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Rituals of (dis)possession: appropriation and performativity in the early modern law of nations

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This article makes a contribution to the history and theory of international law by looking at instruments, institutions, and practices of the Spanish Conquest. Instead of analysing the canonical texts of the 'Spanish fathers' of the law of nations, as has been done several times in the literature, it focuses on the legal forms of territorial acquisition and analyses the performative character of the ceremonies of possession that served to legalise the Conquest in the early modern political and theological order of 16th century Europe.

And there I found many islands filled with people innumerable, and of them all, I have taken possession for their Highnesses, by proclamation made and with Royal standard unfurled and no opposition was offered to me.

—Christopher Columbus.[1]

A. Introduction

It is hardly an exaggeration to say that the past two decades of international legal scholarship have been profoundly marked by the so-called 'historical turn', which redrew the landscape of the discipline, retrieving, among other things, its colonial origins and the 16th century Spanish contribution to the emergence of modern international law.[2] Despite

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[1] '*Donde yo fallé muy muchas islas pobladas con gente sinnúmero, y dellas todas he tomado posesión por sus Altezas con pregón y bandera Real extendida, y no me fue contradicho*'. Cf Christopher Columbus, 'Carta a Santángel' in Christopher Columbus, *Relaciones y cartas de Cristóbal Colón* (Librería de la viuda de Hernando y Ca 1892) 185. All translations in this article are mine, unless otherwise stated.

[2] Throughout this work I use the terms 'international law' and 'law of nations' interchangeably, although the reader must know that the expression used in the late medieval and early modern era was 'law of nations' (*ius gentium*). As is well-known, the idiom 'international law' is coined much later by Jeremy Bentham in the 19th century. On another note, the publication of Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) is often considered the watershed moment of the 'historical turn'. On the historical turn, see Matthew Craven, 'Theorizing the Turn to History in International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 21; Matthew Craven, 'Introduction: International Law and Its Histories' in Matthew Craven, Malgosia Fitzmaurice and María Vogiatzi (eds), *Time, History and International Law* (Brill 2007) 1; Randall Lesaffer, 'International Law and Its Histories: The Story of an Unrequited Love', in Craven, Fitzmaurice and Vogiatzi (n 2) 27; Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (IILJ Working Paper 2012/2) <http://iilj.org/wp-content/uploads/2016/08/Orford-The-Past-as-Law-or-History-2012-1.pdf> accessed 11 January 2022; Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56 *American Journal of Legal History* 104; Martti Koskenniemi, 'Colonization of the Indies — The Origin of International Law?', in Yolanda Gamarra (ed.), *La idea de América en el pensamiento ius internacionalista del siglo XXI* (Institución Fernando el Católico 2010) 43; Andrew Fitzmaurice, 'Context in the History of International Law' (2018) 20 *Journal of the History of International Law* 5; George Rodrigo Badeira Galindo, 'Force Field: On History and Theory of International Law' (2012) 20 *Journal of the Max Planck Institute for European Legal History* 86; Valentina Vadi, 'International Law and Its

the fact that this turn has represented a breath of fresh air in a literature characterised by sterile normative approaches and discussions, the new historical narratives have had, most of the time, a reductive outlook and narrow historiographical scope. Replicating old models, the Spanish origins of international law have been analysed largely as a 'history of ideas', a doctrinal contribution to the development of international legal *thought*. Consequently, international law histories of this period have focused on the writings of the School of Salamanca and especially on Francisco de Vitoria's *Relectios* and the continuation of his ideas in subsequent developments of the discipline.[3] Arguably, however, the Spanish influence on the development of the modern international legal order goes far beyond a mere doctrinal contribution that can be synthetised in an intellectual history of canonical authors and authoritative texts.[4] Above all, the Spanish conquest enabled the mobilization, transportation and transplantation of different political institutions, legal instruments, and legal practices and strategies to the New World. In particular, with the colonisation of America, the European common law (*ius commune*), of which Castilian law was a particular instantiation, 'crossed the Atlantic and, in the process, also gained ground as an international law of sorts'.[5]

Histories: Methodological Risks and Opportunities' (2017) 58 *Harvard International Law Journal* 311; Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7 *London Review of International Law* 89, among others.

[3] The literature is abundant: see, eg, Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004); Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2001) 61 *University of Toronto Law Journal* 1; Martti Koskenniemi, 'Vitoria and Us: Thoughts on Critical Histories of International Law' (2014) 22 *Journal of the Max Planck Institute for European Legal History* 119; Matthew Craven, 'Colonialism and Domination' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012); Manuel Jiménez Fonseca, '*Jus Gentium* and the Transformation of Latin American Nature: One More Reading of Vitoria?' in Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press 2017). It should be noted that already at the wake of the 20th century, Ernest Nys, Camilo Barcia Trelles, and James Brown Scott highlighted the 'contribution' of the Iberian Catholic thought to the development of modern international law. Scott, in particular, is well-known for his unflattering defence of Vitoria and his successors as the 'true fathers' of international law. Cf Ernest Nys, *Les droits des gens et les anciens jurisconsultes espagnols* (Martinus Nijhoff 1914); Camilo Barcia Trelles, *Francisco de Vitoria, fundador del Derecho Internacional moderno* (Cuesta 1928); James Brown Scott, *The Catholic Conception of International Law: Francisco de Vitoria & Francisco Suárez* (Carnegie Endowment for Peace 1934); James Brown Scott, *The Spanish Origin of International Law, I: Francisco de Vitoria and His Law of Nations* (Clarendon Press 1934). In the same period, the realist German scholars also associated the history of international law with Spanish imperialism. Cf Wilhelm Grewe, *The Epochs of International Law* (Michael Byers tr, De Gruyter 2000 [1984]); Carl Schmitt, *The Nomos of the Earth in the International Law of the* Jus Publicum Europaeum (GL Ulmen tr, Telos Press 2003 [1950]).

[4] See, eg, Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press 2002); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press 2010); Tamar Herzog, *Frontiers of Possession: Spain and Portugal in Europe and the Americas* (Harvard University Press 2015).

[5] Tamar Herzog, 'Did European Law Turn American? Territory, Property and Rights in an Atlantic World' in Thomas Duve and Heikki Pihlajamäki (eds), *New Horizons in Spanish Colonial Law* (Max Planck Institute for European Legal History 2015) 77. In a way, the continuity between the *ius commune* and the early modern law of nations was already implicitly pointed out by Hersch Lauterpacht when he analysed the influence of private Roman law in international law in his classical study *Private Law Sources and Analogies of International Law* (Longman, Greens & Co 1927). On this, see Randall Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription' (2005) 16 *European Journal of International Law* 25.

The central role of law to the whole Spanish colonial enterprise of the 16th century can hardly be disputed today. Although the Spanish carried out the Conquest through force and military campaigns, their authority over the New World was asserted through legal instruments.[6] Spaniards wanted to legitimise their control over the Indies not only before the *americani* but against rival European powers, and therefore needed to ground their claims in shared rules and principles. As can be expected, some of the most interesting doctrinal developments and discussions of the time were geared towards legalising the possession of new territories. Following ancient Roman sources, rediscovered in the 11th century in Bologna, Spanish imperial agents had recourse to different legal means and instruments to annex and take possession of territories.[7] Given that Roman legal sources usually required the performance of solemn acts and formulas, these instruments, in turn, fostered the production of a large reservoir of ceremonies—'rituals of possession', as Greenblatt called them[8]—which aimed to institute a Spanish legal title over the Indies.

In what follows, I analyse these legal forms of possession, paying special attention to these ceremonial acts and how they served to legalise the Conquest in the international political and theological order of 16th-century Europe. As any textbook on international law makes clear, the ideas and practices about land possession and appropriation developed and evolved at the heart of the 'Age of Discoveries', shaping our modern understanding of the mechanisms of territorial acquisition in international law, at the doctrinal level,[9] in states' policies and practices,[10] and in courts' judgments.[11] Yet, the

[6] See, eg, Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press 1992); Silvio A Zavala, *Las instituciones jurídicas en la conquista de América* (Porrúa 1988); Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Little, Brown and Company 1965); Tamar Herzog, 'Sobre la cultura jurídica en la América colonial (siglos XVI-XVIII)' (1995) 65 *Anuario de Historia del Derecho Español* 903.

[7] On the role of Roman law in European colonial expansion, cf Bernardino Bravo Lira, *Derecho común y derecho propio en el Nuevo Mundo* (Editorial Jurídica de Chile 1989) and David A Lupher, *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (University of Michigan Press 2006). On the role of Roman law in particular for the formation of the law of nations see Lauterpacht (n 5) and Lesaffer (n 5). Nevertheless, as Benton and Straumann point out, and as we are going to see throughout this article, we do not have to assume that Roman law sources were always rightly understood or were faithfully followed by imperial agents: Lauren Benton & Benjamin Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice' (2010) 28 *Law and History Review* 1.

[8] Stephen Greenblatt, *Marvellous Possessions: The Wonder of the New World* (University of Chicago Press 1991) 58 and 73.

[9] For the contemporary doctrine on the subject, see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 215; Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 495; and more specifically, RY Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963); Surya P Sharma, *Territorial Acquisition, Disputes and International Law* (Martinus Nijhoff 1997); Andrea Carcano, *The Transformation of Occupied Territory in International Law* (Brill 2015).

[10] On state practices in general see Sharma (n 9); Jennings (n 9); Carcano (n 9). On some state's practices in particular see CHM Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies' (1948) 25 *British Yearbook of International Law* 311.

[11] See, eg, *Island of Palmas* (1928) 2 RIAA 829; *Clipperton Island* (1931) 2 RIAA 1105; *Legal Status of Eastern Greenland* (1933) PCIJ Rep Series A/B No 53, 64; *Minquiers and Ecrehos Case (France v UK)* [1953] ICJ Rep 47; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12. See also Brian Taylor Summer, 'Territorial Disputes at the International Court of Justice' (2004) 53 *Duke Law Journal* 1779. Moreover, it should be highlighted that past practices of territorial acquisition have a particularly strong weight in current practices of international law because of the well-established principle of 'intertemporal law', which establishes that territorial disputes should be adjudicated in the light of the rules of international law as they existed at the time of the territorial acquisition, and not as they exist today. As Max Huber said in the *Island*

16th-century ceremonies of possession are rarely described in textbooks[12] or in histories of international law;[13] most of the historiographical work that has focused on them did not examine the implications they had for the law of nations,[14] and the random legal studies available on them are mostly descriptive and restricted to examining dogmatic legal issues.[15] In contrast, my approach is informed by theory: in addition to analysing these ceremonies, this article contends that these legal instruments *made* America an appropriable territory while sanctioning its appropriation. In other words, following insights from different disciplinary approaches, in particular philosophy of language and New World ethnohistorical research, I show the performative nature of the ceremonies, and thus argue that appropriability and appropriation were simultaneously enacted at the core of these rituals of dispossession. Therefore, this article contributes to the literature not only by looking at the instruments and institutions of the Conquest, but also by showing how performativity theory, which has been influential in social studies over the last years, can be utilised in international legal and historiographical approaches to understand the working and effects of international institutions and norms. This article, consequently, represents an invitation and provides the tools to consider other colonial instruments and international institutions in the same light.

B. Some clarifications on method

Working at the intersection of rules and practices as a translation of old mind-sets to the new colonial realities, and usually scorned by the doctrine of their time, the rituals of possession represent a good starting point to look at the concrete institutions, norms and practices that gradually brought international law to life in the 16th century. Like many other colonial practices and institutions, these legal forms have not been under the spotlight of international legal historiography, although they are important in shedding light on the doctrine of *dominium*, the significance of which for the history and development of modern international law has been recently highlighted by the scholarship.[16] Therefore, ideas and practices of the period such as these are of the

of Palmas arbitration: 'The effect of discovery by Spain is […] to be determined by the rules of international law in force in the first half of the 16th century': *Island of Palmas* (1928) 2 RIAA 829, 845.

[12] See, among others, Malcolm D Evans (ed), *International Law* (5th edn, Oxford University Press 2018) and Shaw (n 9) which are two of the best-selling textbooks on the discipline containing 'historical' sections.

[13] For example, two of the most influential books on the history of international law of the 20th century, Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company 1954) and Grewe (n 3) have just brief references to the ceremonies of possession.

