pagden, *Lords of All the World*, pp. 76–77.

52 Banner, "Why Terra Nullius?", p. 98.

53 Fitzmaurice, "Genealogy of Terra Nullius", p. 4. Most likely, this was influenced by the request of British Columbia law scholar and ICJ judge Philip Jessup, who wrote to Scott in 1939 "asking if Australia had been described as *terra nullius* during the period of occupation" (ibid., emphasis added), while the term "in the late nineteenth century" in other contexts emerged "if ever" as an "analogy" to *res nullius* and was "judged to be inappropriate for Africa" (ibid., p. 13).

54 Ibid., pp. 4; 13; 2; 6. See Benton and Straumann, "Acquiring Empire by Law", p. 6.

55 M. Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia*, Sydney: Macleay Press, 2005; Fitzmaurice, "Genealogy of Terra Nullius", p. 5; S. Lindqvist, *Terra Nullius. A Journey through No One' s Land*, London: Granta, 2007.

56 International Court of Justice (ICJ), *The Indo-Pakistan Western Boundary (Rann of Kutch)*, 19 February 1968, http://legal.un.org/riaa/cases/vol_XVII/1-576.pdf (accessed 18 September 2018), p. 563 (emphasis added); T. Donovan, "Challenges to the Territorial Integrity of Guyana: A Legal Analysis", *Georgia Journal of International and Comparative Law* 32 (2004), pp. 661–730; at 691, footnote 152.

57 Wiessner, "Indigenous Sovereignty", p. 1153–1154 (emphasis added). Furthermore, Federico Lenzerini points out that Spanish colonization was justified at the end of the nineteenth century "on account of the presumed lack of sovereignty of Indigenous Peoples over the lands traditionally occupied by them" and grounded in "the doctrine of discovery" based on the fiction

territory inhabited by tribes, which have a social and political organization, cannot be, by nature, considered *terra nullius*".[58] Consequently, the ICJ concluded that *terra nullius* was "erroneously and invalidly applied against the tribal peoples of the Western Sahara", which was confirmed by the well-known Mabo vs. Queensland case of 1992 in Australia, which had also "denounced" the doctrine of *terra nullius*.[59] Invented just a few decades prior, historians are indicating the invention of the term as "Error Nullius"[60] and "impostor",[61] since such a "revisionism" had "flattened [. . .] the contours of history"[62] and likewise raises the question of how Europeans had then lawfully acquired (if so) the Americas and other parts of the world.

For the Americas, the historical research results are, furthermore, indicating that the French had concluded "numerous agreements and alliances with various North American nations", but only "one formal treaty" during the seventeenth and eighteenth century in New France,[63] since they instead mainly "simply asked for permission to reside with them [the Indigenous Peoples]",[64] although Robert Miller asserts that the French would have been the co-inventors of *res nullius*.[65] By contrast, the Portuguese would have had justified their colonial appropriation practices in the seventeenth century by "vacant lands" claims, such as resulting from a letter of the governor of Rio de Janeiro in 1640 and a papal bull of 1676 about the northern Rio de la Plata area. Notably, there are no

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of *terra nullius* to justify the "legitimacy of the occupation of the territories newly discovered" (Lenzerini, "Sovereignty Revisited", p. 164). In addition, Federico Lenzerini confirms the affirmation of the treaty practice by the Court, since the ICJ "emphasized that 'sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers'" (ibid.). See also A. Murphy, "Territory's Continuing Allure", *Annals of the Association of American Geographers* 103 (2013) 5, pp. 1212–1226, at 1220.

58 Gilbert, *Indigenous Peoples' Land Rights*, p. 28–29 (emphasis added).

59 E. Daes, "Indigenous Peoples and their Relationship to Land", 11 June 2001, E/CN.4/Sub.2/2001/21, pp. 1–77.

60 Connor, "Error Nullius Revisited", chapter 4; Fitzmaurice, "Genealogy of Terra Nullius", p. 4.

61 Fitzmaurice, "Genealogy of Terra Nullius", p. 14. For the attempt of introducing the related "neologism" of *territorium nullius* at the end of the nineteenth century in the context of the Berlin/Congo Conference of 1884–1885 (p. 13) and the subsequent try-out to "distill" the concept into "regulations of international law" at the Institut de Droit International Lausanne in September 1888 by German Law Professor Ferdinand von Martitz, which was, however, effectively opposed by French diplomat Édouard Engelhardt, see Fitzmaurice, "Genealogy of Terra Nullius", pp. 10–11; 13; 19.

62 Fitzmaurice, "Moral Uncertainty", p. 384.

63 Fitzmaurice, *Sovereignty, Property*, p. 8.

64 Seed, *American Pentimento*, p. 22.

65 Miller, *Native America*, p. 21.

recorded purchase agreements concluded by both Portuguese and Spanish, whose application of *res nullius* is likewise disputed.[66] Instead, the Spanish discourse is focused on conquest and discovery.

