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Our future march on Mars – a walk on a well-known path

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Contents

Summary

The Europeans were confronted with something new and unknown to them when they ‘discovered’ the Americas. Humanity today is at the verge of establishing a settlement on Mars and being confronted with something new and unknown. This raises the question of what can be learned from history. The working hypothesis of this thesis is that humanity is justifying its right to space with arguments similar to those used by the Europeans when they colonized the Americas.

The method used in this thesis is composed of both a traditional method of interpreting international law but also a critical method inspired by the Critical Legal Studies movement (CLS) and Third World Approaches to International Law (TWAIL).

The first part of the thesis examines the European arguments for justification of colonizing the Americas. By using a critical method, I come to the conclusion that the Europeans did not see the indigenous people as legal equals and that the Europeans adapted their arguments depending on the situation in order to benefit themselves.

In the second part of the thesis, space law is examined through partly a traditional method of interpreting international law, but partly also with a critical method. The traditional method involves interpretation of major space law documents and scholarly literature related to it. With the critical method, I seek to reveal space law as a means of power for humanity and to what extent colonial thought replicates itself in space law.

The third and last part of the thesis is composed of a comparison between the colonization of the Americas and space law. The comparison has been conducted through a close reading inspired by a critical method and shows that the law is fluid in the sense that similar arguments are used in space law and in the colonization process. It also shows that the law is dependent on the one in the position of power: similar arguments are used but by different actors and in a different time.

Sammanfattning

Européerna konfronterades med något nytt och okänt för dem när de "upptäckte" Amerika. Människan håller idag på att etablera en bosättning på Mars och kommer att konfronteras med något nytt och okänt. Detta väcker frågan om vad som kan läras av historien. Arbetshypotesen i uppsatsen är att mänskligheten rättfärdigar sin rätt till rymden med argument som liknar dem som används av européerna när de koloniserade Amerika.

Metoden som används i uppsatsen består av både en traditionell metod för tolkning av internationell rätt, men också en kritisk metod inspirerad av Critical Legal Studies-rörelsen (CLS) och Third World Approaches to International Law (TWAIL).

Den första delen av uppsatsen granskar de europeiska argumenten för att kolonisera Amerika. Genom att använda en kritisk metod kommer jag till slutsatsen att européerna inte såg de inhemska människorna som juridiskt likvärdiga och att européerna anpassade sina argument beroende på situationen för att kunna dra fördel av dem.

I den andra delen av uppsatsen granskas rymdrätten delvis genom en traditionell metod för att tolka internationell rätt, men delvis också med en kritisk metod. Den traditionella metoden innebär en tolkning av stora rymdrättsdokument och vetenskaplig litteratur relaterad till den. Med den kritiska metoden försöker jag avslöja att rymdrätten används som ett maktmedel för mänskligheten och att kolonialtänkandet återfinns även i rymdrätten.

Den tredje och sista delen av uppsatsen består av en jämförelse mellan koloniseringen av Amerika och rymdrätten. Jämförelsen har genomförts genom en nära läsning inspirerad av en kritisk metod och visar att lagen är flytande i den meningen att liknande argument används i rymdrätten och koloniseringsprocessen. Det visar också att rätten är flytande och bestäms av den i maktposition: liknande argument används men av olika aktörer och vid olika tidpunkter.

Preface

The process of writing this thesis has been full of moments of joy but also of doubt. With me I have had the support of many great people and I would like to thank them. Thank you Lund and all the amazing people I have met.

Moa De Lucia Dahlbeck became my supervisor after I had changed topic after one month into the semester, which I am truly grateful for. She supported and guided me through the entire process of this thesis with advice, inspiration and constructive criticism. My gratitude to her and appreciation of her contribution is genuine. Thank you Moa!

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Lastly, I would like to thank the search function, “CTRL+F”.

Lund, 3 January 2018
Per Wisaeus

Abbreviations

CLS	Critical Legal Studies
OSD	Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space
OST	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies
TWAIL	Third World Approaches to International Law
UNGA	United Nations General Assembly

Definitions of terms

The Americas	The word is used when describing the American continents, both South and North America, in a contemporary perspective. See also *New World.*
Appropriation	Throughout the thesis I will use the term appropriation to describe the process of taking control over an area with the purpose to use it exclusively and with a long-term intention, unless otherwise stated.
Celestial body	For the sake of convenience, celestial body shall have the meaning of a planet, asteroid or meteoroid in this thesis.
Christianity	In this thesis all Christians and all forms of Christianity will be treated as one entity, unless otherwise stated.
Europe	When examining the colonization, I recognize the diversity within the European continent and the varying strategies of appropriation which different countries within Europe adhered to during the colonization era, but for the sake of convenience these different strategies and countries will all be referred to as one entity in general. In this thesis, 'European' thus refers to a *Christian* from the European continent, unless otherwise stated.
Francisco de Vitoria	The name of a prominent legal scholar contemporary with the colonization of the Americas. I will consequently spell his name 'Francisco de Vitoria' but when the literature spells his name differently I will reproduce that spelling.
Humanity and we	The totality of all human beings. In this thesis, I will use 'we', 'our' and 'us'

	which refer to the humanity as a collective. See also *Mankind*.
Indians, natives, barbarians, savages and indigenous people	In literature contemporary with the colonization of the Americas, the indigenous people of this, so-called, New World is usually referred to as Indians or natives and sometimes as barbarians and savages. In this thesis I make use of the term indigenous people when referring to the original habitants on the American continent. However, when literature uses the terms Indians, natives, barbarians or savages, I reproduce these terms as a historical fact.
Mankind	The same semantic meaning as 'humanity' but could also be seen as a legal subject, however there are differing opinions on the latter.[1] In this thesis 'mankind' will have the same meaning as humanity. If the meaning is the legal subject, this will be emphasized. See also *Humanity*.
New World	The American continents. The literature from the 15th and 16th century refer to the American continents as the New World. In this thesis I will use the New World when referring to a source or a perspective from the source's time. See also *the Americas.*
	The two continents which are today called North and South America were called 'new' since they were unknown for Europeans up until late 15th century. The name 'New World' originates from when printers in 1503 in Venice, Paris and Antwerp printed a map called *Mondus Novus*. This shows a Eurocentric view on the world since it emanates from the Europeans' point of view. Also, the naming of the continents to 'America' illustrates Eurocentrism since the name stems

[1] Nyman Metcalf (1999) p. 192.

	from the Italian explorer Amerigo Vespucci.[2]
Papal bull	Document issued by the Pope.[3]
Space	Outer space outside of Earth, including celestial bodies. There is a discussion of exactly where space starts and Earth ends, which I will not touch upon. Both *space* and *outer space* will be used as equivalents, however outer space will be more frequently used when discussing space law.
Spanish	For the sake of convenience and understanding, the different Spanish kingdoms during the colonization will be referred to as one entity.