[14] Cf Francisco Morales Padrón, 'Descubrimiento y toma de posesión' (1955) 12 *Anuario de estudios americanos* 321; Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (Cambridge University Press 1995); Patricia Seed, 'Taking Possession and Reading Texts' in Jerry M Williams & Robert E Lewis (eds), *Early Images of the Americas* (University of Arizona Press 1993) 111; Paja Faudree, 'Reading the Requerimiento Performatively: Speech Acts and the Conquest of the New World' (2015) 24 *Colonial Latin American Review* 456; Greenblatt (n 8). An exception to this is the work of Benton & Straumann (n 7) which is, however, mostly descriptive and avoids engaging in conceptual analysis or debate about the wider social and legal effects these ceremonies had.

[15] See Arthur S Keller, Oliver J Lissitzyn & Frederick J Mann, *Creation of Rights of Sovereignty through Symbolic Acts, 1400–1800* (Columbia University Press 1967); Julius Goebel Jr, *The Struggle for the Falkland Islands* (Yale University Press 1927); and Friedrich A F von Der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 *American Journal of International Law* 448, which paid attention to the role of ceremonies of possession in international law.

[16] Both Martti Koskenniemi and Matthew Craven has been insistent on this point, arguing that the notion of *dominium* is at the foundation of our current universal legal order based on private exchanges. Cf

foremost importance both for their historical relevance and their significant continuities with the modern global order and its institutional arrangements.

In what follows, I cannot but operate at a certain level of generality, using terms like 'Spain', 'English', 'doctrine', 'western', etc., to describe trends, ideas, practices, contexts or situations that were not as uniform and homogenous as this language seems to suggest. Moreover, given the scope of this article, I pay only secondary attention to the thinking of theologians and jurists—the 'law in books'—and focus on how certain ideas, institutions and norms were translated to sort out imperial agents' needs in the colonial context of the Indies—'law in action'.[17] By putting legal practices before ideas, or at least by placing them before their formal exposition in doctrine, I attempt to reverse the usual inclination in the scholarship that has prioritised literature and abstract discursive formations over practices on the ground.[18] As Randall Lesaffer pointed out, international legal histories have considered doctrine to be an accurate and even authoritative statement for what the law of nations of a certain period was, overlooking that this emphasis on doctrine gives only a partial picture of the then applicable law, and, consequently, of the history of international law.[19] The advantage of my approach is not only that it allows a novel understanding of the historical sources of international law but it also avoids the misrepresentations resulting from analysing historical and social processes from the literature (legal doctrine), which do not always coincide with legal practices and the everyday operation of law. Since the law of nations in the 16th century involved different actors and was applied daily by imperial agents, officials, lawyers, explorers and merchants, what they did should also be considered in examining the rise of modern international institutions. For that reason, even if the Spanish contribution to the colonial history of international law has been extensively analysed by the literature, I believe it is worth going back to it to survey unexplored areas. I do draw on the recent international legal scholarship, but my article attempts to analyse the emergence of modern international law from a different standpoint and through the exploration of different sources. Consequently, it entails expanding upon existing scholarship while sharpening its critical orientation towards analysing the relationship between law, imperialism and colonialism on the ground, thereby inviting new research applying such a lens to the study of early modern European expansion. My suggestion is that it is necessary to look *beyond* the legal thought of the time and start analysing the concrete legal institutions and

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Koskenniemi, 'Empire and International Law' (n 3); Koskenniemi, 'Colonization of the Indies' (n 2); Craven, 'Colonialism and Domination' (n 3). Yet, while they mostly analyse the category of *dominium* largely from the doctrine of the School of Salamanca, I attempt to do this mostly from the practices of imperial agents.

[17] As is well-known, the distinction between 'law in books' and 'law in action' was coined by Roscoe Pound: Roscoe Pound, 'Law in Books and Law in Action' (1910) 12 *American Law Review* 12.

[18] I do not intend to draw any strong artificial separation between 'ideas' and 'practices', in particular because the *ius commune* is largely a doctrinal elaboration. The distinction I stress is merely heuristic, since practices are informed by ideas, and, in turn, practices make ideas that also determine new practices. I agree with Roberto Unger, who considers doctrine as a 'form of conceptual practice' and, therefore, I still pay attention to doctrine: Roberto Unger, 'The Critical Legal Studies Movement' (1983) *Harvard Law Review* 565. In this regard, I also agree with Fitzmaurice and Benton who — although discussing with each other — have both highlighted the necessity of analysing juridical thought and practices together. See Benton, *A Search for Sovereignty* (n 4) xiv, 121, 277 and Fitzmaurice, 'Context in the History of International Law' (n 2) 20. That said, legal practices and legal doctrine do not always match in one moment in time — most usually they do not — and, it is necessary to partially isolate them for the analysis. Moreover, the scholarship has tended to focus more on how ideas shape practices; I try to emphasize how actions determine ideas.

[19] Cf Lesaffer (n 2) 32–3, 35 36–7.

strategies that informed the emergence of the law of nations in the 16th century, thus enlarging the archive of sources for a broader historical understanding of international law. Accordingly, the 'birth' of modern international law could be situated in this period not merely because of the theoretical production of the Spanish jurists but rather because of the creation of different legal instruments, institutions and practices that would serve to regulate and channel the international and inter-imperial dispute for the New World.[20]

For this analytical task, the *derecho indiano*[21] scholarship, to which the historiography of international law has paid little attention, is crucial and this article will draw on it, alongside primary and other important secondary sources. In contrast to international legal scholarship, this school has studied the concrete legal institutions and practices of the Spanish Conquest. Some *derecho indiano* literature even attempted to focus its attention on what it saw as an 'Indian system of international law' (*sistema indiano de derecho internacional*).[22] It is indeed odd that international legal history and the *derecho indiano* scholarship, which focused on related subjects, have rarely met. But if this school provides me with sources and materials, I depart from the very often conservative (sometimes apologetic) perspective that is imprinted in its studies. As Luigi Nuzzo said, the bulk of *derecho indiano* has been able 'to imagine the colonial laws without the Indians and the Indies, the legal history of the Conquest without the conquest or the conquered',[23] falling many times into idealised descriptions of the Spanish institutions, which hide—intentionally or not—the violence of the colonial context.

Over recent years, legal historians of the early modern period have attempted to close the gap between the attention given to doctrine and to practices in the international legal historiography and made important contributions to understanding better the history of international law and some of its early institutions.[24] My work is informed by these explorations but adopts a different approach. This article is part of a larger archaeological-

[20] The international legal literature occasionally paid attention to instruments such as treaties, bulls, and diplomatic rules of the 16th century, but, as Lesaffer pointed out, 'traditionally, historians of international law have devoted a disproportionate amount of attention to doctrine to the detriment of international legal practice': Lesaffer (n 2) 32. In this regard, it could be said that an ample range of sources still remain unexplored. Maybe because they have been seen as essentially 'municipal' or 'local', colonial norms and institutions were largely ignored by international legal scholars. In a way, the literature projected post-Westphalian conceptions of what counts as 'international' and 'local' to a set of rules and practices that were not seen as such in the past, disregarding relevant sources that could have helped to understand how colonialism shaped modern international law.

[21] Translated as 'Spanish colonial law'. This Iberoamerican school of legal historiography was established by Ricardo Levene and Rafael Altamira in the period between the 1920s and 1940s. Over the years, this school has unearthed and analysed an extensive array of documents and materials to show the particularities of Spanish colonial law and institutions. On this school, see Thomas Duve and Heikki Pihlajamäki, 'Introduction: New Horizons of *Derecho Indiano*' in Thomas Duve and Heikki Pihlajamäki (eds), *New Horizons in Spanish Colonial Law. Contributions to Transnational Early Modern Legal History* (Max Planck Institute for European Legal History 2015) 1.

[22] Ricardo Zorraquín Becú, 'El Sistema Internacional Indiano' (1977) *5 Revista de historia del derecho* 323.

[23] Luigi Nuzzo, 'De Italia a las Indias. Un viaje del derecho común' (2008) 10 *Estudios Socio-Jurídicos* 92.

[24] Cf Benton, *A Search for Sovereignty* (n 4); Herzog, *Frontiers of Possession* (n 4), Thomas Duve, 'Spatial Representation, Juridical Practices, and Early International Legal Thought at around 1500. From Tordesillas to Saragossa' in Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017); Saliha Belmessous (ed), *Empire by Treaty: Negotiating European Expansion, 1600–1900* (Oxford University Press 2015).

genealogical work[25] on the legal forms of the Conquest and the globalisation of law in the 16th and 17th centuries. In this regard, this work is conceived as a 'history of the present', which investigates the past not to satisfy the scholar's curiosity but to illuminate our current predicament.[26] Therefore, my work is theoretically-oriented, and I develop an analysis that looks to be both historical and philosophical. This methodological approach has been used in other works of the kind, and today it has been subjected to debate in the context of a broader dispute between 'contextualist' and 'critical/juridical' approaches to the history of international law.[27] Without getting into this discussion, and although the outcomes of this method cannot be fully appreciated in an article with these characteristics, I think this clarification should help the reader to understand the scope of this investigation and how it was undertaken. In a way, the prominence I give to practices in this text is a consequence of the many inflections that archaeology-genealogy has impressed on historical work.[28] The originality of this article lies, therefore, in its method of analysis and the theoretical apparatus it provides, and crucially in the broader historical and conceptual implications of the analysis.

C. Rituals of land-taking

In the medieval order of the so-called *Respublica Christiana*[29] the soil was fragmented into different categories, which permitted diverse types of land-appropriation. In this

[25] In the terms expressed by Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (A Sheridan tr, Pantheon Books 1972); Michel Foucault, 'Nietzsche, Genealogy, History' in *Language, Counter-Memory, Practice: Selected Essays and Interviews* (D Bouchard ed, D Bouchard & S Simon trs, Cornell University Press 1977); and Giorgio Agamben, *The Signature of All Things: On Method* (L D'lsanto & K Attell trs, Zone Books 2009).

[26] I am not saying here with this that other historical approaches do not share this interest too, but simply highlighting one of the main aspects that has characterised archaeology-genealogy.

[27] Cf Anne Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166; Orford, 'The Past as Law or History' (n 2); Lesaffer (n 2); Koskenniemi, 'Vitoria and Us' (n 3); Fitzmaurice, 'Context in the History of International Law' (n 2); Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *Journal of the History of International Law* 7.

[28] As Foucault says: 'Instead of deducing concrete phenomena from universals [here we could replace 'universals' with 'doctrinal concepts'], or instead of starting with universals as an obligatory grid of intelligibility for certain concrete practices, I would like to start with these concrete practices and, as it were, pass these universals through the grid of these practices': Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (M Senellart ed, G Burchell tr, Palgrave Macmillan 2008) 3. The focus on concrete practices in the early law of nations has had the effect of deepening the use of the 'contextualist' method — see Fitzmaurice, 'Context in the History of International Law' (n 2) 7, 16 —, even while it could also be argued to be a departure from the conceptual approach common to the intellectual histories of this school. Although I cannot elaborate on this point in detail here, I believe that 'contextualism' and 'genealogical-archeological' approaches are not necessarily at odds in all respects — as most commentators seem to assume — and have important points in common that deserve to be explored. This interest in closer examination of practices is one of them.