Discovery vs. Occupation

The second persistent legal myth of European colonial appropriation concerns the doctrine of discovery, since discovery was also dismissed as lawful means of European colonial appropriation by both Hugo Grotius and Francisco de Vitoria. Accordingly, historians unanimously agree that Vitoria, in 1532, had rejected the "legal fiction" of discovery[67] of the papal bulls of Pope Alexander VI (1493)[68] by arguing that this "was a question neither of the limits of papal jurisdiction, nor of Roman law, but of the law of nature, the *ius naturae*, and that the issue was consequently one not of juridical but of natural rights",[69] which had also raised general scepticism about Spain's "just title in the New World".[70] In this context, Robert Miller suggests that even the papal bulls of Pope Alexander VI of 1493 would have already indicated that discovery had to be complemented by occupation in order to establish a lawful title, since the papal bull *Inter Caetera* of 1493 had limited the grant to Spain to those areas not "occupied" by "any European monarch".[71] This is substantially confirmed by the examination of the four papal bulls of 1493 of chapter 3.

Identically, Hugo Grotius declined the doctrine of *discovery* as valid legal means of European colonial appropriation since *Mare Liberum* of 1609,[72] as discovery only applies "to those things [sic!] which belong to no one" (*res nullius*),[73]

66 Miller, "International Law of Colonialism", p. 901.

67 Williams, *Western Legal Thought*, p. 100.

68 Pagden, *Burdens of Empire*, p. 137; Id., "Dispossessing the Barbarian", p. 80; Fitzmaurice, *Sovereignty, Property*, pp. 8; 49; Gilbert, *Indigenous Peoples' Land Rights*, p. 9, Doyle, *Title to Territory*, p. 28; Williams, *Western Legal Thought*, pp. 80–81; Miller, "The International Law of Colonialism", p. 859; Lenzerini, "Sovereignty Revisited", p. 164.

69 Pagden, "Dispossessing the Barbarian", p. 80.

70 Fitzmaurice, *Sovereignty, Property*, p. 49.

71 Miller, "International Law of Colonialism", p. 869.

72 Gilbert, *Indigenous Peoples' Land Rights*, p. 10; M. F. Lindley, *The Appropriation and Government of Backward Territory in International Law*, London: Longmans, Green and Company, 1926, p. 13.

73 H. Grotius, *The Law of War and Peace*, Book 2, chapter 22 "On Unjust Causes of Wars", para. IX; Gilbert, *Indigenous Peoples' Land Rights*, p. 48.

which is, however, not the case for areas of "native rulers".[74] Instead, Grotius determined that "discovery (*inventio*) needed to be perfected by possession",[75] in order to be lawfully acquired, which would apply "even though the occupant may be 'wicked, may hold wrong views about God, or may be dull or wit'".[76] The precise European colonial legal provisions for the practice of occupation are examined in chapters 8 (Hugo Grotius) and 3 (Francisco de Vitoria), which were confirmed by the English Common Law of William Blackstone in 1765.[77] Meanwhile, colonial and comparative law historians have examined symbolic practices of European occupation or possession taking, such as planting flags and crosses and erecting stone monuments,[78] which were applied "across empires".[79] Hence, the Spanish applied those practices against the English and Dutch "in the first decades of the seventeenth century" in northeastern South America to hinder their further advancement inland[80] and respond to their "fledgling settlements and simple fortifications" in the mouth of the Amazon,[81] same as earlier Spanish explorers, such as Columbus, Vasco Núñez de Balboa, Diego de Almagro, and Ferdinand Magellan.[82] According to Lauren Benton, those symbols were mostly established "in estuaries or river junctions" and "near the sea", as done by the Portuguese in the mouth of the Congo in 1483 (stone column), the French at Caspé harbour in 1534 (cross), Florida,[83] and Tahiti in 1768,[84] and by the English in the mouth of the Mississippi in 1682 (stone columns and crosses), Cape Henry near Chesapeake Bay in 1607 (cross),[85] and in Australia in 1768 and 1776 (marks and inscriptions).

Furthermore, the Portuguese have complemented such symbolic acts "with celebrating mass in new lands, and bringing home symbolic items, commonly a handful of dirt, to present to the king", whereas the meaning of those symbolic

74 Armitage, "Introduction", p. xv.

75 Pagden, *Burdens of Empire*, p. 135 (emphasis added).

76 Grotius, *The Law of War and Peace*, Book 2, chapter 22 "On Unjust Causes of Wars", para. IX.

77 Banner, "Why Terra Nullius?", p. 102.

78 Miller, "International Law of Colonialism", p. 874.

79 Benton, *Search for Sovereignty*, pp. 57–58.

80 Ibid., See also P. Seed, *Ceremonies of Possession in Europe' s Conquest of the New World*, New York: Cambridge University Press, 1995.

81 Benton, *Search for Sovereignty*, p. 58. See J. H. Elliott, *Empires of the Atlantic World. Britain and Spain in America, 1492–1830*, New Haven: Yale University Press, 2006, pp. 29–56.