[2] Lester (2009), pp. 302 and 378.
[3] Garner & Black (ed.) (2009) p. 222 *Bull*.

1 Introduction

When the Europeans colonized the Americas they did this while relying on a range of justifying arguments. For example, it was claimed that since the people of the New World did not want to trade with the European visitors this was a just cause for the use of force.[4] Another argument in the same spirit was that many societies which the Europeans encountered in the Americas was underdeveloped according to the Europeans.[5] Yet another was that the people of the New World did not use the land properly and therefore in no need of the territory in the same sense as people from the European continent.[6] These were all reasons justifying colonization. This demonstrates that there were arguments created to fit every possible occasion and to refute every possible critique of the European activity.

Both NASA and the private initiative Mars One are planning for a human settlement on Mars.[7] It is, for instance, the current climate changes affecting the planet that make a potential human settlement in space seem relevant. Considering the current state of the Earth, it appears like a natural next step for humans to approach space. If humans would set out to conquer space on a larger and more structured scale it would not be the first time for human kind to go out into the unknown. The human species is and has always been curious of its surroundings and the unknown. In that sense it seems not farfetched to imagine humans leaving Earth to establish a settlement in outer space. Throughout the history of human kind there are many examples of groups of people coming to places, conquering them and their inhabitants as if they were discovering something new. The European 'discovery' of the Americas, Africa and Australia are examples of that. The colonization of the Americas, Africa and Australia has been condemned retrospectively, in

[4] Fassbender (ed.) (2012) p. 868.
[5] Pagden (1982) p. 91.
[6] Behrendt (ed.) (2010) pp. 7–8.
[7] Mars One's website, About, http://www.mars-one.com/about-mars-one [Retrieved 01-11-2017] and Nasa's website, Journey to Mars, https://www.nasa.gov/topics/journeytomars/index.html [Retrieved 01-11-2017].

ideological as well as legal terms.[8] With this in mind, it seems relevant to ask what history might teach us about our current activities and exploration of space. Because the current activities in space resemble a well-known historical behavior, there is reason to suspect that humanity is on its way to repeat the very same mistakes made by the Europeans during the previous millennium, but perhaps even in a larger scale.

In this thesis I will show that space law and its major treaties are permeated by a colonial way of thinking even though the field was established in the 1960's, at the end of the de-colonization era and at the beginning of a scholarly critique of colonization.

I have chosen to analyze space law not only because of the question of appropriation with respect to space but also because there is a need to problematize human's perception of space. It is fruitful to use space law since it effectively reveals the human's relation to things and phenomena that are new to the human perception.

Using the colonization of the Americas as an example of how parts of humanity historically has coped with encounters with something new is an effective means of analyzing our current approach to space. Both the aspect of temporal distance and the near consensus makes the colonization of the Americas uncontroversial and useful for this thesis.[9] Using the colonization of the Americas effectively shows an historical example of how mankind tends to perceive the '*other'*.

There have been scholars arguing in favor of both appropriation and conquest. For example, Stephen Gorove, concludes that appropriation of space is possible since the legislation does not prohibit all types of appropriation.[10] A more extreme view is held by Charles Chaumont who

[8] Fassbender (ed.) (2012) p. 788.
[9] Fassbender (ed.) (2012) p. 788.
[10] Gorove (1968) p. 351.

claims that mankind could create a new empire and expand out into space.[11] Modesto Seara Vázquez considers a conquest of a lower civilization as plausible and acceptable.[12]

The problem related to humanity's further discovery of space is that even if we would find that it is wrong to conquer new planets and objects found, this is not a guarantee for a non-violent behavior. During the colonization of the Americas there were indeed legal scholars raising their voices in opposition to the domination. Nevertheless, the colonization went on for a long time which reminds us that we are not immune for making mistakes even though we are aware of the risks.[13] The same scenario could take place again. In retrospect, we know that the colonization of the Americas was wrong. But one could wonder if we would act differently today.

1.1 Hypothesis and research questions

When reading the main document of space law, the *Outer Space Treaty* (OST), and scholarly comments to it, it is rather striking to see the resemblance in reasoning and perception between our current reasoning and motivation of conducting activities in space, and, historical arguments justifying territorial colonization on Earth. This is particularly striking when considering the fact that there is scholarly consensus about the lack of legal ground for the colonization of the 'New World'.[14] To begin with, to call an inhabited space 'new' reveals that a very particular perspective is taken when considering the matter. The land colonized during the European colonization was certainly not new for the people who already lived there. It was only new from the particular perspective of the Europeans. Furthermore, what can be a clearer sign of appropriation than to name a 'discovered' continent after a European traveler?[15]

[11] Chaumont (1960) pp. 42–43.
[12] Seara Vázquez (1965) p. 239.
[13] Pagden (1982) pp. 57–59.
[14] Fassbender (ed.) (2012) p. 788.
[15] Lester (2009) pp. 302 and 378.

It is the current discursive recurrence to the notion of 'the new' and 'the unknown' that reveals a potential danger in the development of international law on space. The danger resides in, as indicated above, a risk of committing exactly the same mistakes of naturalizing dominance that we have historically defended by legal arguments with respect to the discovery of new places on Earth.

In the light of all this, it is the working hypothesis of this thesis that we currently are justifying our right to space with arguments similar to those used during the era of colonization which we subsequently have rejected as ideologically and morally reprehensible. I will study both the scholarly analyses of the law regulating colonization in the 16th century and the law regulating State activities in space in order to put this hypothesis to test. My principal research question is therefor: *What are the similarities and the differences between the colonization of the Americas and unlimited human access to space?*

To be more specific, in order to test my hypothesis, I will investigate how space is conceived today within the context of international law. This is to say that I will ask what kind of image of space is being produced and reproduced by international law on space and its surrounding scholarly discourse. To answer my principal research question it is necessary to study the arguments used in the contemporary discourse on space law in favor of an unlimited access to space. It will also be necessary to juxtapose these arguments with the legal arguments used to justify the European colonization of the Americas. Therefore, the analysis of my principal research question will be guided by the following two questions: *What arguments were used in both justifying and opposing the European colonization of the Americas? What arguments have been brought forward both in favor of and against an unlimited human access to space?*

The final answer to the principal research question will be deduced from an analysis of the similarities and differences between the discourses of activities and space and colonization of the Americas.