[29] The '*Respublica Christiana*' was the set of European Christian kingdoms that were under the orbit of the Papacy and therefore shared certain legal rules and customs — in general, it coincided with the geographical area encompassed by the *ius commune* — that makes it possible to speak of a pre-global European international legal order that extended from the 11th to the 16th century. See Grewe (n 3) and Schmitt (n 3) 58. The *Respublica Christiana* is usually known also as 'The Christian Commonwealth' and the term dates back to the Middle Ages. See John Watkins, 'Towards a New Diplomatic History of Medieval and Early Modern Europe' (2008) 38 *Journal of Medieval and Early Modern Studies* 1. Even though certain tenets of this commonwealth would survive, the religious wars and the subsequent emergence of a 'state system' with a sharp separation between the Church and the states — marked by the Peace of Westphalia

early international order, it was commonly held—although not without controversy as we will see—that the main territorial distinction separated Christian from non-Christian soil. Because of the dual political structure of the *Respublica Christiana*—which established the *imperium* of the kings and the *authoritas* of the Pope—the acquisition of lands depended on both powers acting together. The non-Christian soil belonging to heathen peoples could be granted by the Pope to a Christian prince, who was entrusted then with an evangelising mission over that territory. The lands so assigned (*terrae missionis*) could be conquered and annexed by the Prince as a consequence of the mission, which usually also conceded jurisdiction and dominion over the lands. It was commonly understood, moreover, that the territory belonging to the Islamic kingdoms were the soil of 'perpetual enemies' (*hostes perpetui*), and, therefore, that there existed 'just cause' to make war to conquer them. If this war was fought under the mandate of the Pope, it was considered, in addition, a 'holy war', a 'crusade'.[30]

It should not be overlooked that the colonisation of America was carried out under these tenets.[31] It was, in a certain way, a 'crusade' to bring the Christian faith to the New World and conquest and annexation were justified under these juridical and theological ideas. Therefore, we should not be surprised by the fact that after Columbus's discovery, Spain requested the papal concession of the corresponding mission, which would be granted in the first *Inter Caetera* bull of May 1493 by Pope Alexander VI. This document designated America as heathen soil, establishing the crown of Castile's mandate to evangelise it and 'donated, granted and assigned […] full and free dominium, absolute power, authority and jurisdiction' ('*donamus, concidumus, et assignamus* […] *dominos cum plena, libera, et onmimoda potestate, auctoritate, et jurisdictione*') to the kings of Spain over the New World.[32] The *Inter Caetera* bulls were the main legal title on which the Spaniards instituted the colonisation of America. As the Pope had done with other donations of lands to Portugal and other kingdoms in the past, the edicts were explicit in stating that the Holy See was not merely assigning a mission to evangelise the Indians but also granting *dominium* and *jurisdictio*[33] of all the territories and islands discovered or to be discovered hereafter in the Indies (*repertas et reperiendas in posterum*) to the Spaniards,

(1648) — would represent the end of the '*Respublica Christiana*' and the emergence of the so-called *ius publicum europaeum*.

[30] See Grewe (n 3) 40–50; and Juan Manzano, *La incorporación de las Indias a la corona de Castilla* (Ediciones Cultura Hispánica 1948) 13. As we will see, part of the doctrine and some European nations would later reject this understanding that allowed the Pope to allocate land. However, at the time of Columbus's discovery, this was standard ecclesiastic practice; it had international scope and was recognised and accepted by most European nations. See Zorraquín Becú (n 22) 340.

[31] On this see Juan Manzano, 'El sentido misional de la empresa de las Indias' (1941) 1 *Revista de Estudios Políticos* 108.

[32] This *Inter Caetera* bull was the first of the so-called five *Bulas Alejandrinas* granted by the Pope to Spain in relation to America. Each bull referred to different aspects: donation of lands, their demarcation, privileges of the kings, extraordinary powers of missionaries, and extension of the donation. For the full text in Latin of the *Inter Caetera* bull with an English translation see Francis G Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies* vol 1 (Carnegie Institution of Washington, 1917) 56–63. For an overview of the bulls see Zorraquín Becú (n 22) 327–78.

[33] Medieval scholars distinguished between *dominium jurisdictionis* (sovereignty) and *dominium rerum* (ownership). See, eg, Domingo de Soto, *Relectio de Dominio* (Jaime Brufau Prats ed, Universidad de Granada, 1964). That is why the bull mentions both *domunium* and *jurisdictio*, making it clear that the donation is full and absolute, encompassing both property and sovereignty. For an interesting analysis of how this distinction will play a role in the development of modern international law see Koskenniemi, 'Empire and International Law' (n 3); Koskenniemi, 'Colonization of the Indies' (n 2); Craven, 'Colonialism and Domination' (n 3).

provided that these lands were not be already in the actual possession of another Christian prince.[34] Therefore, the Pope was granting full and absolute sovereignty over the New World to the Spaniards.

The Papal donation to Spain, nonetheless, would be strongly disputed by other European powers—France, England, and the Netherlands—who refused to recognise the authority of the Catholic Church in these matters. It is clear that the extension of the donation left them out of the exploration of the New World. Moreover, soon after Columbus's journey, the order established by the *Respublica Christiana* would start to slowly crumble, thanks to the movement of secession initiated by the Reformation, and would no longer provide a common and unifying political ground to all Christian polities. By 1550, papal jurisdiction and canon law had lost their authority in almost half of the West.

At the same time, in this period, there existed a strong controversy around the legitimate modes of territorial appropriation. When Spaniards arrived in America there were various 'traditional' forms of land-acquisition: inheritance, marriage, succession, feudal forfeiture, discovery, occupation, conquest, cession (donation, sale or exchange), and other lesser known variants. These modes did not differentiate between 'public' or 'private' acquisition, and were employed, wielded or defended according to the convenience and interests of the agents in dispute.[35] An inability to agree on criteria allowed parties to prefer one solution over the other according to their interests.[36] Therefore, the open defiance of the Papal donation by certain princes, plus the uncertainty on the lawful means of territorial annexation, obliged the Spaniards to justify their dominion over the Indies with recourse to different titles, some of them of a theological nature—such as the bulls—and others of a more mundane character.[37]

'Discovery' and 'occupation' were the first titles alleged by Spaniards to claim their rightful possession of the new lands.[38] When Columbus departed from Spain, the legal advisors to the crown considered these legal titles to be enough. The uncertainty over the definition of these terms, however, later convinced the kings of Spain to require the Papal donation of the Indies.[39] It was strongly disputed, for example, that the mere 'discovery'

[34] Cf Davenport (n 32) 56.

[35] Regarding these forms of acquisition see Manzano, *La incorporación* (n 30) 16.

[36] See, Herzog, *Frontiers of Possession* (n 4) 26.

[37] We can consider that, in a certain sense, these quarrels over the titles to the New World would eventually open up a space of secular discussion about the conditions of territorial appropriation. The paradoxical but fundamental role of the Papal donation in the secularisation of the international legal discourse has usually been overlooked. The *Inter Caetera* indirectly forced the kingdoms not benefited by the Pope to reject the theological arguments and to use mundane reasons to sustain their equal right to the New World. Most of those secular arguments were taken from Roman legal sources and natural law, as Benton & Straumann (n 7) 20, make clear.

[38] Cf Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500-c. 1800* (Yale University Press 1995) 80.

[39] Manzano, *La incorporación* (n 30) 13–14 mentions additional reasons why the Catholic kings would have decided to request the Papal donation. On the one hand, the Spanish laws — in particular, the important *Partitas* of Alfonso the Wise — established only four ways to gain sovereignty over a territory: inheritance, marriage, voluntary election, and the *donation of the Pope or the Emperor* (Partita II, Title I, Law 9). Curiously, neither discovery, occupation nor conquest were mentioned as legitimate forms to acquire sovereignty. The only case where something similar to occupation was accepted as a form of acquisition was the case of land as a 'new island born from the sea'. But the term used here is not 'occupation' but 'to populate' (*poblar*) — 'who populate [the island] first' (*aquel que la poblare primeramente*) (Partita III, Title 27, Law 29). On the other hand, previous Papal donations granted Portugal

(*inventio*/*repertas*)—that is, the simple sighting—of the lands was sufficient to get a title over them. Spain and Portugal[40] at times supported this position. However, other European kingdoms actively resisted this perspective, which, moreover, did not agree with the Roman sources on which the legal order of the *Respublica Christiana* was based, nor with the opinion of eminent theologians and jurists who usually rejected bare discovery as a legitimate mode of territorial acquisition.[41]

It is clear that the practices of the time were not homogeneous, and discovery never enjoyed general recognition as a source of sovereignty.[42] It was typically asserted, in this regard, that together with the act of discovery, it was necessary 'to take possession' of the new lands. This position was consistent with Roman law sources indicating that 'possession' was a prerequisite of 'dominion'. In this context, that is, in the case of an original acquisition of lands considered *res nullius*—a thing without owners[43]—dominion was acquired through *occupatio* and involved two things: a physical act of appropriation and the intention and will to hold the territory as one's own.[44]

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rights over part of the Atlantic, giving them some space for potential reclamations of the Indies. In fact, soon after Columbus's voyage, Portugal claimed the islands discovered were within their zone of donation.

[40] Portugal also defended the idea that to find new navigable routes, to develop new charts, maps and instruments of navigation awarded legal title over the territories discovered using those methods. Cf Seed, *Ceremonies of Possession* (n 14) 1, 9, 100–149. Curiously, however, Portugal was also against bare discovery and in favour of taking possession of lands when disputing territories with Spain: see Herzog, *Frontiers of Possession* (n 4) 26. As von Der Heydte (n 15) 452 pointed out, nations could base their own land claims on discovery but refuse to recognise discovery as conferring legal title to their rivals.

[41] In contrast to imperial agents, doctrine has largely been opposed to the principle of bare discovery. Cf Andrew Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 842. In the few cases doctrine admitted discovery virtually equated it with occupation. See, eg, Francisco de Vitoria, *Relectio de Indies* (L Pereña and JM Pérez Prendes eds, Consejo Superior de Investigaciones Científicas 1967) 13–31. Vitoria, however, claimed that discovery and occupation did not work as a legitimate title for Spain in the Indies because these lands were inhabited.

[42] Pagden, *Lords of All the World* (n 38) 82

[43] As America was densely populated at the time Spaniards arrived, to consider these lands *res nullius* was a contested issue. Over recent years, there has been controversy about the role played by the principle of *res nullius* or the related concept of *terra nullius* (land without owners) in the Spanish conquest. Pagden, for example, argued that Spaniards did not make use of *res nullius* (Pagden, *Lords of All the World* (n 38) 91), and later stated that this principle was just part of a broad set of ideas and practices about acquiring new territory: Anthony Pagden, 'The Struggle for Legitimacy and the Image of Empire in the Atlantic, to c. 1700' in Nicholas Canny (ed), *The Origins of Empire* (Oxford University Press 1998) 34; Anthony Pagden, 'Law, Colonization, Legitimation, and the European Background' in Michael Grossberg and Christopher Tomlins (eds), *The Cambridge History of Law in America, vol. I: Early America (1580–1815)* (Cambridge University Press 2008). Following Pagden, Elliot claims that this principle became of much greater service to the English and French than to Spaniards: JH Elliot, *Empires of the Atlantic World: Britain and Spain in America 1492–1830* (Yale University Press 2006) 32. Benton & Straumann, alternatively, have suggested that European explorers made a strategical use of this principle 'depending on local conditions, Indigenous people's actions, and the state of interimperial rivalries': Benton & Straumann (n 7) 2. Fitzmaurice, in contrast, argues that both *res nullius* and *terra nullius* were anachronistically projected into the past by the 20th century, and that in the 16th century, the notion of 'occupation' prevailed: Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory' (n 41) 859–60.

[44] We should take into account that *occupatio* in Roman law did not generally apply to land. The Roman view was that any land had an owner. The only clear reference to land occupation as *res nullius* is the case of an 'island borne from the sea' (*insula quae in mari nata*) in *Digest* 41.1.7.3. Medieval lawyers took Roman law occupation but stripped it from its technicalities and generalised the case of the island rising from the sea to all they considered vacant land. On *occupatio* in Roman law see Max Kaser, *Roman Private Law* (R Dannenbring tr, University of South Africa 1984) 134, and Eugène Petit, *Tratado elemental de derecho romano* (J Ferrández González tr, Editorial Porrúa 2007) 245 and 246; Grewe (n 3) 125.

Consequently, taking possession meant both the action of materially seizing the land (*corpus possessionis*) and the fact of manifesting the *animus domini* over the thing.[45] However, it was not clear what the extent and content of this 'taking' or 'occupation' was. According to some, these acts merely involved 'the formal ceremony of taking possession, the symbolic act',[46] and according to others, it also necessarily implied an effective occupation of the territory. It is certain that since the 15th century, the practices of princes and imperial agents show a growing inclination to recognise importance in symbolic acts, but it would remain contested whether these acts bestowed by themselves legal title over land. In other words, the discussion was whether 'symbolic annexation' or 'effective occupation' were sufficient.[47] In a way, these opposing arguments were placing more weight on one or the other element of possession as formulated in Roman sources. While the 'symbolic' position sustained a subjective or psychological approach, giving more importance to the *animus* of the possessor, the defenders of 'effective occupation' made the objective or material seizing of the land the determining factor.