82 Miller, "International Law of Colonialism", p. 874.

83 Benton, *Search for Sovereignty*, pp. 57–58.

84 Pagden, *Lords of All the World*, p. 81.

85 Benton, *Search for Sovereignty*, p. 57–58.

acts remains debatable, as they are interpreted either as attempts "to establish occupancy and possession" and "allege its ownership"[86] or as an expression of the "intention to travel or settle vast, unbounded riverine regions".[87] The legal meaning of those symbolic practices are unexamined, while the European colonial law about the subsequent occupation is generally overlooked.

Accordingly, the Dutch evidently rejected a "title on the basis of discovery alone"[88] and instead applied occupation as justification practice against the English in North America,[89] while the insights about the Spanish practices are inconclusive for the first decades, since both Columbus and Balboa would have had made "first discovery" claims.[90] However, the letter patent of Columbus "did not make any claim that the Spanish monarchs in any way owned or had a right to seize the as yet undiscovered lands"[91] and the subsequent discovery claim of Magellan of 1520 has contained the order "to discover *and* take possession of lands in the king's name",[92] although it remains unclear, how the explorer was supposed to take possession in a lawful manner. Moreover, the Spaniards applied occupation at least since the late 1530s, when discovery was complemented with other means of appropriation, namely conquest, settlement (population) and pacification, although Robert Miller claims that Spain would have initially "vehemently" opposed occupation.[93] In addition, the Royal Order of the Spanish king Philipp II in 1573 explicitly instructed "that he [the Spanish king] would not approve any new discovery expeditions until after the lands already discovered 'shall be settled'"[94] and the Spanish acceptance of the Grotian legal requirement of occupation was confirmed in 1609[95] and likewise used by the Spanish of the Viceroy of Mexico as justification practice against the French

86 Miller, "International Law of Colonialism", pp. 874–875; 870.
87 Benton, *Search for Sovereignty*, pp. 57–58.
88 Doyle, *Title to Territory*, pp. 38–39.
89 Miller, *Native America*, p. 22.
90 Miller, "International Law of Colonialism", p. 865.
91 J. Muldoon, "Colonial Charters: Possessory or Regulatory?", *Law and History Review* 36 (2018) 2, pp. 355–381, at 357.
92 Miller, "International Law of Colonialism", pp. 865–866. See also ibid., pp. 870; 874–875; 919 (emphasis added).
93 Ibid., p. 869.
94 Ibid., p. 870. In addition, Robert Miller asserts that Chile in the 1880s likewise made "first-discovery claims to the lands around the Straits of Magellan and to Rapa Nui" (Easter Island) (ibid.), although the first European sighting the island was Dutchman Roggeveen in 1722 (G. McCall, "Trade, Slavery, and Colonialism" in: R. Maaka and C. Andersen [eds.], *Indigenous Experience: Global Perspectives*, Toronto: Canadian Scholars, 2006, pp. 30–45, at 31).
95 Pagden, *Burdens of Empire*, p. 135.

in Florida, since the Spanish king had "feared that if settlements were not quickly established there was a great risk of French settlements being established".[96] Moreover, occupation was applied by the French in the Charter of Acadia granted to Pierre du Gast by Henry IV in December 1603,[97] which was predated by the Roberval grant of the French king François I in 1540,[98] while the Portuguese used occupation to justify their claims against the French and Dutch in Brazil.[99] Arguably caused by the Spanish control over the Crown of Portugal during the period 1580–1640,[100] both Portugal and Spain applied occupation also in the South American boundary negotiations, resulting in the *Tratado de Límites* (Treaty of Madrid) of 1750.[101] Most notable, the English in well-researched North America justified their colonial practices by occupation already in the famous letter patent granted by King Henry VII in 1497 to John Cabot,[102] which Robert Miller confusingly cites as example for the application of "discovery",[103] although the original grant just contained the order to "conquer, occupy and possess".[104] The means of occupation was likewise stressed in the subsequent letter patents of Queen Elizabeth I to Humphrey Gilbert and Walter Raleigh in 1578[105] and 1590[106]

96 Miller, "International Law of Colonialism", pp. 870–872.

97 King Henry IV, "Charter of Acadia to Pierre du Gast, Sieur de Monts", 18 December 1603, Avalon Collection: http://avalon.law.yale.edu/17th_century/charter_001.asp, Lillian Goldman Law Library, Yale Law School, New Haven. This Charter grants Pierre du Gast "to people and inhabit the lands, shores, and countries of Acadia, and other surrounding areas, stretching from the fortieth parallel to the forty-sixth, and there to establish our authority, and otherwise to there settle and maintain himself in such a way that our subjects will henceforth be able to be received, to frequent, to dwell there, and to trade with the savage inhabitants of the said places" (ibid.).

98 Thereupon, the French established the Compagnie des Isles de l'Amérique in 1642 and 1685 (Lindley, *Backward Territory*, p. 25). See Jennings, *Invasion of America*, p. 5.