1.2 Theory

Both Critical Legal Studies movement (CLS) and the related Third World Approaches to International Law (TWAIL) have contributed to this thesis theoretical basis. CLS emerged in the 1970s and 1980s and can broadly be described as the idea of law as fundamentally fluid and vague and that law is shaped by the powerful.[16] TWAIL developed as a movement in the 1990s[17] and is interested "to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans."[18] Since I will examine appropriation of land and space which involves different actors with various amounts of power, these theories are relevant.

1.3 Material and method

In this thesis I have used different materials and methods to examine the research object and problem. When analyzing literature on the colonization of the Americas, I have read both primary and secondary literature on the subject matter. The primary literature is mainly contemporary with the colonial process and presents justifying or critical arguments on colonization. The secondary literature consists of literature authored in the 20th and 21st century about the ideological, legal and political context of colonization. I have studied historical, legal historical and legal literature. When examining the colonization of the Americas I will with a critical

[16] Sypnowich, Christine, "Law and Ideology", *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/win2014/entries/law-ideology/ [Retrieved 01-01-2018].
[17] Gathii (2011) p. 27.
[18] Mutua (2000) pp. 31-39.

method try to identify the vagueness and fluidity of the law and how it benefitted the powerful.

The examination of space law has been made through a traditional analysis of legal sources which primarily relies on Article 38 of the Statute of the International Court of Justice ICJ. Article 38 gives that the formal sources are international treaties, international customary law, general principles of law, judicial decisions and legal scholarship.[19] When examining space law, I have included legal scholarship from 1960's. I have chosen to include this material because it is relevant since it is contemporary with the creation of space law and its major documents and thus gives an important key of how to interpret space law. When examining space law, I have not only used a traditional method of interpretation of international treaties, resolutions and legal scholarship, but also a critical legal theory. By using a critical legal theory, I aim to reveal the law as a means of power for humanity and to investigate to what extent the colonial thought replicates itself in space law.

The comparison between the colonization of the Americas and space law has been conducted through a close reading of the material with the intention to find similarities and differences between the two research objects. The reading is inspired by CLS and TWAIL, meaning that I aim to demonstrate that the law is fluid and will change its meaning to suit the purpose of the one in the position of power.

1.4 Delimitation

I will mainly use the European colonization of the Americas since it is an illustrative example of the methodology of colonization. When discussing space law, the central sources will be OST and OSD and scholarly doctrine related to it, because they are the main documents in space law. Hence, following space treaties will not be discussed:

- The Rescue and Return Agreement

[19] Thirlway Hugh, *The Sources of International Law* in Evans (ed.) (2010) pp. 97–98.

- The Liability Convention
- The Registration Convention
- The Moon Agreement, even though it deals with appropriation and use of it, I have chosen to not include it in the scope of the thesis, because of the lack of ratifying states.

Further, regarding space law and human access to space, I have chosen to focus on the sources set out in Article 38 of the ICJ. Even though this way of ranking the sources has been subject to criticism it is a starting point for examining space law.[20] Hence, due to limitations of this thesis, I have chosen to not examine the language and description of the various Mars expeditions.

1.5 Previous research and relevance

To my knowledge, there has only been conducted one comparison between territorial colonization and the current practice of space activities at a smaller scale before. The article *In Space, No One Can Hear You Contest Jurisdiction* by Taylor Stanton Hardenstein, puts its main focus on criminal law in space. Hardenstein starts off by making a comparison between the Doctrine of Discovery[21] in the Americas and space.[22] Instead, I take the comparison of the arguments used in appropriation to be of central concern for understanding human current behavior. In this thesis I elaborate both the legal arguments in defense of the historic colonization and the current practice of space activities. This thesis is relevant in so far as we still appear to stand at the verge of initiating a full-scale colonization of space. Discussing potential practical effects of a current legal argumentation is essential for making considered strategies on how to act so as to cause minimum harm when embarking on new legal projects.

[20] Thirlway Hugh, *The Sources of International Law* in Evans (ed.) (2010) pp. 97–99.
[21] In short, the Doctrine of Discovery means that whoever first sees land has the right to appropriate it. See more in 2.2.4 Discovery.
[22] Hardenstein (2016) p. 251.

1.6 Structure

This thesis is composed of three parts. The first part will focus on the colonization of the Americas and investigates the legal arguments used to justify and oppose such appropriation. The second part is dedicated to a discussion of the regulation of space law regarding unlimited human access to space. The third and last part, demonstrates the resemblance of thinking in space law with the thinking of the colonization of the Americas.

2 The colonization of the Americas

2.1 The Iberian sprint to the Americas

During the 15th century Europe received much desired and valuable goods such as gold, spices and silk from the East. On the Iberian Peninsula, there were several smaller kingdoms which all started to explore their vicinities. Mainly Spanish and Portuguese kingdoms subsidized private expeditions to the West Coast of Africa in the search for the valuable goods. The expeditions were motivated by a desire to challenge the Arabian, Venetian and Genovese merchants who dominated the European trade on the mentioned goods.[23] Controlling the trade was a very lucrative income and thus made it desirable and motivated efforts to expand one's share of it. Also, another purpose for the Iberian powers to send expeditions to non-European territories was the interest in evangelizing humanity.[24]

To this end, Christopher Columbus's expedition in the search for an alternative route to the East Indies was neither unexpected nor original. The Spanish and Portuguese powers searched and received the blessing from the Pope and were rewarded quite generously. For example, Pope Nicholas V encouraged the expeditions by calling on to "search out and conquer all pagans, enslave them and appropriate their lands and goods".[25] Pope Alexander VI made an equally bombastic statement in his bull which gave the Spanish kings eternal and exclusive jurisdiction over "all /…/ remote and unknown mainlands and islands /…/ that have been discovered or

[23] Fassbender (ed.) (2012) p. 865.
[24] Tomlins, Christopher, *The Legalities of English Colonizing: Discourses of European Intrusion upon the Americas* in Dorsett & Hunter (ed.) (2010) pp. 52–53, see further in 2.2.4 Discovery.
[25] Fassbender (ed.) (2012) p. 865.