Admittedly, because of the disputed nature of bare discovery as a mode of acquisition, both Spain and Portugal asserted their possession through these ritual forms that expressed a symbolic annexation, but they did not necessarily carry out an effective occupation afterwards. That is to say, the Spanish and Portuguese usually—but not always—sustained the idea that bare discovery suffices as a legitimate title; but in the event that this was not so, they alleged that symbolic possession should be enough as a mode of acquisition, no subsequent effective occupation being necessary to obtain dominion over the discovered territories.[48] The reason for this standpoint was obvious: Spain and Portugal were not in a position to effectively occupy all the lands they had discovered during their exploratory travels. In addition, symbolic possession would allow them to acquire control of vast regions with remarkable speed and economy. Accepting that possession should be effective, as, for example, was claimed by the English, the French and the Dutch, would have meant Spain and Portugal substantially limiting the scope of their domains and the future expansion of their empires.

As a result, there were two main ways of understanding what occupation entailed at that time, and both were closely linked to the antagonistic interests of the nations that competed for the New World. The problem that emerged for the international legal order was to define when there was possession that served as a legal title for dominion: whether it was sufficient for it to be 'symbolic', according to the interests of Spain and Portugal, or whether it had to be followed by an 'effective occupation', as the minor but emerging European powers defended. In most cases, as happened with discovery, doctrine did not favour symbolic acts as sufficient means of acquisition and instead privileged effective

[45] See *Digest* 41.2.3.1. However, we should also note that Roman sources are not that clear about the elements of possession — as the Savigny/Jhering debate showed in the 19th century — nor do they provide a general definition for property/*dominium*. Cf Joan Miquel, *Derecho romano* (Marcial Pons 2016) 167. This should have provoked more uncertainty on how to acquire new territories and some margin for antagonistic interpretations of the sources in the 16th century. We should also note that in the original acquisition of a *res nullius*, possession converges with *dominium*, that is, possession becomes property, and their requirements are assimilated, as Paulo makes clear in *Digest* 41.2. See Petit (n 44) 245.

[46] Keller et al (n 15) 148–9.

[47] See Waldock (n 10) 323; von Der Heydte (n 15) 452.

[48] I said not always, because both Spain and Portugal could also defend effective occupation occasionally. See on this von Der Heydte (n 15) 454. Notice that this has led Goebel (n 15) 58, to claim that effective occupation was the rule in states' practices at the time. In contrast, some other scholars have interpreted these contradictions as 'strategic'. Cf Benton & Straumann (n 7) 29–30.

occupation of the land. Imperial agents adopted one solution over the other according to their relative position and interests. It is noteworthy that this discrepancy between doctrine and practices would continue well up until the 19th century, when effective occupation was finally endorsed by states in the Berlin Conference of 1884–85.[49]

The forms of the legal rituals to take possession varied depending on the case and nationality of the explorers. The Spaniards used to make solemn statements that included naming the appropriated territory, along with the act of unfurling royal standards and driving crosses into the ground. The Portuguese, alternatively, used to build stone pillars and place royal arms and crosses over the soil. The French usually carried out large theatrical processions, resembling religious or coronation ceremonies, and placed crosses on high ground. Other kingdoms did not have such elaborate rituals. The Dutch, for example, simply used to engrave wooden shields with the name of their religion 'Reformed Christians' ('*Cristianos reformados*'), written in Spanish so as to drive away other explorers. The English, on the other hand, asked that twig and turf be brought to them as part of a ritual act, but many times, they did not carry out these ceremonies, considering that the construction of walls and fences—or of any other territorial boundary—or of houses and buildings, complied sufficiently and even to a greater extent with the legal ceremony of taking possession of the land. In this case, the ceremony of possession blurred with the effective occupation of the territory.[50]

Even if there were national particularities, the variants between the different European nations in these practices should not be exaggerated. As Lauren Benton suggests, the explorers did not usually stick to one culturally determined 'national' method and usually combined and alternated them in different performances depending on the circumstances. Spaniards, for example, could adopt 'English ways' by using chunks of earth resembling the turf and twig ceremonies, while English settlers could adopt 'Iberian forms' by unfurling royal standards, driving in crosses, or naming the land.[51] The most common forms imperial agents used consisted of placing 'markers'—state columns, wooden pillars, and crosses—at strategic places, such as islands in estuaries or the joining of rivers, where they could be visible to other European explorers. The ceremonies of possession, then, consisted of a common repertoire used flexibly and strategically with the purpose of communicating claims of ownership to other European powers; legal ceremonies worked as a shared language to convey inter-imperial claims.[52] We should not forget that medieval ceremonies were usually aimed at creating political visibility in

[49] See Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory' (n 41) 847.

[50] For a detailed description of these forms see Seed, *Ceremonies of Possession* (n 14); Seed, 'Taking Possession and Reading Texts' (n 14) 112, 116–19; and Keller et al (n 15).

[51] Benton, *A Search for Sovereignty* (n 4) 55; Benton & Straumann (n 7) 31–2.

[52] Seed has argued that the fact the ceremonies adopted different culturally determined approaches, made it difficult for the European nations understand each other and concede a legal basis to their mutual claims: Seed, *Ceremonies of Possession* (n 14) 12. Even if it is true that there were — both involuntary and intentional — mistranslations that at times caused misunderstandings and disputes about the land claims, Seed overstates the situation. Europeans relied heavily on shared and widely circulating notions about the acquisition of territory as prescribed in the *ius commune*, which had Roman law as its foundations. This made their legal practices understandable and easily translatable to each other. For a more detailed critique of Seed's argument see Benton, *A Search for Sovereignty* (n 4) 55 and Benton & Straumann (n 7) 31–2.

a time when the world was often perceived as a theatre. In this regard, the ceremonies of possession were a performance on the 'stage of the world'.[53]

Let us take Columbus's first arrival in America, probably one of the most famous travel accounts of all time, which is quite illustrative of how the Spaniards and other European explorers carried out these rituals. As Bernardino Bravo Lira noticed, Columbus's ceremony of possession was probably the first 'legal act' ever to be accomplished in American lands.[54] The events occurred on 12 October 1492 and are recounted in Columbus's journal, transcribed by Bartolomé de Las Casas:

> The Admiral called to the two captains and to the others who had jumped ashore and to Rodrigo Descovedo, the notary of the whole fleet, and to Rodrigo Sánchez de Segovia; and he said that they should be witnesses and attest that, in the presence of all, he would take, as in fact he did take, possession of the said island for the king and for the queen his lords, making the declarations that were required, and which at more length are contained in the testimonials made there in writing.
>
> *El Almirante llamó á los dos capitanes y á los demás que saltaron en tierra, y á Rodrigo Descovedo, Escribano de toda el armada, y á Rodrigo Sánchez de Segovia, y dijo que le diesen por fe y testimonio como él por ante todos tomaba, como de hecho tomó posesión de la dicha isla por el Rey é por la Reina sus señores, haciendo las protestaciones que se requerían, como más largo se contiene en los testimonios que allí se hicieron por escrito*.[55]

A more detailed version of the same facts is related by Columbus's son. In the biography he wrote about his father, Ferdinand tells us that, after sighting land, Columbus went to the coast and extended the royal banners, which had a green cross painted on them along with the names of the sovereigns of Castile and Aragon. After thanking God and kissing the ground, 'the Admiral arose and named the island "San Salvador"' ('*el Almirante se levanto en pie y puso por nombre á la isla "San Salvador"*') and 'took possession [of the lands] in the name of the Catholic kings with the appropriate ceremony and words' ('*tomó posesión en nombre de los reyes Católicos con la solemnidad y palabras que se requieren*').[56] Unfortunately, the details of the ceremony performed, and the words pronounced are not described. Following other contemporary examples, however, we can imagine that Columbus might have left a mark on the ground: maybe by placing stones, marking trees, cutting grass, raising mound or pillars, or erecting a cross. The words pronounced would have contained praise to God and declared unequivocally the act of taking possession of the lands on behalf of the Spanish kings.[57] These acts were far from

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[53] I take this idea from MA Visceglia, 'Les cérémonies comme compétition politique entre les monarchies française et espagnole, à Rome, au XVIIe siècle' in Bernard Dompnier (ed), *Les cérémonies extraordinaires du Catholicisme baroque* (Presses Universitaires Blaise Pascal 2009) 365.

[54] Cf Bernardino Bravo Lira, 'El derecho indiano y sus raíces europeas: Derecho común y propio de Castilla' (1988) 58 *Anuario de historia del derecho español* 5.

[55] The English translation belongs to Greenblatt (n 8) 55, but I made some minor changes following the original. For the Spanish version see Columbus's journal in Columbus (n 1) 23–4.

[56] Ferdinand Columbus, *Historia del Almirante Don Cristóbal Colón, Escrita por Don Fernando Colón su hijo*, vol. 1 (Imprenta de T Minuesa 1892) 103.

[57] See the detailed description of ceremonial acts in 'Instrucción que dio el Rey a Juan Díaz de Solís para el viage expresado' (November 24, 1514) in Martín Fernandez de Navarrete (ed), *Colección de los viajes y descubrimientos que hicieron por mar los Españoles*, vol. 3 (Editorial Guarania 1945) 149. Regarding speeches pronounced in these ceremonies see 'Testimonio de un acto de posesión que tomó el gobernador Pedrárias Dávila, en nombre de SS. MM., en la costa del sur, del señorío de aquellos dominios' (January 27, 1519) in Joaquín F Pacheco et al (ed), *Colección de documentos inéditos, relativos al descubrimiento,*

being improvised. Not only were they registered by a notary, but performing this ceremony was required by the *capitulación de Sante Fé*, the written agreement that Columbus signed with the Catholic kings before departing from the Iberian Peninsula. In concrete, the agreement stated explicitly that whether new lands were found, these solemn acts should be performed, leaving due record by a notary in a written document.

As we can appreciate from Columbus's acts, giving name to the territories was an essential part of the ceremonial act of taking possession of the land. This issue can be seen clearly also in the Instructions that the kings gave to the conquistadors and governors appointed to the Indies, which explicitly required them 'to name the land, the cities, towns, and places'[58] as the first act of possession. Following this tradition, Columbus was lavish in his bestowal of new names on the different geographical features that he encountered in his voyages. He proudly claimed to have named 600 islands on his first trip, and he lamented having left about 3,000 islands without a name, and, therefore, arguably, without an owner![59] It has even been suggested that Columbus used to fall into a state of 'veritable naming frenzy' on certain days on his first journey.[60] On January 11, for example, the Admiral's journal reports that:

> At midnight he left the *Rio de Gracia* […] and sailed four leagues to the East, reaching a cape which he called *Belprado*. From there, to the Southwest rises the mountain which he called *Monte de Plata*, which he said was eight leagues away. At eighteen leagues to the East […] is found the cape which he called *del Angel* […] Four leagues to the East one quarter Southeast, there is a point which the Admiral called *del Hierro*. Four leagues farther, in the same direction, is another point which he named *Punta Seca*, then six leagues farther there is the cape which he called *Redondo*. And from there to the East is found *Cabo Francés* […]
>
> *A medianoche salió del* Rio de Gracia [...] *navegó al Leste hasta un cabo que llamó* Belprado*, cuatro leguas; y de allí al Sueste está el monte á quien puso* Monte de Plata*, y dice que hay ocho leguas. De allí al cabo del* Belprado *al Leste, cuarta del Sueste, está el cabo que dijo del* Angel […] *al Leste, cuarta del Sueste, hay cuatro leguas, á una* Punta *que puso* del Hierro*; y al mismo camino, cuatro leguas, está una punta, que llamó la* Punta Seca*, y de allí al mismo camino, á seis leguas, está el cabo que dijo* Redondo*; y de allí al Leste está el* Cabo Francés […][61]

And the list of names and places extends a few pages more. This land-nominative act was so important that it was regulated. Thus, custom indicated that this nomination should not be arbitrary and be grounded in different factors. The motivation for the name, for example, could be based on the establishment of a relationship between the chronological order of the discovery and the order of importance of the objects associated with the names. Therefore, Columbus's first name-giving acts followed the hierarchical order established in the medieval Christian world: the names were assigned referring first to

conquista y organización de las antiguas posesiones españolas de América y Oceanía, sacados de los archivos de reino, y muy especialmente del de Indias, vol. 2 (Imprenta Española 1864) 549.