99 Miller, "International Law of Colonialism", pp. 870–872.

100 Ibid., p. 855, footnote 28.

101 Ibid., p. 883; D. R. Perez, *El Tratado de Límites de 1750 y la Expedición de Iturriaga al Orinoco*, Madrid: C.S.I.C. Instituto Juan Sebastián Elcano, 1946.

102 Jennings, *Invasion of America*, p. 5.

103 Miller, "International Law of Colonialism", p. 867; Washburn, "Moral and Legal Justifications", p. 17.

104 Jennings, *Invasion of America*, p. 5. Hereby, the Cabot grant is determined as "charter of conquest" (ibid.).

105 Lindley, *Backward Territory*, p. 25.

106 Queen Elizabeth I, "Patent to Sir Walter Raleigh to Settle Virginia", House of Commons, 14 December 1584, in: Q. Beers (ed.), *The Roanoke Voyages 1584–1590*, London: The Hakluyt Society, 1955, 1, pp. 126–128, www.encyclopediavirginia.org/Sir_Walter_Raleigh_s_Patent_to_Settle_Virginia_1584 (accessed 18 September 2018). The grant was given to Walter Raleigh for "the discovery and inhabiting of certain foreign lands and countries" (ibid.).

for discovery and occupation,[107] when "first discovery" had to be explicitly perfected by occupation "within a reasonable amount of time".[108] Both Humphrey Gilbert and Walter Raleigh, however, failed in the implementation of occupation in practice, since the ship of Gilbert "sunk on the return voyage"[109] and Raleigh was forced to abandon his attempts in Virginia *inter alia* due to the "(p)oor relations with the local Indians",[110] whereupon he shifted his attention in February 1595 to the search of "El Dorado" in the South American Guiana.[111] In this context, Andrew Fitzmaurice claims that Raleigh had established a "small colony or trading post" in 1604, which was "folded two years later",[112] which remains unconfirmed by the precise examination of the presence and practices of Raleigh in the area (chapters 5).

Meanwhile, the English continued to use occupation as colonial justification practice in North America, after the English king James I, in 1607, had accorded a royal grant to merchants of London and Plymouth "to make habitation, plantation, and to deduce a colony of sundry of our people into that part of America, commonly called Virginia [. . .] not now actually possessed by any Christian Prince or people", which resulted in the establishment of Jamestown (Virginia) as first permanent English colony in North America.[113] Moreover, "discovery and plantation" was indicated in the subsequent Charter of May 1609,[114] while occupation alone was applied as colonial justification by the Virginia Company in 1622[115] and

107 Williams, *Western Legal Thought*, p. 156; Seed, *American Pentimento*, pp. 9–11; Queen Elizabeth I, "Charter to Sir Walter Raleigh", Westminster, 25 March 1585, Avalon Collection: http://avalon.law.yale.edu/16th_century/raleigh.asp.

108 Miller, "International Law of Colonialism", pp. 869; 875.

109 Williams, Western Legal Thought, p. 163;

110 Ibid., p. 182.

111 A. Fitzmaurice, *Humanism and America: An Intellectual History of English Colonisation, 1500–1625*, Cambridge: Cambridge University Press, 2009, p. 52. Moreover, Robert Williams points out that Raleigh's subsequent narrative has established the "fiction [of El Dorado]" (Williams, *Western Legal Thought*, p. 182).

112 Fitzmaurice, *Humanism and America*, p. 52.

113 Ibid., p. 201; King James I, "The First Charter of Virginia", Westminster, 10 April 1606, Avalon Collection: http://avalon.law.yale.edu/17th_century/va01.asp. The same provision emerges in the Hudson's Bay Company Charter of 1670 (Miller, "International Law of Colonialism", p. 869). See Muldoon, "Colonial Charters", pp. 370–373; Lindley, *Backward Territory*, p. 25.

114 King James I, "The Second Charter of Virginia", Westminster, 23 May 1609, Avalon Collection: http://avalon.law.yale.edu/17th_century/va02.asp. This was predated by significant objections about the lawfulness of the establishment of the Jamestown colony in February 1609 (Banner, *How the Indians Lost Their Land*, p. 13).

115 Pagden, *Burdens of Empire*, p. 139.

against the competing claims of the Spanish,[116] Swedish, and Dutch during the seventeenth century,[117] who in turn applied the same colonial justification practice against the English, French, and Dutch in 1640.[118] In addition, the Swedes advanced occupation against the Dutch,[119] whose Company was established on behalf of the Swedish King Gustav Adolf in December 1624 by the founder of the Dutch West India Company (WIC) Willem Usselincx,[120] who established the WIC in June 1621, after the Dutch had entered the scene in New Netherland in 1614.[121] Eventually, the English continued to apply occupation as colonial justification practice in the nineteenth and twentieth century, although Anthony Pagden argues that the agriculturalist argument advanced by John Locke's *Two Treatises of Government (*1689/90)[122] would have presented "the basis for most English attempts to legitimate their presence in America",[123] which was in practice only sparsely applied until the second half of the eighteenth century[124] and had even provided "a robust defence of native

116 Miller, *Native America*, p. 22.

117 Miller, "International Law of Colonialism", p. 867.

118 Ibid., p. 863.

119 Miller, *Native America*, p. 22.

120 King Gustav II Adolph, "Warrant for William Ussling to Establish a General Company for Trade to Asia, Africa, America and Magellanica", Stockholm, 21 December 1624", Avalon Collection: http://avalon.law.yale.edu/17th_century/charter_012.asp.