hereafter may be discovered by you or your envoys" lying west of the Azores and Cape Verde.[26]

Spain and Portugal competed for the territories in the Western Hemisphere and had sometimes different opinions on the true ownership of land. Despite Pope Alexander VI's rather clear and strong statement on the Spanish jurisdiction westwards of the Azores and Cape Verde, the bull did not resolve one of the territorial disputes between the Spanish and Portuguese powers. The bull from the Pope did not mention the Portuguese jurisdiction to the east of the line drawn by the Church and it overlooked the territories already governed by Christian powers. Therefore, the two state powers resolved the question by entering a separate agreement.[27]

The failure of the Pope to resolve the question could be regarded as a signal of the declining power of the papacy. The Pope was not strong enough to force Spain and Portugal to obey the Papal bull. Another way of viewing it is to regard it as a proof of the underlying importance of theology in the legal world.[28] In order for the Spanish and Portuguese to continue their exploration and conquest they needed the Papal blessing. The practicalities of exactly what was Spanish land and what was Portuguese land was to be decided by themselves but could not have continued without the Papal bull. The Papal bull could therefore be regarded as a moral and political approval of the countries' actions.[29] Another reason for the Spanish and Portuguese to make changes in the geographical claims could also have been the difficulties in making precise cartographical lines.[30] However, the Papal bulls serve as an important note that the further exploration and claiming of the Western Hemisphere would probably have been a lot harder without some sort of Papal blessing. The Papal bulls justified the Spanish and Portuguese powers' claims.[31]

[26] Fassbender (ed.) (2012) p. 865.
[27] Fassbender (ed.) (2012) pp. 865–866.
[28] Fassbender (ed.) (2012) p. 866.
[29] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) p. 12.
[30] Schmitt (2003) p. 93.
[31] Anghie (2005) p. 17.

If the Spanish and Portuguese powers had not respected the Papal bulls or their internal agreement, they had been facing the risk of being excommunicated. Excommunication was the Church's most severe punishment and meant a social stigma for the person excommunicated.[32] It meant that a person did not share the Church's beliefs, did not participate in the sacramental life and ultimately, did not share the spirit of Christ.[33] Excommunicating a person excluded it from the Christian commonwealth. Vassals were not bound by their oath to an excommunicated sovereign.[34] Obviously then, this was a powerful argument against exposing oneself for the risk of being excommunicated. Whereas it did not mean that a person was no longer a Christian,[35] it clearly meant a social stigma for the affected person: a sign of not belonging to the community.[36] If the Spanish wished to avoid excommunication they had to either make an agreement with the Portuguese or avoid Portuguese areas. This was one of the reasons for King Ferdinand and Queen Isabella to send Columbus westwards, thus away from Christian territories.[37]

2.2 Methods of justification

2.2.1 Europe, Christianity, Civilization and 'the Other'

To understand the colonization of the Americas it is important to understand the dominant way of thinking in Europe at the time and the Europeans' self-perception. Throughout history, there has been an evident inclination towards differencing 'us' from 'them'. One way of doing this has been by dividing the world into a civilized and an uncivilized world. The idea to divide the world into an 'us' and 'them' is old and the denomination of what

[32] Peters (2006) p. 1.
[33] Peters (2006) pp. 4–5.
[34] Williams (1990) *The American Indian in western legal thought: the discourses of conquest*, pp. 22–23.
[35] Peters (2006) p. 4.
[36] Peters (2006) p. 1.
[37] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) pp. 11–12.

is *us* and what is *them* has switched over time. Aristotle made a difference between the noble Greeks and the logos-lacking barbarians who could not speak Greek.[38] The legal scholar Francisco de Vitoria relied upon Aristotle's way of reasoning in the 16th century when he divided the world into two: the Spanish and the barbarous Indian.[39]

From this point on in history Europe has, in science, politics, and philosophy been taken as the center of the world and the ideal by which to measure different phenomena.[40] Seeing the world as rotating around Europe both legally and intellectually meant that the Europeans could justify much of their activities in the Americas. The Europeans considered their international law to be applicable to the whole world. The concept of *civilization* meant *European* civilization.[41] One example is the perception of the Christian Church which saw itself as universal and had a saying about non-Christian's issues.[42]

Many European philosophers saw non-Europeans as barbarians. As barbarians, they could be subjugated and were seen as less human than the Europeans. Since the Europeans conquered these barbarians, the Europeans considered themselves as a higher form of humanity. The fact that Europeans saw their civilization as the higher form of civilization was a justification for the colonization. As the civilized people in the world, the Europeans had the right – so they argued – to appropriate uncivilized land.[43] The 16th century philosopher Juan Gines Sepúlveda considered the natives as savages and barbarians. He supported his view by referring to Aristotle's work *Politics* where Aristotle claimed that a barbarian is a slave by nature.[44] The reason for Sepúlveda's argumentation was probably to legally incapacitate the indigenous people and to hand over the jurisdiction and

[38] Pagden, Anthony (1982), p. 16.
[39] Fassbender (ed.) (2012) pp. 917–921.
[40] Schmitt (2003) p. 86.
[41] Schmitt (2003) pp. 86–87.
[42] Anghie (2005) p. 17.
[43] Schmitt (2003) p. 103 and Fassbender (ed.) (2012) pp. 933–935.
[44] Aristotle (2001) *Politica* Bk I: Ch 2, p. 1128.

power of the 'discovered' land to the European civilization.[45] Of course, there were those who objected. The Christian theologian St. Augustine argued that even though the natives were barbarians, they were at least humans. Vitoria considered Christians and non-Christians as legal equals.[46]

The Spanish had to be able to distinguish themselves from the indigenous people in order to justify conquest. One of the more prominent thinkers of the time, Vitoria, considered the Spanish to be more civilized than the indigenous people. For example, the indigenous people lacked the correct cultural expressions, agricultural methods and manufacture in order to be considered civilized.[47] Further, the Europeans considered that the indigenous people lacked one of the fundamentals of civilization, namely the compliance with natural law.[48]

2.2.2 Natural law

In literature contemporary to the colonization of the Americas it is often referred to natural law when discussing in what sense the barbarians were possible to conquer. However, natural law is often not defined nor explained fully. I will not go into detail about the meaning of this complex term. It is sufficient for my purposes to note that natural law was used as a substantial prerequisite against the argument that the Europeans made illegitimate claims when they appropriated new territory on newly discovered land. According to the idea of natural law, it was not sufficient for the indigenous people inhabiting a given place to have *a* legal system in order for them to claim sovereignty for themselves they also had to show that this law reached up to a certain substantial standard of law which was defined by the Europeans.[49]

[45] Schmitt, Carl, p. 102.
[46] Schmitt, Carl, pp. 104–105.
[47] Fassbender (ed.) (2012) p. 920.
[48] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) p. 9.
[49] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) p. 9.