[58] Thus, for example, it can be read in the Instruction given to Governor Pedrarias Dávila dated on August 4, 1513: 'Once arrived there […] give a name to the whole land, to the cities and towns and places' ('*Llegados alla […] poner nombre general a toda la tierra general, a las ciudades e villas e logares*'), quoted in Columbus (n 56) 138.

[59] Tzvetan Todorov, *The Conquest of America: The Question of the Other* (Harper & Row 1992) 121.

[60] Ibid 27.

[61] See Columbus's journal in Columbus (n 1) 146.

God, and then to the Virgin Mary, the King, the Queen, and the Heirs to the throne, and so on, in descending order. So, Columbus writes that:

> To the first [island] I came upon, I gave the name of *San Salvador*, in homage to His Heavenly Majesty who has wondrously given us all this. The Indians call this island *Guanahani*. I named the second island *Santa María de Concepción*, the third *Fernandina*, the fourth *Isabela*, the fifth *Juana*, and so to each of them I gave a new name.
>
> *A la primera que yo fallé puse nombre* San Salvador*, á conmemoración de su Alta Majestad, el cual maravillosamente todo esto ha dado: los indios la llaman* Guanahani*. A la segunda puso nombre la isla de* Santa María de Concepción*; á la tercera* Fernandina*; á la cuarta la* Isabela*; a la quinta isla* Juana*, é así á cada una nombre nuevo*.[62]

In some cases, explorers and colonists could also choose to use the names of saints, especially if their day in the liturgical calendar had coincided with the day of discovery. In addition, the motivation could also be given by the relationship of the name with the topological characteristics of the place it designated. So, for example, in Columbus's journal, we read: 'I gave this cape the name *Fermoso* [beautiful] because so it is' ('*al cual puse nombre cabo Fermoso, porque asi lo es*');[63] or 'he saw a cape covered with palm trees, and named it *Cabo de Palmas*' ('*vido cabo lleno de palmas y púsole* Cabo de Palmas').[64] It is interesting to note here that Columbus seems to be perfectly aware that these places already have Indigenous names. In some way, 'to give a new name' annulled the previous name, as if it were an act of possession that amounted to cancelling the Indigenous ownership in existence up to that moment. That is why the Spanish crown was also preoccupied with naming and required Columbus to report how many islands had been found, the names given to each of them, and the original Indian names.[65] These close relationship between *naming* and *possessing* should not be overlooked. The acts of naming or renaming can reasonably be characterised as forms of onomastic and epistemological imperialism. Finding a 'just' name not only meant affirming that the previous one had not had that character, but also that there was an 'adequate' name for everything. This attitude was in line with a very common thought in Europe at the time, postulating that names were an image of the essence of things.[66] Not only people but also objects had 'true names'. Determining a true name was therefore an act of authority and sovereignty: to find the name of something was to have real power over it, to be the real owner of a thing. Moreover, all this has undoubted resonance, of course, with the importance of the name and the act of name-giving in the Judeo-Christian tradition. It has been pointed out that when reading Columbus's journal and letters we have the

[62] See 'Carta a Santángel' in Columbus (n 1)185.

[63] See Columbus's journal in Columbus (n 1) 38.

[64] Ibid 49. Explorers could also choose the name of their hometowns (eg. 'New Spain', 'New Granada'), and in few cases, Indigenous names where kept, usually if new names did not hold up. In this case, however, names were Castilianised (eg. 'Cuzco' for 'Qosqo'). See Elliot (n 43) 33.

[65] Elliot (n 43) 32.

[66] The belief in the connection between names and essences, or the link between things (*res*) and the word that names it (*nomen*), has a long history in Western thought. Already in Plato's *Cratylus* we can find a discussion on whether names are 'conventional' or 'natural', whether the language is arbitrary, or whether signs have an intrinsic link with the things they designate (see 383a–385, although the whole dialogue revolves around this issue). Moreover, the 'debate on the universals' that starts in the 12th century between the Dominicans and the Franciscans, or the 'realist' and the 'nominalist' schools, represents another reverberation of this discussion.

impression that he behaves quite 'like Adam in the midst of Eden'.[67] Beyond the humorous image this sentence evokes, we must not forget that in Judeo-Christian lore there is a clear relationship between the power of naming that God grants to Adam and his lordship over the beasts he names.[68]

Naming or re-naming, then, enabled a transition from one state to another: from Indigenous possession to European possession, from 'false ownership' to 'true ownership'. Like baptism marked the entrance of people into the world of the Christian faith, a Christian name for the land signalled the entry of the territory into the possessions of the Spanish kings and the Christian Commonwealth. In the same way that Catholic baptism involved incorporation into the Christian *populus*, these rituals of territorial appropriation were a *christening* that indicated first the annexation of the territory into the topological space of the Spanish crown, and secondly, and more generally, its inclusion into the sphere of the *Respublica Christiana*.

In this context, nor could Indians escape the 'name-giving frenzy' of imperial agents. According to the chroniclers, the first natives taken from the Indies to Spain were re-named 'Don Juan de Castilla' and 'Don Fernando de Aragón'. The practice of assigning Castilian names to Indians would be common in subsequent years, and, in a way, these new names acted as marks signalling their vassalage to the crown. The rituals of appropriation of the land had as a counterpart the religious baptisms carried out by the missionaries of the different spiritual orders to convert the Indians, a practice that also reached hyperbolic levels. It is said, for example, that the Franciscans carried out massive conversions in ceremonies where thousands of Indians were baptised at the same time. This practice earned them the criticism of the Dominicans, who, in any case, were no less insistent on the importance of converting and incorporating the Indians into the *communitas Christiana* by the act of baptism. The territorial nominations and the baptisms of Indians were an integral part of the same axis of annexation to which the New World was subjected. In the same way, Patricia Seed comments:

> Columbus's practice of naming—or more accurately, renaming—rivers, capes, and islands as part of the ceremony of taking possession was repeated throughout the conquest of the New World and constituted one of the culturally specific acts of Spanish imperial authority. The practice represents a form of ritual speech that undertakes a remaking of the land. Naming geographical features in effect converts them from their former status to a new European one: the external body of the land remains the same, but its essence is redefined by a new name. The use of ritual speech to name territory is analogous to the process of baptism practices upon the peoples of the New World. These two key elements—the renaming of places and the ceremonial declarations—instituted Spanish colonial authority through an act of speaking, a dramatic enactment of belief in the power of words.[69]

And, in a similar sense, Todorov says:

> The first gesture Columbus makes upon contact with the newly discovered lands (hence the first contact between Europe and what will be America) is an act of extended nomination: this is the declaration according to which these lands are henceforth part of the Kingdom of Spain.[70]

[67] See Todorov (n 59) 6.

[68] Cf Genesis 2:19–20.

[69] Seed, 'Taking Possession and Reading Texts' (n 14) 122.

[70] Todorov (n 59) 28.

It should come as no surprise that the nominative prodigality regarding lands would extend to the inhabitants of the New World. If ceremonies of possession work to annex lands, baptisms enable the incorporation of people, and we will see later that other instruments would fulfil this role too. These legal forms taken together were meant to inaugurate the dominion over the territory and its population, that is, they had to produce the title of sovereignty over the New World and its inhabitants. They constituted, in this regard, 'symbolic acts of sovereignty' or arrangements to 'display authority', as international law scholars have described them.[71]

However, in a more profound sense, these legal ceremonies also had a 'performative' nature, that is, the ability to create a new—previously non-existent—extra-linguistic reality.[72] Performative speech acts are those that, under certain conditions, *accomplish* the actions they describe. They are acts in which speech constitutes social action; when discourse *does* what it *says*. In his seminal work *How to Do Things with Words*, John L Austin, who developed this idea, argued that performative utterances are not limited to describing a factual situation—as in the 'constative speech acts'—but are those that while describing a given reality also produce it. Not by chance, one of the main examples of performative utterance that Austin discusses in his work is the 'name-giving act', or, baptism. According to Austin, the act of pronouncing the words ('I name this ship Queen Elizabeth' or 'I baptise you') transforms the status of the thing or person that is the object of the ceremony.[73] In other words, the speech not only realises the action of naming or baptising but also produces a new reality. The contemporary widespread interest in Austin's ideas has broadened the application of performativity theory to analyse utterances that do not explicitly describe actions, or actions and practices, that are not necessarily uttered,[74] putting the distinction between practices and utterances into question, and considering utterances as a form of embodied practice.[75]

Now, this understanding of the performative act can be used to appreciate the real dimension and effects of the Spanish ceremonies of possession, which, as we saw, are rituals consisting of both utterances and actions. It could be said that these ceremonies not only annexed the American soil into the Spanish empire but also *produced* it as a territory ready to be (dis)possessed. It was, then, a double performative production. The Indies became an appropriable land—not all territory was appropriable at the time, as we saw earlier—and, therefore, by that same gesture, they were considered appropriated by the Spanish crown. *Appropriability* and *appropriation* were not successive but concomitant conditions created by the legal ceremonies of possession. While realising the act of 'taking possession', the ceremonies were also changing the status of the Indies by asserting their appropriability; the ceremonial acts over the soil or the renaming of lands were just markers of their new acquired status. In a curious loop, then, the act of appropriation made the lands appropriable, and their appropriability justified *ex post facto*

[71] See Sharma (n 9) 44. See also Keller et al (n 15).

[72] Unspecified references about the performative nature of these ceremonies can also be found in Greenblatt (n 8). In a similar way, Faudree claims that the *Requerimiento*, a particular ceremony of possession that I analyse in the next section, has a performative nature: Faudree (n 14) 456–78.

[73] Cf John L Austin, *How to Do Things with Words* (Oxford University Press 1962) 5, 24, 31, 35.

[74] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969); Jacques Derrida, 'Signature, Event, Context' in *Limited Inc.* (S Weber & J Mehlman trs, Northwestern University Press 1988); Jacques Derrida, 'Declaration of Independence' (T Keenan & T Pepper trs) (1986) 7 *New Political Science* 7; Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (Routledge 1993), among others.

[75] Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997) 10.

the act of appropriation. This will become clear in the next section, where I analyse a peculiar type of ceremony of possession: the infamous *Requerimiento*.

C. *Requerimiento*: rituals of people-appropriation

The Spaniards performed the ceremonies of territorial possession for years after Columbus's discovery of America. As soon as they stepped onto new lands, the Iberian explorers renamed the territory and declared the authority of the Spanish crown. Irrespective of these formal acts, which were duly notarised, it was unnecessary to pronounce any particular speech. As we have seen, it simply had to be clear and so stated that the lands were taken on behalf of the Spanish kings.

This practice would change, however, from 1512 onwards, after the Castilian crown entrusted a commission of eight jurists and theologians—the famous *junta of Burgos*—to study how to strengthen the legal titles of Spain over America. The reason for the creation of this commission was the strong questioning directed at the Spaniards after the Dominican Fray Antonio de Montesinos denounced the exploitation and mistreatment of the Indians in his famous speech of 1511. This event sparked severe doubts about Spain's entitlement to the Papal donation, which was eminently based, as we have seen, on the missionary conversion of the Indians to the Christian faith. This commission of notables—presided over by the Bishop of Burgos, Juan Rodríguez Fonseca; and including the Dominican theologians, Matías de Paz, Pedro de Covarruvias and Tomás Duran; and the licentiates Gregorio, de Sosa, Santiago and the jurist adviser of the crown, Juan López de Palacios Rubios—devoted itself to expanding and elaborating on the reasons and titles for the Spanish Conquest of the Indies. As a consequence of these deliberations, Palacios Rubios would later produce both a treatise[76] and the *Requerimiento* (Requirement), a legal document stating the titles of Spain over the New World.[77]

The text of the *Requerimiento* was intended to be read to the natives, requesting them to submit to the authority of the Spanish crown. According to the members of the commission, the reading of this document legitimised and justified war if the Indians decided not to surrender to Spain. Although this text did not replace the legal ceremonies for taking possession of the land, it did add to those rites the need to read a solemn declaration if the territories were inhabited by Indians. This document was used for the first time in 1514 in the expedition led by Pedrarias Dávila[78] to the Darien and was then used profusely in other excursions in the Caribbean islands. Later on, it was employed in the conquest of Mexico and Peru, as well as in each of the encounters the Spaniards had

[76] See Juan López de Palacios Rubios, *De las Islas de Mar Oceano (Libellus de Insulis Oceanis)* (P Castañeda Delgado et al trs) (EUNSA [1512-1516] 2013 [1512–16]). Palacios Rubios wrote the treatise between 1512 and 1516 at the request of Ferdinand II, in order to summarize the debate on the Spanish titles. See about this Christiane Birr, '*Dominium* in the Indies: Juan Lopez de Palacios Rubios' *Libellus de insulis oceanis quas vulgus indias appelat* (1512–1516)' (2018) 26 *Journal of the Max Planck Institute for European Legal History* 267.