121 The States-General of the United Netherlands, "General Charter for Those Who Discover Any New Passages, Havens, Countries, or Places", The Hague, 27 March 1614, Avalon Collection (hereafter Avalon): http://avalon.law.yale.edu/17th_century/charter_010.asp. See also Avalon, The States-General of the United Netherlands, "Grant of Exclusive Trade to New Netherland", 11 October 1614, The Hague, https://avalon.law.yale.edu/17th_century/charter_011.asp; The States-General, Charter of the Dutch West India Company", The Hague, 3 June 1621, in: *British Guiana Boundary Arbitration with the United States of Venezuela. Appendix to the Case on Behalf of the Government of Her Britannic Majesty* (hereafter BRC), British Foreign Office London: Harrison and Sons, 1898, serial No. 18, p. 46. The foundation of the WIC was predated by the voyage of Henry Hudson along the coast from Newfoundland to Albany (including Manhattan) with the ship "Halve Maen" of VOC Amsterdam in 1609 (Lindley, *Backward Territory*, p. 25), after the Dutch disengaged with the Spanish monarchy in 1581 (Armitage, "Introduction", p. xi).

122 Armitage, "John Locke", pp. 602–627. See also Gilbert, *Indigenous Peoples' Land Rights*, p. 89; Doyle, *Title to Territory*, p. 43; Fitzmaurice, *Sovereignty, Property*, pp. 24–25; Armitage, *Ideological Origins*, p. 97; Seed, *American Pentimento*, pp. 38–39; Banner, *How the Indians Lost Their Lands*, pp. 39; 43–48; Corcoran, *John Locke on the Possession of Land*, pp. 8–9; Pagden, "Struggle for Legitimacy", p. 4.

123 Pagden, "Struggle for Legitimacy", p. 43.

124 Banner, *How the Indians Lost Their Land*, pp. 43–8; 58; 80–81; 152; 157–158; Washburn, "Moral and Legal Justifications", p. 23. Nevertheless, John Locke's theory still plays a significant role in contemporary political philosophy debate about theories of territory. See, e.g., C. Nine "A

rights to lands and possessions".[125] Instead, the English advanced occupation against the Spanish in 1790, when they likewise affirmed "that the consent of the natives supported its right to possession".[126] Moreover, occupation was cited in the contested claim to Oregon Country and the Pacific Northwest[127] and was likewise applied by Thomas Jefferson in 1813 and 1816, while "first occupation" was several times called upon as justification practice between the 1820s and 1840s. Nonetheless, after the Declaration of Independence of 4 July 1776, the justification for Oregon shifted back to discovery,[128] while occupation vanished in the landmark ruling of Johnson vs. M'Intosh (1823),[129] when Chief Justice John Marshall had retrospectively declared that "discovery" would have

Lockean Theory of Territory", pp. 148–165; M. Moore, *A Political Theory of Territory*, Oxford: Oxford University Press, 2015; C. Nine, *Global Justice and Territory*, Oxford: Oxford University Press, 2012; M. Moore, "Which People and what Land? Territorial Right-holders and Attachment to Territory", *International Theory* 6 (2014) 1, pp. 121–140; D. Miller, "Property and Territory: Locke, Kant, and Steiner", *Journal of Political Philosophy* 10 (2011) 1, pp. 90–109, and D. Miller, "Debatable Lands", *International Theory* 6 (2014) 1, pp. 104–121; A. Banai et al., "Theories of Territory Beyond Westphalia", *International Theory* 6 (2014) 1, pp. 98–104; A. Stilz, "Nations, States, and Territory", *Ethics* 121 (2011) 3, pp. 572–601; D. Miller, "Territorial Rights: Concept and Justification", *Political Studies* 60 (2012) 2, pp. 252–268; A. J. Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society*, Princeton: Princeton University Press, 1993. For differentiated accounts on property and territory, see J. W. Singer, "Original Appropriation of Property: From Conquest & Possession to Democracy and Equal Opportunity", *Indiana Law Journal* 86 (2011) 3, pp. 763–778. Similarly, Allen Buchanan indicates that scholars are often "confusing property in Land with Territory" (A. Buchanan, "The Making and Unmaking of Boundaries: What Liberalism Has to Say", in: A. Buchanan and M. Moore [eds.], *States, Nations, and Borders. The Ethics of Making Boundaries*, Cambridge: Cambridge University Press, 2003, pp. 231–261, at 232).

125 Corcoran, *John Locke on the Possession of Land*, pp. 3–4. For Locke's involvement and role in the English colonization of Carolina, see Fitzmaurice, *Sovereignty, Property*, p. 15; Banner, *How the Indians Lost Their Lands*, pp. 43–48; Armitage, "John Locke", pp. 602–627.