Living in a society was not enough to be considered civilized. In order to be regarded as a civilized individual one needed also to obey laws and customs derived from natural law. As mentioned, even indigenous people were considered to be bound by natural law.[50] In the case of the indigenous people in the Americas, most of them had laws and customs but these were not satisfactory according to relevant European scholarship. According to Vitoria the Indians' laws failed to make their citizens into good and virtuous men. As proof of the Indian law's failure, Vitoria pointed out the existence and exercise of cannibalism and human sacrifice in some of the Indian societies.[51]

The European idea of natural law was used to substantiate the European intellectual and moral superiority over the indigenous people. The concept nicely captures the political and ideological ideas that were dominating at the time. In order for a society to be considered to be civilized it not only had to fulfill the European concepts of agriculture and commerce but also the society had to accept and practice natural law.[52] The strong conviction that Europe and Christianity were the center of the world is a key to understand how the Europeans could see the world outside of theirs as terra nullius.

2.2.3 Terra nullius

> Terra nullius – The land of no one. A territory not belonging to any particular country.[53]

Terra nullius is a term that was used by European scholars to describe a piece of land as empty, null or void. Kant argued that the Europeans saw "America, the negro countries, the Spice Islands, the Cape"[54] as terra nullius since the Europeans treated them like nothing. He further criticized the

[50] Williams (1983) *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, p. 10.
[51] Pagden (1982) p. 79.
[52] Hunter, Ian, *Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations* in Dorsett & Hunter (ed.) (2010) p. 13.
[53] Garner & Black (ed.) (2009) p. 1610 *Terra nullius*.
[54] Kant (1996) p. 329.

Europeans for false intention when they claimed to be there for the sake of trading when they in reality brought their troops there in order to oppress natives and stir up conflict among them.[55] The effect of land being terra nullius was that it was available and possible to claim. The original understanding of terra nullius derived from Roman law and referred to land that actually was new. Land that rose out of the water was considered to be new.[56] Such cases could be caused by change in currents or a land created out of a volcanic eruption or tectonic events.[57] At the time of European arrival in the Americas none of these events had occurred recently. Rather, if one would apply the original meaning of terra nullius to the case of the Americas, it would give the indigenous people living there right to the title of the land since they were there first. Hence, the use of principle by the European conquerors actually switched its meaning at the expense of the legal rights of the original inhabitants.

This simple fact plainly shows how the Europeans considered the Americas as *terra nullius*. One of the legal effects of terra nullius according to international law at this time was that the territory in question was possible to claim. As terra nullius, a conquering state had various strategies of claiming the land to choose from.[58] Also, I consider the idea of the right to travel freely and engage in trade as related to the notion of land being terra nullius. Vitoria considered that the Spanish had the right to travel and trade and if the indigenous people hindered these rights, it was a cause for war.[59]

In order to justify this behavior, the European colonist powers used the definition liberally and included in the term not only lands that were actually new or empty of human settlement but also human settlement that

[55] Kant (1996) p. 329.
[56] Zulueta (ed.) (1950) p. 48.
[57] Tomlins, Christopher, *The Legalities of English Colonizing: Discourses of European Intrusion upon the Americas* in Dorsett & Hunter (ed.) (2010) p. 56.
[58] Fassbender (ed.) (2012) pp. 840–841 and Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) pp. 7–8
[59] Vitoria (1991) *Political writings*, pp. 278–280.

did not fit into what Europeans saw as civilized.[60] The Europeans did not consider that the indigenous people used the lands in a way that was proper by a European standard.[61] The civilized way of using the land was to cultivate it. Cultivating the land meant by this time's standard that humanity tamed the Earth and transformed nature's potential into products useful for humanity. Even though indigenous people to some extent cultivated crops this was not sufficient to be regarded as proper agricultural use of land. It was seen as too simple to only farm one crop and using a planting stick, as the indigenous people did.[62] Thus, the idea of terra nullius is connected to the idea of civilization, which was examined above. Land that was considered or defined as terra nullius was free for the Europeans to appropriate upon 'discovery'.

2.2.4 Discovery

Francisco de Vitoria claimed that the Spanish explorers in the Americas was merely tourists and had the right to explore the newly found land.[63] Claiming a piece of land as belonging to you based on 'discovery' is one of the earliest examples of an application of a principle of international law. It is called the Doctrine of Discovery and can be traced back to the fifth century A.D. when the Roman Catholic Church started to establish the idea of universal Papal jurisdiction and claiming to have a responsibility to make Christianity a worldwide religion.[64]

As such, the Christians through the Church and its popes saw the world outside of their Christian world as heathen. The heathens should be respected, the Pope proclaimed, under the condition that they followed the European idea of natural law. If not, the pagans were exposed to the risk of

[60] Miller (2010) *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies,* pp. 29–30
[61] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) pp. 7–8.
[62] Pagden (1982) p. 91.
[63] Seifert (2004) pp. 311–312
[64] Williams (1990) *The American Indian in western legal thought: the discourses of conquest*, pp. 13–18.

suffering from the effects of the Europeans waging just war on them and the pagans could consequently be entirely stripped of their right to their land.[65]

The Christian Church believed that it had the right to resolve the question since it had the responsibility to bring Christianity and enlightenment to the world. The Church also argued that it had the holy mandate to take care of the whole world and the responsibility for the spiritual health of all humans. Because of these huge responsibilities some considered that the Church had the mandate to express views in all human affairs, even those which concerned secular affairs among the so-called pagans.[66] Vitoria, however, forcefully objected to this idea.[67] As shown, the Church claimed to have jurisdiction over the entire world. As a consequence, the temporal sovereigns of Europe had to rely on the Pope's blessing in order to legitimately conquer heathen territory. It can be seen as a delegation of power from the Pope to Christian sovereigns to conquer heathens.[68]

Because the Church had to care for the whole world, this meant it also had to care for the infidels. The Church accepted the infidels' choice of leader and their dominium, as long as they did not violate natural law. Christians could not simply conquer any non-Christian country without the blessing from the Pope.[69]

The argument of 'civilian' was frequently used and can be connected to the Church's reasoning about barbarians and the issue of justice. The term is also relevant for understanding the Catholic Church's idea of being responsible for the whole world. The barbarians were savages and the Church felt that it had the responsibility for their well-being.