[77] The disagreement of scholars in relation to the birth date of the *Requerimiento*, claiming 1510, 1512, 1513 and 1514 (cf Faudree (n 14) 456), emerges from the fact that the practice of 'requiring' the land existed in America before Palacios Rubios elaborated the *Requerimiento* and was already common in the conquest of the Canary Islands and the *Reconquista* (Manzano, *La incorporación* (n 30) 54). On the Moorish sources that this institution might have had, in particular in the ritual demand for submission in Islamic Jihad, see Seed, *Ceremonies of Possession* (n 14) 72.

[78] See Hanke (n 6) 33. Zavala mentions that other authors syndicated Alonso de Ojeda as the first explorer using the *Requerimiento* in his expedition to Cartagena. Cf Silvio A Zavala, *Estudios indianos* (Editorial Libros de México 1984) 105.

with the Indians until 1573, a moment when the *Requerimiento* would be replaced by a revised and less belligerent document called 'Instrument of Obedience and Vassalage' (*Instrumento de Obediencia y Vasallaje*).[79]

The *Requerimiento* began by expressing the status of 'servant' (*criado*) or 'messenger' (*mensagero*) of the person who was commissioned to do the reading, that is, stating that they were acting under the mandate and representation of the kings of Spain. After that, the document affirmed the sources of authority of the Spanish crown through a genealogical account that began with God and then extended from St Peter to the Pope, in order to affirm the legitimacy of the Papal donation by virtue of which 'their Highnesses are monarchs and lords of these islands and *Tierra-Firme*' (*sus Alteças son Reyes é señores destas islas é Tierra-Firme*). Immediately afterwards, the document informed its listeners that the lordship of the Church and the kings had been accepted by almost everyone to whom this lordship had been previously announced, who they now serve as 'subjects and vassals' (*súbditos é vassallos*), with 'goodwill and without presenting any resistance' (*buena voluntad é sin ninguna ressistençia*), also adopting the Christian Faith. The *Requerimiento* concluded by urging the natives to recognise the Church and the kings' lordship over the New World, as well as their authority to preach the gospel. If they did so, they were promised the 'love and charity' (*amor é caridad*) of the kings, as well as their freedom, and that of their wives and children. Otherwise, the Spaniards considered themselves justified to initiate hostilities—under the pretext that they would be in a case of 'just war'—and to enslave the Indians and forcibly take their lands. The last part of the *Requerimiento* reads:

> If you do not do this [submit] or if you maliciously delay doing so, I guarantee that with God's help, we shall confront you with all the power we have, and wage war against you in all the places and in all the forms that we can; and we shall hold you to the yoke, and to the obedience of the Church and their Majesties; and we shall take you and your wives and your children, and shall make them slaves, and as such, we shall sell and dispose of them as their Majesties may command; and we shall take away your possessions, and shall do all the harms and damages that we can, as to vassals who do not obey or refuse to welcome their lord, and resist and contradict him.
>
> *Y si así no lo hicieseis o en ello maliciosamente pusieseis dilación, os certifico que con la ayuda de Dios, nosotros entraremos poderosamente contra vosotros, y os haremos guerra por todas las partes y maneras que pudiéramos, y os sujetaremos al yugo y obediencia de la Iglesia y de sus Majestades, y tomaremos vuestras personas y de vuestras mujeres e hijos y los haremos esclavos, y como tales los venderemos y dispondremos de ellos como sus Majestades mandaren, y os tomaremos vuestros bienes, y os haremos todos los males y daños que pudiéramos, como a vasallos que no obedecen ni quieren recibir a su señor y le resisten y contradicen*.[80]

By creating the grounds for a just war (*ius ad bellum*), the *Requerimiento* made the Indians, who did not accept becoming vassals, become enemies of the crown and conquest become the main title of possession. As we have seen earlier, legitimate warfare

[79] Cf Seed, 'Taking Possession and Reading Texts' (n 14) 128. Although other authors mention that the *Requerimiento* fell into disuse before in the decade of the 1540s. See Zorraquín Becú (n 22) 356.

[80] The full version of the *Requerimiento* that I quote in part here and which would have been the first version used by the Spaniards can be found in G Fernández de Oviedo, *Historia General y Natural de la Indias*, vol. 3 (Imprenta de la Real Academia de la Historia 1851–55 [1478–1557]) 28–9. Another similar version — in this case, the *Requerimiento* entrusted to Francisco Pizarro in his expedition to Peru — can be consulted in Luciano Pereña, *La idea de Justica en la Conquista de América* (Mapfre 1992) 237–9.

was an acceptable instrument of land-appropriation in certain circumstances. Not peaceful *occupatio* of an empty land as in the case of the ceremonies of possession, but violent conquest is what the *Requerimiento* made legitimate. In any case, the difference between these two categories was blurred. According to Roman law sources, conquest or belligerent occupation (*occupatio bellica*) was considered a *species* of the *genus* of occupation. The occupation was *bellica* when it was brought about during, or as a result of war, and it carried the effect of granting ownership over things acquired by force from the enemy. Romans assimilated the belongings of enemies and peoples with whom they were not allied to *res nullius* (a fictional *res nullius* called *res hostiles*).[81] That is why, mistakenly or not, medieval jurists tended to merge *occupatio* and *occupatio bellica* to analyse whether it was legitimate to take heathen lands.[82] Even if there is some controversy around this issue, the concept of just war in the Middle Ages did not substantially change the idea that occupation could sometimes adopt the form of conquest. Rather, these two concepts co-existed to ascertain that war could be an instrument of conquest or punishment.[83] Seen in this light, then, the *Requerimiento* created an artificial *res nullius*: it made the native lands become uninhabited by 'emptying' or 'vacating' them through a legal fiction. By obliterating previous Indigenous ownership, the *Requerimiento* made the lands available for occupation.

It is interesting that the *Requerimiento* was based essentially on two theses that sought to justify Spain's *dominium* over the New World, which evidences, in a way, the power this instrument had to *erase* previous forms of ownership. The first of these ideas was formulated by Martín Fernández de Enciso—one of the three 'experts', with first-hand knowledge of the Indies, heard at the Junta of Burgos—who argued that biblical passages justified the violent Spanish excursions into the New World. Enciso explained that the Pope had assigned the Indies to the Spaniards, just as the Jews had received the 'Promised Land' from God.[84] Elaborating on this thesis, he declared:

> Moses sent Joshua to *require* the inhabitants of the first city [of the promised land], which was Jericho, to abandon and yield their land because it belonged to them [the people of Israel] inasmuch as God had given it to them; and when the people [of Jericho] did not give up their land [Joshua] surrounded them and killed them ... And afterwards he took all the promised land by force of arms, and many were killed and those who were captured were given as slaves and used as slaves. And all this was done by the will of God because they were idolaters.
>
> *Envió Josué á* requerir *á los de la primera ciudad que era Gericó, que le dejasen é diesen aquella tierra, pues era suya, porque se la habia dado Dios; é porque no se la dieron los cercó é los mató á todos ... é después les tomó toda la tierra de promision por fuerza de armas, en que mató infinitos de ellos, é prendió muchos, é*

[81] See Petit (n 44) 246; Grewe (n 3) 125; Carcano (n 9) 14–15. *Res hostiles* usually applied to enemy belongings in Roman soil. Out of this space, authors discuss whether things captured in war — in particular land — become public (*ager publicus*) or could be acquired through *occupatio* by individuals. Palacios Rubios seems to follow this distinction in his treatise when he contends that Indigenous goods seized in a just war pass into the ownership of soldiers who took them, while cities, villages and castles becomes the king's property. See Palacios Rubios (n 76) 194 and Birr (n 76) 272.

[82] We can find already in Bartolus an early merger between *occupatio* and *occupatio bellica*, when he assimilates the 'islands borne from the sea' to the lands in hands of heathens. See Grewe (n 3) 125.

[83] See Carcano (n 9) 15. See also Frederick H Russell, *The Just War in the Middle Ages* (Cambridge University Press 1975) 7. Against this idea Grewe (n 3) 122, sustained that the doctrine of 'just war' and medieval rules of knightly private warfare prevented the existence of a right of conquest.

[84] See Hanke (n 6) 31–2.

> *á los que prendió los tomó por esclavos, é se sirvió dellos como de esclavos. E todo esto se hizo por voluntad de Dios porque eran idólatras.*[85]

Enciso believed that just as Joshua had 'required' the idolaters to hand over the lands that God had granted to the Jews, the kings also 'could very justly send to require these idolatrous Indians to yield the land' ('*podia muy justamente enviar á requerir á estos indios idólatras que le entregasen la tierra*'),[86] and in the event that they did not surrender, 'he could make war on them and take [the lands] by force and kill them, and apprehend them, and he could give those who were imprisoned as slaves' ('*les podia hacer la guerra é tomársela por fuerza é matarlos, é prenderlos sobre ello, é que a los que fuesen presos los podía dar por esclavos*').[87] Moreover, Enciso argued that the idolatrous character of the Indians—that is, what justified tearing them apart from their lands—was the result of four 'causes' that he enumerated: the natives did not know God and worshipped many gods; they practiced acts of sodomy and dressed up like women; they committed collective suicide; and, on top of that, they were cannibals.

The other doctrine that was used to support the *Requerimiento* was developed by Henry de Segusio—also called Hostiensis—in the 11th century and defended the Papal donations of land insofar as it also argued the absolute spiritual and temporal authority of the Pope as *Dominus Orbis*. In concrete terms, this theory held that only Christians could own land and justified the conquest of any territory owned by non-Christians. For Hostiensis, all sovereignty would have been transferred from non-Christians to the faithful with the arrival of Christ. The former could retain the ownership of their lands only in the case that they recognised the absolute sovereignty of the Catholic Church. Otherwise, the Pope had the power to take their lands away from them and grant them to Christians. This theory affirmed the universal jurisdiction of the Pope, based on the fact that ultimately all sovereignty was subject to the authority of Christ, who would have delegated it to St Peter and then to his successors.[88]

Beyond the legal or theological justifications for the *Requerimiento*, the incorporation of this instrument to the colonising process saw little change to the situation of the Indians or their understanding of the motives of the Spanish conquistadors. According to the chroniclers, in practice, the *Requerimiento* was generally read:

> … to trees and empty huts when no Indians were to be found. Captains muttered its theological phrases into their beards on the edge of sleeping Indian settlements, or even a league away before starting the formal attack, and at times some leather-lunged Spanish notary hurled its sonorous phrases after the Indians as they fled into the mountains. Once it was read in camp before the soldiers to the beat of the drum.

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[85] See Enciso's memorial in Joaquín F Pacheco, Francisco de Cardenas & Luis Torres de Mendoza (eds), *Colección de documentos inéditos relativos al descubirmiento, conquista, y organización de las antiguas posesiones españolas de América y Oceanía, sacados de los Archivos del Reino y muy especialmente del de Indias*, vol. 1 (Imprenta de Manual G Hernández 1864–74) 443–4 (the translation belongs to Hanke (n 6) 32, although I have made changes, following the original document, indicated in square brackets. Emphasis added).

[86] Ibid 444.

[87] Ibid.