126 Doyle, Title to Territory, p. 39.

127 Miller, "International Law of Colonialism", p. 876.

128 Ibid., pp. 877; 868.

129 Pagden, *Burdens of Empire*, pp. 133–135; Washburn, "Moral and Legal Justifications", p. 25; Lenzerini, "Sovereignty Revisited", p. 265; Banner, *How the Indians Lost Their Land*, pp. 11; 194–195; Gilbert, *Indigenous Peoples' Land Rights*, p. 55; L. Robertson, *Conquest by Law*, Oxford: Oxford University Press, 2005, pp. 3–5; Williams, *Western Legal Thought*, pp. 2; 29–31; 325; B. Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America", in: J. McLaren, A. R. Buck, and N. Wright (eds.), *Despotic Dominion: Property Rights in British Settler Societies*, Vancouver: University of British Columbia Press, 2005, pp. 50–78, at 50–56.

given title to the English,[130] which was most notably done in breach with the valid European colonial law of the initial stage of English colonial appropriation. At the same time, this practice had violated the intertemporal law rule.

Conquest and the Question of "Just War"

Finally, the doctrine of conquest was unanimously accepted as legal means of European colonial appropriation, which remained valid until its dismissal by the Kellogg-Briand-Pact in August 1928,[131] whereas UN resolution 3314 (XXIX) of 1974 highlighted that "titles previously created" should not be affected from the dismissal and only applies to cases, where the previous appropriation was "lawful".[132] In determining the lawfulness of a conquest during the initial stage of European colonization, historians are so far selectively referring to some of the eight reasons constituting a "just war" in the legal writings of Francisco de

130 Gilbert, *Indigenous Peoples' Land Rights*, p. 57; Lenzerini, "Sovereignty Revisited", p. 265. In this context, Anthony Pagden suggests that the Chief Justice in his ruling had acted based on "good political reasons" (Pagden, *Burdens of Empire*, p. 138). In contrast, the narrative about the historical context of the ruling by Lindsay Robinson has revealed significant economical motives (L. Robertson, *Conquest by Law. How the Discovery of America Dispossessed Indigenous Peoples of Their Land*, Oxford: Oxford University Press, 2005, pp. 3–95). Moreover, Jérémie Gilbert points to the subsequent case of Cherokee Nation v. Georgia (1830), wherein Chief Justice Marshall would have had "completed" his "legal construction" and created the doubtful "notion of 'quasi-sovereignty'", since Marshall had argued that "based on the fact that the Cherokee had signed a number of treaties with the government of the United States, the judge ruled that '[t]he acts of our government plainly recognize the Cherokee nation as a state and the courts are bound by those acts', but at the same time rejected the recognition of the Cherokee's territorial sovereignty" (Gilbert, *Indigenous Peoples Land Rights*, pp. 57–58).

131 S. Korman, *The Right of Conquest. The Appropriation of Territory by Force in International Law and Practice*, Oxford: Oxford University Press, 1996, p. 7.

132 Gilbert, *Indigenous Peoples' Land Rights*, pp. 14–15. Accordingly, Malcolm Shaw defines conquest from a contemporary perspective as "the act of defeating an opponent and occupying all or part of its territory", which, however, "does not itself constitute a basis of title to the land" (M. Shaw, *International Law*, Cambridge: Cambridge University Press, 2008, p. 500). Instead, "(i)t does give the victor certain rights under international law as regards the territory, the rights of belligerent occupation, but the territory remains subject to the legal title of the ousted sovereign". Moreover, Shaw indicates that "(s)overeignty as such does not merely pass by conquest to the occupying forces, although complex situations may arise where the legal status of the territory occupied is, in fact, in dispute prior to the conquest" (ibid., pp. 500–501).

Vitoria.[133] At the same time, his seven causes of an "unjust war" are completely overlooked and the legal writings of Hugo Grotius hardly considered. Whereas Anthony Pagden in general argues that "there were no immediate or obvious reasons for considering the European invasions of America as in any sense just",[134] Vitoria, Grotius, and their contemporaries of the sixteenth and seventeenth century had defined several, in part contradictory "just causes" to start waging a war by Europeans and declaring the successful war as a legal means of appropriation by conquest. Accordingly, Jérémie Gilbert is selectively citing four "just" Vitorian causes, namely if Indigenous Peoples had refused (1) "a free passage of their lands" or (2) "to trade among them", or had declined to (3) "share the wealth of their lands" or rejected the (4) "propagation of Christianity",[135] while Robert Williams focuses on the cause of "idolatry" to establish the argument of the persisting legal pluralism of the time, since Vitoria's Protestant contemporary Alberico Gentili had excluded idolatry as "just cause", which had ruled out one of the main legal justifications "used by papist Spaniards for seizing the lands of Indians throughout the New World solely on the basis of non-belief". Moreover, the well-known European colonial law scholar Williams questions the general applicability of European colonial law to Indigenous Peoples in the Americas *prior* to the *lawful* acquisition by Europeans.[136] Finally, Cathal Doyle provides a rare reference to the legal provisions of the European colonial law of Hugo Grotius, who had "upheld the notion of a just war where commerce was not permitted",[137] which was rejected by his Portuguese contemporary Serafim De Freitas.[138] More precisely, the Dutchman distinguishes three "just causes" in *De Jure Belli ac Pacis* (1625) as having "legal effect", namely (a) self-defence, (b) the "recovery of property", and (c) "the inflicting of punishment",[139] and, for