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[65] Williams (1990) *The American Indian in western legal thought: the discourses of conquest*, pp. 13–18.
[66] Williams (1990) *The American Indian in western legal thought: the discourses of conquest*, pp. 13–14.
[67] Victoria (1995[1917]) *Francisci de Victoria De indis et de iure belli relectiones*, p. 134.
[68] Anghie (2005) p. 17.
[69] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) pp. 9–10.

As evident from all this, there existed in this early expression of international law various causes for war based on discovery that were considered as just. The term discovery seemed to have had the meaning of a piece of land outside of the Christian world and being the first Christian to see it. In order to have the right to 'discover' land, i.e. taking control over it, it seems like a state needed to comply with two prerequisites: the land had to be ruled by non-Christians and the inhabitants had to have violated natural law.

As mentioned, the Pope gave grants of jurisdiction to kings who discovered new areas. The argument of discovery was widely used by royals and explorers as a mean of claiming land. It was often claimed that a traveler had made a discovery in the name of a prince. Jurists did not see the argument of discovery as a serious one but it was part of state practice.[70] Since it was part of state practice, it was considered to be a part of international law. It seems like the Doctrine of Discovery did not meet any objection until the 16th century when, among others, Hugo Grotius and Vitoria started to challenge the doctrine. Grotius critique was mainly focused on the simplicity of the doctrine: ownership over land, he argued, could not be claimed merely by discovery.[71] Vitoria did not consider the Americas as empty and therefore it could not be appropriated by discovery.[72] Perhaps the fact that different nation had different definitions of the practical meaning of *discovery* incited the debate. For example, both England and Portugal claimed discovery to areas and had disputes about what it actually meant. The English held that discovery did not justify a right to rule. It was not sufficient to claim ownership by naming, seeing or building cottages on land.[73]

Instead, the English held that ownership was granted when one possessed the country by creating villages. Villages were created by constructing

[70] Fassbender (ed.) (2012) pp. 840–841.
[71] Grotius, Hugo (2000[1916]) pp. 14–16.
[72] Fassbender (ed.) (2012) p. 842.
[73] Seed (1995) pp. 18–19.

houses with surrounding fences. It was simply not enough for claiming sovereignty to a land by claiming to have been there first, accompanied by sticking a flag into the soil or by digging up a piece of dirt as a proof of first discovery.[74] The Portuguese, on the other hand, saw the mapping and technological equipment for navigation as a seal of approval for sovereignty over the discovered areas. The Portuguese thought that since they had made the effort of creating and inventing navigational equipment and made the effort to explore and discover areas, they had the title of sovereignty to the land.[75]

As mentioned, legal scholars of the time of colonization did not think much of the argument of discovery as a cause for ownership. This was not necessarily a critique of colonialism per se, however. Both Hugo Grotius and Samuel Wharton saw the argument of discovery as impeding further European colonization. Grotius' motive for criticizing the argument of discovery was a desire to combat the huge claims made by Spanish in the name of discovery. He thought that this was an obstacle for empire since the Spanish had made huge land claims without actually possessing them. This impeded other powers to create a stronger empire with the Spanish land by actually possessing and exploiting the land.[76]

Wharton did not consider that discovery could render any titles. Instead, the only lawful ways to acquire the title of a land were occupation and cession. Wharton was also clear on the fact that the land in the Americas was possessed by the natives at the time of European arrival. The natives possessed the land by occupation and could sell it to resign the right to the land. By this way of arguing Wharton made the European purchases of indigenous people's land legitimate.[77] Noteworthy is that Wharton had an interest of doing so since he was a part of a group of land speculators.[78]

[74] Seed (1995) pp. 18–19.
[75] Seed (1995) pp. 100–101.
[76] Fassbender (ed.) (2012) pp. 842–843 and Grotius, Hugo (2000[1916]) pp. 14–16.
[77] Wharton (1781) p. 10.
[78] Fassbender, Peters, Peter & Högger, p. 843.

Vitoria on the other hand saw the right of discovery as a just one out of many. However, it could only be just if the land in question actually was empty. Regarding the Spanish claim to have discovered the Americas, Vitoria rejects this argument by stating the obvious: the land was not empty.[79] Vitoria's argument can be seen as controversial since he was Spanish and apparently arguing that the Spanish conquest was unjust. It seems especially brave since he was ordered by the king, Charles V, to examine the question.[80] One reason for Vitoria to make this claim was perhaps because the Spanish crown was torn between its conscious and its economic interest in the colonies.[81] However, as I shall show, Vitoria used other arguments to come to the conclusion that the Spanish conquest was just.

An important justification of the Doctrine of Discovery was made by the U.S. Supreme court in the case *Johnson v M'Intosh* from 1823. The court concludes:

> Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.[82]

The court does not seem to make much of an elaborated reason for why discovery renders the right to appropriation. This right is mostly supported by the fact that since everybody else was claiming land based on discovery, so it should be legal. This is, in a sense of course true, international law consists of the rules that states have agreed upon. The rules are valid to the extent that everybody respects them. States are bound by the rules but can change the meaning of rules by

[79] Victoria, Francisco de (1995[1917]), pp. 138–139.
[80] Victoria, Francisco de (1995[1917]), p. 72.
[81] Williams (1983) *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, pp. 65–66.
[82] Johnson v M'Intosh 585.

acting collectively differently. A rule of international law is not a legal rule if no one is respecting it.[83]

2.2.5 Conquest

> Conquest – An act of force by which, during a war, a belligerent occupies territory within an enemy country with the intention of extending its sovereignty over that territory. /…/ *Hist*. The acquisition of land by any method other than descent, esp. by purchase.[84]