[88] However, Hostiensis's theory was not accepted by all theologians and jurists. This theory rivalled the one elaborated some years before by Pope Innocent IV (1243–1254), who held that all human beings, Christian and non-Christian, had dominion over their territories. See James Muldoon, 'Medieval Canon Law and the Conquest of the Americas' (2000) 37 *Jahrbuch für Geschichte Lateinamerikas — Yearbook of the History of Latin America* 20. Palacios Rubios (n 76), however, made use of Hostensis's ideas to justify the Conquest. The other opinion, in contrast, would be defended by Vitoria, Las Casas, and other theologians.

> Ship captains would sometimes have the document read from the deck as they approached an island, and at night would send out enslaving expeditions, whose leaders would shout the traditional Castilian war cry 'Santiago!' rather than read the Requirement before they attacked the near-by villages.[89]

Thus, while the *Requerimiento*'s elaboration responded to a political and doctrinal concern about the legitimacy of the Conquest and the necessity of taking into account Indians' relative 'freedom', the practices through which it was put into use suggest something very different. Contemporary Spaniards did not ignore these circumstances. The priest Bartolomé de Las Casas lamented the situation and confessed that he could not decide 'whether to laugh or to cry' when he heard about these practices.[90] Gonzalo Fernández de Oviedo, explorer and then chronicler of the crown, who apparently had the 'privilege' of being the first to read the *Requerimiento* to the Indians in the expedition led by Dávila to *Tierra Firme*, said that 'I would have preferred that the *Requerimiento* was made to be understood by them' ('*quisiera yo que aquel requerimiento se les hiçiera entender primero*'). It is not surprising then that the document unleashed the criticisms of other European nations at the time, who accused the Spaniards of hypocrisy, and triggered the mockery and ironic comments of historians and scholars over the centuries. Indeed, the absurdity of the *Requerimiento* has been established as the point of departure from which to analyse the document, and we can see this in many recent works as well, which criticise the fact that Indians could not understand its content.[91]

Leaving aside the most extreme and absurd cases, if we look carefully from a strict juridical point of view, the action of the Spaniards had a legal motivation and even resonates with contemporary legal practices. The *Requerimiento* is in line with a long legal tradition in the West which originated in Roman sources that privileges the fulfilment of ritual forms over substantive rightfulness, and which ascertains the establishment of authority and jurisdiction on the observance of procedural ceremonies.[92] It can be said, for example, that the notion of justice that our contemporary legal systems upholds in most countries of the world is based on this 'formal' or 'procedural' ideal, which considers a verdict or a judgment 'just' only if the forms prescribed to it have been correctly followed (what we usually term 'due process'), regardless of the substantive 'justice' (or 'injustice') of the decisions taken. Moreover, if the idea of reading an incomprehensible text to the audience sounds like a bizarre way to uphold authority, we cannot overlook that there are many similar instances of equally odd practices in current political and legal spheres. For example: the drafting of laws, norms, policies and regulations that are utterly incomprehensible to the majority of citizens, and which, not for that reason, cease to be enforced and considered legitimate; the pronouncement of judgments before defendants—in some cases, even in their physical absence—wholly disconcerted by the reasoning and terms used by judges and lawyers; or the 'reading of rights', as in the 'Miranda rule', to arrested suspects who do not usually understand what the police officers recite.

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[89] Hanke (n 6) 34.

[90] Bartolomé de Las Casas, *Historia de las indias*, vol. 3 (Biblioteca Ayacucho 1986) 216.

[91] See, eg, Hanke (n 6); Todorov (n 59); Seed, *Ceremonies of Possession* (n 14); and Greenblatt (n 8).

[92] The Roman legal process during the archaic period and part of the Republic (the system of *legis actiones*) was based on solemn formulas and very rigid rituals and is one of the best representatives of Western legal formalism. See Miquel (n 45) 122-123. Contemporary 'legal formalism' can be seen as the ideological heir of this legal tradition. See Duncan Kennedy, 'Legal Formalism' in Neil J Smelser and Paul B Baltes (eds), *Encyclopedia of the Social & Behavioral Sciences*, vol. 13 (Elsevier 2001) 8634.

In a way, for Spaniards, it mattered little if the Indians understood the meaning of the *Requerimiento*. Taken to the extreme, legal formalism encouraged dispensing with their understanding and even their physical presence during the act. After all, if their understanding was not essential, nor was their physical presence. The actual task for the conquistadors was to carry out the legal formalities imposed by the document; formalities capable of producing the desired legal effects regarding their actual addressees, that is, *the rest of the European peoples* within the inter-national and inter-imperial space.[93] In fact, because of the Papal donation Spaniards did not need any kind of 'recognition' or act of 'concession' from the Indians themselves, but just to show and make evident to the rest of the Europeans that they were acting in accordance with the Papal bulls.[94] The *Requerimiento* —like the ceremonies of possession of the land—was intended to give legitimacy to the Spanish titles in the context of the legal order of the *Respublica Christiana*.[95] Therefore, these acts must be interpreted within the system of international law to which they belonged, and which granted them their formal validity. As Carl Schmitt put it, 'these symbolic acts of seizure, such as laying a stone or hoisting a flag, [did not] 'as such' establish legal title. True legal titles obtained only within the framework of a recognised order of international law, for which such symbols have a legal force'.[96] That is why the Indians cannot be considered the main addressees of the readings. Although the textual orientation of the *Requerimiento* is towards the natives, they cannot be taken as its final audience, in view of the legal order in which the document was meant to be a part of. These acts were embedded in the inter-national and inter-imperial politics of the *Respublica Christiana* and were directed to create political and legal effects in that sphere that was totally alien to the natives. The *Requerimiento* was, as the very text makes explicit, a derivation of the Papal bulls, and thus it was aimed to justify the Conquest in the light of the principles of the Christian Commonwealth.

It could be said that the use of the *Requerimiento* indicates a displacement on what the object of the appropriation was. If the legal ceremonies of possession were essentially focused on the act of land-taking—in its annexation into the Spanish empire—the *Requerimiento* emphasised the subjugation of the Indians, that is, their incorporation into the Empire as vassals of the Spanish kings. The *Requerimiento*, in a way, worked together with baptisms of Indians as a means to incorporate people into the *Respublica Christiana*. Unlike other legal rituals of possession, where crosses or royal banners were planted on the ground, the act of reading a document was intended to establish authority and

[93] Other scholars have also pointed out that the ceremonies were directed to other Europeans. Cf Greenblatt (n 8) 60; Elliot (n 43) 31; Benton, *A Search for Sovereignty* (n 4) 55; Faudree (n 14) 465. Seed also makes this point, but, for her, the addressees were the members of the same national culture, not other Europeans from different nations: Seed, *Ceremonies of Possession* (n 14) 11. Other possible addressees were, according to the scholarship, the Spanish crown, the Pope, and the explorers witnessing the ceremony.

[94] Cf Pagden, *Lords of All the World* (n 38) 91.

[95] Faced with criticism, the Spanish crown ordered the use of translators when the *Requerimiento* was read to the Indians: see Manzano, *La incorporación* (n 30) 52. Yet, the *Requerimiento* was never translated into any Indigenous language; chronicles rarely mention the use of translators, and, in the few cases they do, the aptitude of the translators or the accuracy of the translations are questionable. Cf Matthew Restall, *Seven Myths of the Spanish Conquest* (Oxford University Press 2003) 92–3. These attempts, then, were not born out of a preoccupation for the linguistic gulf between the Indians and the explorers but out of the questioning Spaniards received from other European powers, making clear who were the real addresses of the *Requerimiento*.

[96] Schmitt (n 3) 131.

jurisdiction over the inhabitants of America.[97] It should be said, again, to avert any confusion, that this establishment of authority over the Indians was produced primarily in relation to the European nations and not to the Indians themselves. The *Requerimiento* was thought to show to the other Europeans—not to the Indians—that Spaniards exercised their dominion rightfully and legitimately.

Now, the *Requerimiento*, like the ceremonies of possession that I have considered before, can be analysed as a performative speech act. In some way, as Faudree[98] claimed, when commentators discuss the document's absurdity, what is implicit in the criticism is that the *Requerimiento* does not fulfil its performative function insofar as the 'felicitous conditions'—the circumstances that make a performative act successful, in Austin's terms[99]—are not achieved because the addressees do not understand the speech (or are not even present when the request is formulated).[100] To be sure, this argument can be sustained as long as we deem the Indians the main addressees of the *Requerimiento*. In contrast, if we consider the *Requerimiento* was addressed to the Europeans, as I have argued, the 'felicitous conditions' should be determined not in relation to the natives but to the Europeans. In other words, the success of the instrument depends on what type of performative speech act we consider the *Requerimiento* was and who its addressees were. If we consider that the *Requerimiento* is a 'request' made to the Indians—as the literature usually has it—the document certainly does not fulfil its conditions of felicity, since the addressees are absent or do not understand the language in which the request is expressed. In contrast, if we understand the document as a 'declaration' to the other European powers, the conditions are in principle met: Europeans understood the meaning of these acts and their physical presence was unnecessary to make these acts successful or felicitous. In other words, it could be sustained that the real aim of the *Requerimiento*—as it happened in the ceremonies of possession—was to *declare dominion over the Indies*: to request the land of the Indians was an integral part of the textual elements of the declaration but not the object of the *Requerimiento* itself as a legal instrument.[101] We should not forget that in certain performative acts, the speech can be formally oriented, as part of the procedure or as an element of the ceremonial act, towards a particular addressee but have another, ultimate, target audience. This is clear, for example, in baptisms, which are rhetorically addressed towards the baptised person or thing named ('I baptise *you*', 'I name *you*') but does not require their acknowledgement or understanding because the actual addressees are the witnesses to the ceremony.

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[97] As Seed pointed out: 'what the act of reading [the *Requerimiento*] accomplishes [...] is the establishment of authority over *people* [... it] articulated authority over the persons rather than over land': Seed, 'Taking Possession and Reading Texts' (n 14) 127 (emphasis in original).

[98] Faudree (n 14) 466.

[99] Austin (n 73) 16, 22.

[100] As Greenblatt said, the *Requerimiento* is 'spectacularly "infelicitous" in virtually every one of the senses detailed by Austin': Greenblatt (n 8) 65.

[101] The other important aspect to take into account to determine who was the ultimate addressee of the document is the fact that for a large part of Spanish jurists and theologians the Indians did not necessarily count as qualified addressees. This is the reason why the necessity of their understanding of the text should be considered relative. Actually, the inferiority of the inhabitants of the Indies, which Todorov (n 59) 148 calls the 'thesis of Inequality', was the argument sustained by Ginés de Sepúlveda in *Democrates alter, sive de justis belli causis apud indos* (Demócrates segundo o de las justas causas de la guerra contra los indios) (M. Menéndez y Palayo tr, Boletín de la Academia de la Historia, 1892 [1544–5]) to defend the validity of the *Requerimiento* and the just war against the Indians. Even Vitoria, who argued for Indians' rights to their lands, considered them inferior and 'incapable' like children: Vitoria (n 41) 95–7.

By acknowledging the *Requerimiento* as a felicitous performative act, in turn, we can examine the *constitutive* character of these speech acts. Like the rituals of possession, the *Requerimiento* did not merely perform the appropriation of the lands but established the conditions of *appropriability* of the Indies by stating that God granted these lands to the Pope, and by him to the Spanish. According to the *Requerimiento*, which follows the bulls, Spaniards had *jurisdictio* and *dominium* over the discovered or to be discovered territories—this is what actually legitimises the taking of possession after all—but still the lands need explorers to require it in the name of kings.[102] If that is the case, however, we might wonder, why should these lands be appropriated at all? Why should they be *required* of the Indians if the territories were already under the dominion of the kings? There is a 'slippage' between appropriability and appropriation in the document: if the condition to require the lands was the dominion granted by the Pope, at the same time, the requisite to get dominion was to require the lands of the Indians. Dominion was both a prerequisite and the result of the *Requerimiento*. There is then a circularity that lays bare the mutual constitution of appropriability and appropriation in the document.