133 Hereby, conquest is understood in the narrow legal sense of successfully waging war to precisely distinguish the practice from other legal means of appropriation, whereas some scholars are conceptualizing conquest in a broader manner, such as Robert Miller, who defines conquest "as analogy", which subsumes cases, such as the Spanish's "merely arriving in new lands" (Miller, "International Law of Colonialism", p. 919).

134 Pagden, *Burdens of Empire*, p. 123.

135 Gilbert, *Indigenous Peoples' Land Rights*, p. 9.

136 Williams, *Western Legal Thought*, pp. 195–197.

137 Doyle, *Title to Territory*, pp. 38–39.

138 Ibid., p. 42.

139 Grotius, *The Law of War and Peace*, Book 2, chapter 1 "Causes of War", para. II.

example, also rejected the denial of Christianity by Indigenous Peoples as "just" punishment cause for waging war, as "(w)ars cannot justly be waged against those who are unwilling to accept the Christian religion".[140] Hence, the colonial law of both the Salmantine legal theologian Francisco de Vitoria and Dutch lawyer Hugo Grotius are systematically examined in chapters 3 and 8.

In practice, conquest was applied by the Spanish, Portuguese and, to a lesser extent, by the English, but not by the French and Dutch.[141] Therefore, conquest was used by the Spaniards as justification between the fifteenth and seventeenth century.[142] In addition, it was inserted in several Royal Orders. Accordingly, the Spanish king had ordered Pedro de Valdivia in 1541 to conquer the Araucanians of Chile and populate the area, who, however, failed in practice and was killed after "almost constant warfare" by the Mapuche in the battle of Tucapel of 1553, whereupon "European and Chilean expansion south of the Bio Bio River [was paused] for over 300 years". Similar, the Spanish Council of the Indies (*Consejo Real y Supremo de las Indias*, established in 1524) named "nine reasons [. . .] for waging just war against the Araucanians" in 1599, before a papal bull of Pope Paul V "authorized a just war against Araucanians" in 1609, which was complemented by royal orders, permitting the enslavement of "all Indians" in 1608[143] (revoked in 1610) and 1625 (revoked in 1674).[144] In addition, Patricia Seed confirms Spanish conquest orders in the Caribbean by citing the well-known Royal Order of Queen Isabella I of 1503, who permitted to "make war upon the Carib Indians who come to launch armed incursions against them and who eat human flesh" and, thus, connected the causes of "native cannibalism to military resistance".[145] At the same time, the scholar of Latin American colonial history refers to the Royal Order of King Ferdinand of 1509, which permitted "slave raiding from other [Caribbean] islands, because of a shortage of Indians on Hispaniola", provided the slave raids were undertaken upon "official approval" and the inversion of cannibalism claims to justify "brutal Spanish work

140 Ibid., chapter 20 "On Punishments", para. XLVIII. This was already emphasized by Hugo Grotius in "Mare Liberum" of 1609 (Grotius, *Mare Liberum*, pp. 10; 19).

141 Pagden, *Burdens of Empire*, p. 123.

142 Fitzmaurice, *Sovereignty, Property*, p. 8.

143 Miller, "International Law of Colonialism", p. 919.

144 Seed, *American Pentimento*, p. 104.

145 Queen Isabella I, "Proclamation", 30 October 1503, in: E. Williams, *Documents of West Indian History, Vol. 1, 1492–1655. From the Spanish Discovery to the British Conquest of Jamaica*, Port-of-Spain: PNM Publishing, 1963, No. 62, pp. 62–63. See also Seed, *American Pentimento*, p. 104; Whitehead, *Conquest of the Caribs*, p. 310; Sauer, *Early Spanish Main*, p. 161–162; Whitehead, "Carib Cannibalism", p. 70; Whitehead, *Lords of the Tiger Spirit*, pp. 171–172.

regimes" by Spanish "settler" Juan Ponce de Léon,[146] who became known as the second temporary governor of Trinidad. Both practices of enslavement for economical purposes remained legally highly controversial throughout the sixteenth century (chapter 3).