One of the most indisputable arguments for legal possession of land was the one of just war and conquest.[85] To be able to conquer a territory, one needed a just cause for war. Vitoria addressed the question of just war in his *On the Indians, or on the law of war made by the Spaniards on the Barbarians*. He asked if Christians could make just war and started by saying that it seemed like war was altogether prohibited for them. Vitoria came to this initial conclusion by referring to the Gospel (*St. Matthew*, chapter 5), "Whosoever shall smite thee on the right check, turn to him the other also". However, Vitoria swiftly proposes that Christians indeed may wage just war, under certain conditions. The reason why Vitoria changed his mind was connected to his readings of St. Augustine and the Bible. For example, since it is lawful to use force against internal wrongdoers, according to *Romans*, chapter 13[86], it must be lawful to use force against external wrongdoers.[87] Vitoria concludes that every state and prince have the authority to make war. Consequently, the next question becomes to determine what reasons can motivate a so-called just war. Difference in religion is not a cause for just war, neither is the extension of empire or personal glory of the sovereign. The only reason for a just war is when a wrong has occurred. But

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[83] Thirlway Hugh, *The Sources of International Law* in Evans (ed.) (2010) pp. 95, 97 and 100.
[84] Garner & Black (ed.) (2009) p. 344 *Conquest*.
[85] Fassbender (ed.) (2012) p. 847.
[86] *Romans* chapter 13: "He beareth not the sword in vain, for he is the minister of God, a revenger of wrath upon him that doeth evil." in Victoria (1995[1917]) *Francisci de Victoria De indis et de iure belli relectiones*, p. 166.
[87] Victoria (1995[1917]). *Francisci de Victoria De indis et de iure belli relectiones*, pp. 165–166.

not every wrong entitles the right of just war since this would be disproportionate.[88] However, if the right to freely travel and trade was breached, this was a cause for just war.[89]

2.2.6 Occupation and possession

> Occupatio – A mode of acquisition by which a person obtains absolute title by first possessing a thing that previously belonged to no one, such as a wild bird or pearls on the shore.[90]

One of the more respected legal arguments in favor of colonization was that of occupation. In the case of the colonization of the Americas, the land was considered to be terra nullius. The argument is linked to the one of discovery. When other powers than the Spanish and Portuguese started to explore and take control over land in the Americas, they needed to avoid excommunication by violating the Papal bulls.[91] Some, among others, the U.S. Supreme Court, claimed that simply putting a flag into the soil was sufficient to claim land. Other ways of marking the land was engraving stones and trees with the name of the present and relevant king or sovereign. This was a ritual commenced by the first Spanish and Portuguese explorers in the Americas. The Spanish even continued with this practice as late as 1790s while exploring North America. Other say that a power cannot control a territory by simply sticking a flag into the soil. Even though England and France claimed land by this fashion they mainly had a different approach.[92]

As a way of balancing and countering the mainly Spanish dominance in North America, the English and French launched a new element to the Doctrine of Discovery. The launching of the new element had been preceded by legal scholars' studies of canonic law, Papal bulls and history. The new element was partly a consequence of the risk of so-called false

[88] Victoria, Francisco de (1995[1917]), pp. 168–171.
[89] Vitoria (1991). *Political writings*, pp. 278–280.
[90] Garner & Black (ed.) (2009) p. 1610 *Occupatio*.
[91] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) p. 18.
[92] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) p. 13.

claims of land by a power simply taking a chance and stating that it had discovered a piece of land. The new element meant that in order for a state power to actually claim title it had to either occupy or possess the land. An occupation of terra nullius could only be just through physical possession. The idea of occupation is linked to the idea of first discovery. One can discover land but in order to effectively claim to possess it, it would have been necessary to have some sort of physical presence.[93]

2.2.7 Cession and the European title

> "The relinquishment or transfer of land from one nation to another, especially after a war as part of the price of peace."[94]

According to the U.S. Supreme Court in *Johnson v M'Intosh,* a consequence of the Doctrine of Discovery was the principle of *European title*. The European title meant a right for the European country, who discovered the piece of land first, to either conquer or potentially purchasing the land from the indigenous people. The European title was an exclusive one meaning that the European power which discovered the piece of land was the only power to have the right to conquer or purchase the land.[95] This was, according to the U.S. Supreme court a European strategy in order to as quickly as possible, yet in an organized manner, overcome the American continents. Without the Discovery doctrine and European title the Europeans saw the risks of conflicts and wars with each other and this would thus, they feared, steal energy from the more important goal of together overcoming as much land as possible.[96] The Europeans imposed a trade monopoly on the indigenous people which excluded them from having any relation with any other power than the European who claimed right to discovery on the current land.[97]

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[93] Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) pp. 7 and 13.
[94] Garner & Black (ed.) (2009) p. 259 *Cession*.
[95] Johnson v M'Intosh pp. 587–588
[96] Johnson v M'Intosh p. 573 and Miller, Robert J. *The Doctrine of Discovery* in Larissa (ed.) (2010) pp. 5–6.
[97] Williams (1983). *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, p. 3 note 5.

2.2.8 Prescription

Regardless of how the Europeans had appropriated a territory they had an argument that trumped later objections of the way of appropriating the land. The argument was used in the landmark case of *Johnson v M'Intosh* as a way of justifying the Europeans' and their successors' right to North America. The court acknowledged that the land had been conquered in spite of natural law but nevertheless the land of the Indians belonged to the US government on basis of the fact that time had passed since the conquest.[98] The argument was especially potent after certain amount of time had passed, even though one might wonder if a few hundred years of righteous possession really trumps a couple of thousand years of possession. The indigenous groups of people of the Americas are believed to have lived on the continent for tens of thousands of years.

2.3 Summary

As shown, the justification of the colonization was mostly based on and defined by European ideas. It was the Europeans that considered their specific type of discovery to be just. It was considered as a just cause to wage war against the indigenous people of Americas because *European* natural law, interpreted by *European* legal scholars, allowed the Europeans to wage war. The only land ownership recognized was the European ownership, the indigenous people's possession of land was disregarded. Even when the indigenous people's right to the land was recognized, the reason for it seemed only to be for the convenience of the Europeans since the Europeans then could claim to have lawfully bought it from the indigenous people. The Europeans did not recognize the encountered indigenous people as legal equals due to the way the indigenous people had organized their society. The Europeans thought that the encountered societies differed too much in respect of agriculture and culture and that the indigenous people breached natural law.

[98] Fassbender (ed.) (2012) pp. 850–851.