We can try to find the reason for this paradox in the different and opposing sources of the *Requerimiento*. As I said, when drafting the document, Palacios Rubios was also working on his treatise. There, he assimilated the bulls with a privilege, considering that the donation conceded dominion *ipso iure* of the Indies and that neither transfer, nor seizure of possession was necessary.[103] At the same time, contradictorily, he also followed Bartolus's remarks on Papal edicts.[104] The famous commentator considered Papal donations as grants of a 'right of occupation' (*jus ad occupationem*), and, accordingly, understood they should be followed by actual occupation of the land, otherwise, rights were lost. In a way, this interpretation synthetised conflicting ideas about the Pope as *dominus orbis* and Roman sources on possession and *occupatio*.

In tune with these thoughts, some scholars have contended that the Papal bulls to the Spanish kings did not bestow territories but merely legalised or recognised *ex post facto* a territorial possession that already existed in fact or, alternatively, that it merely granted a kind of 'inchoate title', a *jus ad rem* and not a *jus in re*.[105] In this regard, the term 'donation' would be a misnomer, insofar as the bull's purpose would have been merely to convert the possession of land, acquired, or to be acquired in the future, into *dominium*. Even if twisting Roman sources,[106] this interpretation would explain why Spaniards

[102] It could be said that, according to the *Inter Caetera* bulls, the only requisite to get jurisdiction and dominion was to discover the lands granted by the Pope. On this see Zorraquín Becú (n 22) 383.

[103] Palacios Rubios (n 76) 342–4, and Birr (n 76) 278–9.

[104] Cf Palacios Rubios (n 76) 350–9 and Birr (n 76) 279–80.

[105] Cf von Der Heydte (n 15) 450–2.

[106] Roman sources indicated that in the case of an 'original acquisition', occupation did not need the confirmation of an external authority to create rights; as we have seen, it only required that the lands were available (*res nullius*). On the other hand, if the bulls granted *dominium*, as they explicitly claimed, because the Pope, as *dominus orbis*, donated the Indies to the Spaniards — a form of 'derivative acquisition' — occupation would have been unnecessary to get title. Even if donations required getting possession through *mancipatio, in jure cesio*, or *traditio* (ritual acts by which the thing was transferred by the donor to the beneficiary), this does not mean the *Requerimiento* or any other act of possession Spaniards performed in America could have been understood in this way. In donations, *mancipatio, in jure cesio*, or *traditio* never implied to take or require lands from third people; they consisted in symbolic or material acts between the donor and the beneficiary. Probably to sort out this complication, Palacios Rubios contended that the donation granted *dominium ipso iure* (therefore, arguing that no transference or taking of possession was necessary), which, however, contradicted Bartolus's idea — who he also follows — that taking possession

required the lands of the Indians. Other scholars, however, opted for an alternative understanding of the bulls, showing that the issue remains contested. Benton and Benjamin Straumann, for example, have suggested that the donation only assigned a 'sphere of influence',[107] which is close to Vitoria's idea that the Pope's edicts merely granted a 'mission' to evangelise the Indies.[108] This argument, nevertheless, hurts the literality of the text—which expressly grants *jurisdictio* and *dominium*—and does not help us to understand why the *Requerimiento* was held necessary by the Spaniards. Other scholars have contended that the bulls were an arbitration, a concession of a feud, or, an act of 'attribution' of jurisdiction and dominion, based on the rights the Holy See had as the main governing body of Christianity.[109] These interpretations, however, situate us again at the beginning and make it difficult to explain why Spaniards considered the *Requerimiento* necessary.

Whatever the case, Wilhelm Grewe seems to be right when he affirms that it is nearly impossible to establish the original meaning of these documents (assuming that they had such a meaning). As I have shown, participants did not usually act merely according to dogmatic legal considerations but followed political calculations, which made them change or modify their position according to their interests and circumstances.[110] Therefore, it is more important to focus on what this 'slippage' shows us about the *Requerimiento*'s nature. Arguably, the *Requerimiento* contains a discursive paradox that is the outcome of its performative character. In other words, the mutual constitution of appropriability and appropriation brings to light the performativity of the document. Jacques Derrida has shown how performative utterances—especially 'declarations'—do not merely accomplish a particular act but, through an 'amazing retroactivity', also establish the circumstances upon which that act depends.[111] The *Requerimiento* produces both the conditions it presupposes and the effects it is meant to create. In this regard, it literally gave to the kings—and by extension to the conquistadors—the power to take the lands and at the same time dominion over those lands. That is, the dominion so stated and declared in the document only retroactively fulfils its conditions of possibility.

Despite its circular structure, however, it should be said that the *Requerimiento* was not completely self-referential. The slippage in the document also lays out, as we are going to see in the last section, that performatives always depend on the citation of other previous speech acts—which are themselves performative acts—and, hence, acquires its force only through a process of reiteration and regression. Indeed, the *Requerimiento* held its force on the citation of the Papal bulls—referring to St Peter's and Christ's authority and authorisation—while the ceremonies of possession depended on the King's rights—based on God's endowment with such powers. Therefore, performativity theory shows us that jurisdiction and dominion are a material effect of speech acts, which call forth and assert in a continuous relapse the very factual realities they claim to merely describe or represent.

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of the lands was necessary so as not to lose the *dominium* granted by Papal edicts. See Palacios Rubios (n 76) 342–4.

[107] Benton & Straumann (n 7) 35.

[108] Cf Vitoria (n 41) 88.

[109] On this see Zorraquín Becú (n 22) 332–4, 335.

[110] Grewe (n 3) 237.

[111] See Derrida 'Declaration of Independence' (n 74) 10.

D. Conclusion

Behind the discussion on the legitimate modes of territorial acquisition lies a fundamental question that both doctrine and imperial agents implicitly touched upon in their debates: *when and how can a fact become law*? Is it possible that possession, a situation borne out of the realm of fact, turns into a right of *dominium*? Under which circumstances could a fact have consequences in the realm of the law? The opposition between *quid facti* and *quid juris* (what pertains to law and what pertains to fact) and the distinction between *de facto* and *de jure* has a long tradition in the legal scholarship, but the *locus* and the operation through which one becomes the other has remain undertheorised. In other words, what is at stake in these 16th century debates fostered by the Spanish Conquest are the conditions upon which an act of force, an act of material dispossession, can have juridical consequences and develop into law (*jurisdictio*/*dominium*).

To understand the scope and effects of the ceremonies we have to appreciate the relevance of this question in the colonial context. It could be said that, ultimately, the rituals of possession served as 'shifters' or *opérateurs*, converting force into right (and, also, right into force).[112] By means of a textual loop, the ceremonies switched the violence of conquest into a legitimate appropriation and the legitimate appropriation into a legal justification for (further) conquest. Therefore, the legal forms described here worked out not so much to hide the violence of appropriation but, rather, to shift this violence into a legal title. In a way, what was initially a *coup de force*, was later turned into a form of legitimate ownership by an act of 'legal sorcery'.[113] This is what the fabulous retroactivity of the performative utterance achieves in the ceremonies of possession: it produces the conditions of legitimate appropriation at the same time that it accomplishes the appropriation itself. Not by chance, Austin recognises that 'operative' is another term that describes performative acts.[114] In a way, 'operativity' or performativity—as Austin ultimately preferred—transforms the *coup de force* into a *coup de droit*. This is the instituting and founding moment of law, which implies, as Derrida argued, a performative force. Columbus's ceremony of possession represents, therefore, not only the first legal act but also the instituting moment of Spanish and European law in the Indies.

The paradoxical nature of all this process, however, means that, in the end, the appropriation was both produced and asserted by these ceremonies of possession. One cannot but recognise that the very delimitation between *quid facti* and *quid juris* is itself the result of the performative act. Yet, whilst in the theoretical analysis the performative and the constative appear as two separate and well demarcated instances, in real speech acts, this distinction is not necessarily so neat. Because if the performative is to be 'felicitous', it should gradually erase the difference between these two instances that it initially sought to create. In the case of the Spanish Conquest this is clear: with the passage of time and the progression of the colonisation of the New World, the *Requerimiento* became less performative and more constative of the reality in the Indies. The *Requerimiento* served more to reiterate and re-enact established circumstances—the Spanish dominion over the New World—than to create new social conditions.[115]

[112] On *opérateurs* that switch force into law see Michel Foucault, 'Truth and Juridical Forms' in *Power: Essential Works of Foucault: 1954–1984* (J Faubion ed, R Hurley et al trs, New Press 2000) 39.

[113] I take this expression from Manuel Lucena Giraldo, who calls the ceremonies of possession a form of 'legal sorcery' in *A los cuatro vientos. Las ciudades de la América Hispánica* (Marcial Pons 2006) 35.

[114] Cf Austin (n 73) 7. As Austin makes clear in the footnote of this page, the alternative name of 'operative' was suggested to him by HLA Hart.

[115] Cf Faudree (n 14) 472.

Therefore, it should not surprise us that, by the 17th century, after the first period of conquest, prescription (*usucapio*)[116] became one of the most legitimate and accepted title Spaniards could allege over the Indies.[117]

As Judith Butler contends, drawing upon Derrida's notion of citationality, performatives should be understood not as singular and isolated acts, but as reiterated and referential practices that produce social effects over time.[118] As rituals, performatives work over iteration. Unless provisional and unstable, they could acquire the aura of permanence and stability by means of their ritualised repetition. Regardless of what contemporaries and other later commentators thought about its 'felicity', the *Requerimiento* seemingly managed to produce, over reiteration, the results at which it aimed. To the extent that conquest appears increasingly objectionable in the face of new Enlightened ideas—in 1573 Spaniards even banned the use of the word '*conquista*' and replaced it with 'pacification'—prescription emerges as a way to 'clean up' and justify the titles of European colonialism.

It could be argued that the Spanish legal forms produce their desired effects through the destabilisation of the distinction between performatives and constatives. There should be a necessary undecidability between these two poles; a characteristic of the effects produced by the performative utterance, which blur the distinction between statement and action (in this case, appropriability and appropriation). The slippage that blends both extremes, the equivocation and equivocality that it generates, is not a defect of the speech but a required component to produce the sought-after effect of the performative utterance: *the positing of a right where there was force*.[119] The transmutation depends on this indispensable confusion of the terms.[120] For colonial law, (dis)possession is the norm: possession and dispossession become indistinguishable in legal discourse and practice. Unveiling the ungrounded place of law, which finds nothing behind it but the force of a

[116] The Roman law of prescription or *usucapio* allowed for long term *de facto* possession of a thing (*praescriptio longi temporis*) to become *de iure* as a case of *dominium*. At its core, prescription refers to the removal of defects in a putative title arising from usurpation of another's title. Therefore, prescription retroactively transforms a continued act of possession into a right. As Crawford (n 9) 222 says in relation to the rule of acquisitive prescription in modern international law, in practice, however, it is not easy to distinguish occupation and prescription. I would argue that this threshold of indistinguishability between the two categories derives from their shared performative nature, which in both cases works *ex post facto* to legalise an act of force that occurred in the past.

[117] This is the position advanced by Juan de Solórzano Pereyra in *Política Indiana* (CIAP 1930 [1648]) 27. Solórzano was the most important jurist of the Spanish crown during the reigns of Philip III and Philip IV. His opinions are important if we want to understand the official position of the crown at the time because, among other things, the Council of the Indies put him in charge of compiling and systematising the laws of the Indies and he would set the bases for the *Recopilación de la Leyes de Indias* of 1680. It is important to notice, as Pagden does, that, by the 17th century, other nations did accept that prescription could have given a valid title to the Spaniards over certain parts of America: Pagden, *Lords of All the World* (n 38) 90. He is also right when he affirms that occupation and prescription 'were part of the same essentially existential juridical argument: see Pagden, 'The Struggle for Legitimacy' (n 43) 50.

[118] Butler, *Excitable Speech* (n 75) xxi, 60.

[119] In Derrida's words, 'the 'successful' foundation of a state (in somewhat the same sense that one speaks of a 'felicitous performative speech act') will produce after the fact [*après coup*] what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of its self-legitimation': Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (M Quaintance tr) in *Acts of Religion* (Routledge 2002) 270.

[120] See Derrida, 'Declaration of Independence' (n 74) 9–10.

performative operation,[121] language and facts, power and speech, mingle and become one in the legal domain of conquest.

[121] Cf Derrida, 'Force of Law' (n 119) 241–2.