In addition, practices of war are also documented for the Portuguese in Brazil. However, those wars were not necessarily conducted for the purpose of conquests, although they were at least partly justified by the "just causes" of conquests. In contrast to Portuguese conquest justifications in Ceuta (1415) and India by Vasco da Gama (1499), the Portuguese in Brazil had, therefore, permitted "the enslavement of any Indians captured in just wars", "the appropriation of the lands and assets of indigenous peoples" (1595), the enslavement of those Indigenous Peoples, who were "in revolt and at war" (1548; 1570) and "those who habitually attack the Portuguese and eat Christians" (1587). Moreover, military expeditions were also carried out by missionaries in São Paulo in 1606 and as "slave raids against Indians for impeding roads or commerce, failing to pay tribute, refusing to obey calls to work for settlers or the crown, reverting to cannibalism after being Christianized, and impeding preaching of the Gospel".[147] In contrast, conquest claims of the English in North America are limited to two events and the order of the Cabot grant of 1497 to "conquer, occupy and possess".[148] While historians in general tend to argue that North America was appropriated by purchase agreement and conquest,[149] they also tend to retrospectively declare both the Virginia massacre of 1622[150] and the Pequot wars of 1634 and 1657 as conquests,[151] although the Mohegan contested the claim in an "over one hundred years" long lawsuit against Connecticut,[152] which was still in colonial times dismissed by the Privy Council in 1772 "(w)ithout reasons",[153] and the Virginia massacre was followed by a ten year war, resulting in an agreement of peace in 1632, another successful attack by the Algonquian of Opechancanough in 1644 and a peace

146 Seed, *American Pentimento*, pp. 101; 104–105.

147 Miller, "International Law of Colonialism", pp. 917; 919; 104; 107.

148 Jennings, *Invasion of America*, p. 5.

149 Williams, *Western Legal Thought*, pp. 108–120; Jennings, *Invasion of America*, pp. 15; Banner, *How the Indians Lost Their Land*, p. 6; Seed, *American Pentimento*, p. 14.

150 Williams, *Western Legal Thought*, pp. 208–220; Washburn, "Moral and Legal Justifications", p. 20.

151 Jennings, *Invasion of America*, pp. 186–254; Williams, *Western Legal Thought*, pp. 208–220.

152 Miller, "International Law of Colonialism", p. 919.

153 M. D. Walters, "Mohegan Indians vs. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America", *Osgoode Hall Law Journal* 33 (1995) 4, pp. 785–829.

agreement in 1646.[154] Both events are raising the question, when and on which grounds a war is lawfully claimed as conquest[155] and what was *actually* acquired by conquest.[156]

In sum, the systematic review of historical research on both European colonial law and colonial appropriation practices of the Spanish, English, French, Portuguese, and Dutch in the Americas has most striking revealed that both *terra nullius* and *discovery* had *not* presented a sufficient legal means of European appropriation in the early stages of European colonization, since Vitoria and Grotius had clearly rejected the legal doctrines as sufficient to claim a lawful appropriation. Instead, they are presenting legal myths, created in nineteenth-century North America and twentieth-century Australia. Moreover, the chapter had disclosed that occupation presented a common means in justifying appropriation practices by all European actors, whereas the European colonial law provisions on both occupation and conquest still require a systematic and differentiated examination. Therefore, the following chapter 3 precisely examines the valid Spanish colonial law in the period 1493–1573.

154 J. D. Rice, "Second Anglo-Powhatan-War (1622–1632)", www.encyclopediavirginia.org/Anglo-Powhatan_War_Second_1622-1632#start_entry (accessed 17 September 2018); Virginia Places, "The Third Anglo-Powhatan War (1644–46)", www.virginiaplaces.org/nativeamerican/thirdanglopowhatan. html (accessed 17 September 2018). See also Jennings, *Invasion of America*, pp. 58–84; R. Williams, *Western Legal Thought*, pp. 208–220.

155 That the valid colonial law and appropriation and justification practices needs to be carefully distinguished and examined is demonstrated in several cases of the English in New Zealand and Australia, as the English in New Zealand "enacted legislation [. . .] based on conquest even in instances of British military defeats [sic!]", after "having been engaged in warfare against the Māori of the Northern Island" (Miller, "International Law of Colonialism", p. 920). Similarly, the English were, in violation with the Cabot grant, engaged in "massacres" in Australia, such as in the case of the Ngaiawong of Moorundie about 1839 by John Eyre, wherein "a large group" was "mowed down" (Lindqvist, *Terra Nullius*, p. 8). See also I. Clendinnen *True Stories. History, Politics, Aboriginality*, Melbourne: Text Publishing, 2008 [1999]; Id., *Ambivalent Conquests. Maya and Spaniards in Yucatan*, Cambridge: Cambridge University Press, 1987 [2003]), despite the order of the English Crown to James Cook in 1768 "not to attempt the conquest of their land, because any such attempt would be unlawful" (Banner, "Why Terra Nullius?", p. 97).

156 However, the Virginia event of 1622, where Algonquian had killed 350 English colonists, was predated by encroachments of English colonists into Algonquian lands (Jennings, *Invasion of America*, pp. 58–84; Williams, *Western Legal Thought*, pp. 208–220), the forceful removal of corn by English colonists (1619), which was considered as an offence by the Algonquian (Banner, *How the Indians Lost Their Land*, p. 32). See also Williams, *Western Legal Thought*, p. 220. A careful contextual historical-legal examination of the events is still pending.