3 Humans in space

3.1 Space law and its beginnings

Space law is a relatively new part of international law. Because of its rather strange object of regulation, it brings to discussion questions at the heart of normative thought; questions that concern what purposes law has and what should count as just. During the 20th century, the legal and political international community started to consider human activity in space. There were some forward-thinking lawyers that even before humans had sat foot in space started to construct some sort of law for space. It was mostly lawyers specialized in air law that took interest to these extraterrestrial issues.[99]

However, the main part of the development of space law was triggered by the development of human activities in space. At the early stages of space law, the main discussion revolved around the question whether international law was applicable to space or if space was to be considered a legal vacuum. The conclusion was that space was not a legal vacuum. December 20th 1961, the United Nations General Assembly (UNGA) adopted Resolution 1721 claiming that international law applies to space. The law concerning inter-human affairs on Earth thus expanded into space.[100]

General principles of international law should apply to outer space, unless abrogated by the lex specialis of space law. Such principles that are considered to be applicable to outer space are: "sovereign equality of States, non-intervention and non-aggression, the prohibition on the use of force, the right to self-defence, and the peaceful settlement of international disputes."[101] Also the principle of the common heritage of mankind is

[99] Nyman Metcalf (1999) p. 107.
[100] Nyman Metcalf (1999) pp. 104–105.
[101] Hobe (ed.) (2009) p. 67.

generally accepted as valid in space.[102] As formulated today, space law regulates state activities.[103] However, since states are responsible for entities' activities from their jurisdiction, space law can also be said to regulate all human activities in space.[104]

3.2 Space law and access to space

The documents on activities in space which are of most interest for this thesis are the *Outer Space Declaration* (OSD) and the *Outer Space Treaty* (OST). In these, the rules about non-appropriation and province of mankind are found. OSD is an important document since it was adopted unanimously by the UNGA in 1963, however without having any formal legal effect.[105] Among other things, it states that the space is free for exploration and that any kind of national appropriation is prohibited. Exploration and use shall be for the province of mankind.[106] These principles were reinforced a few years later, in 1967, when the OST was ratified. OST is considered to be one of the fundaments of current space law[107], ratified as of today by 105 nations, including the major space faring nations United States of America and Russia.[108]

It is implied that the legal documents of space law are permeated by the understanding of peaceful use and exploration. Space law is permeated by a consensus of peace since it is the Committee on the Peaceful Uses of Outer Space (COPUOS) that has drafted all space documents.[109] Furthermore, in the preamble to OST the State parties to the treaty stress the importance of *peaceful* exploration and use of outer space. Also, Articles III and IX OST

[102] Hobe (ed.) (2009) p. 67.
[103] Nyman Metcalf (1999) pp. 104–105.
[104] Hobe (ed.) (2009) pp. 34–35
[105] Nyman Metcalf (1999) p. 126.
[106] OSD, principles 1–3.
[107] Nyman Metcalf (1999) p. 136 and Dunk von der, Frans *International space law* in Dunk von der & Tronchetti (ed.) (2016) p. 49.
[108] Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, Fifty-sixth session Vienna, 27 March-7 April 2017, Status and application of the five United Nations treaties on outer space, pp. 1–2.
[109] Jankowitsch, Peter *The background and history of space law* in Dunk von der & Tronchetti (2016) pp. 10–12.

mentions peace and peaceful purpose as guidance to the use and exploration of outer space. Ultimately, when COPUOS was formed by the UNGA by adopting the Resolution 1348, the opening sentence clarifies that the common aim is that "outer space should be used for peaceful purposes only". My interpretation of the principle is that it focuses on human relations and actions affecting other humans.

In this thesis I will focus on two articles in the OST: Articles I and II. Article I OST is one of the most important in space law[110] and I will discuss two important principles set out in the Article. The two principles are the *province of all mankind* and the *freedom of exploration, use and access*. Article I OST prescribe:

> The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the *province of all mankind*.
>
> Outer space, including the Moon and other celestial bodies, shall be *free for exploration and use* by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be *free access to all areas of celestial bodies*.
>
> There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation. [Emphasis added]

Article II OST is also an important factor in space law and of importance for this thesis. The Article's most important contribution is the prohibition of national appropriation. The Article sets out:

> Outer space, including the Moon and other celestial bodies, is not subject to *national appropriation* by claim of sovereignty,

[110] Hobe (ed.) (2009) p. 27.

by means of use or occupation, or by any other means. [Emphasis added]

In the following I will examine Article I OST by first addressing the province of mankind-principle and thereafter discussing the meaning of the freedom of exploration, use and access to outer space. Thereafter will I discuss Article II OST and the meaning of the prohibition of national appropriation.

3.3 Province of mankind

In space law there are two similar principles: province of mankind and benefit of mankind. Furthermore, as the principle of common heritage of mankind is part of international law it is also relevant to space law. Still, there is a difference between the three principles. Province of mankind and benefit of mankind can be regarded as somewhat similar.[111] However, there is a difference in meaning and occurrence between province of mankind and common heritage of mankind. Yet, the difference in meaning of the principles will not be further discussed. For this thesis I will examine province of mankind since it is set out in Article I OST.

Article I OST states, inter alia, that all exploration and use of space shall be for the benefit of all countries and that it is the province of all mankind. The notion of including all countries is regardless of the economic or scientific development of the country. The inclusion of all countries creates equal opportunity in principle for all countries to explore, use and access space.[112]

The principle of the province of mankind is related to the notion of space as belonging to no one. As mentioned in an earlier section of the thesis, terra nullius had the meaning of land belonging to no one.[113] However, since *terra* clearly refers to the Earth, this section will discuss *caelestia nullius.*

[111] Nyman Metcalf (1999) p. 131, note 62.
[112] Hobe (ed.) (2009) p. 38.
[113] Garner & Black (ed.) (2009) p. 1610 *Terra nullius*.

Caelestia nullius means space belonging to no one. Several legal scholars consider objects in space to be belonging to no one.[114] One example of humans considering space in its entirety to be belong to no one is the discussion at the early days of space law. In space law's early days there were discussions about whether human law even would be valid outside of Earth. The conclusion was that human law *should* have jurisdiction outside of Earth, hence also in space.[115] Another aspect that supports the view that space is caelestia nullius is that the Magna Carta of space law, OST, in its opening Article, prescribes that space is free for exploration, use and access for humans.[116] Based on all this, I hold the view that space is regarded as caelestia nullius because of the way the human relates to it. Since humans consider space to be free to explore, use and access, it is caelestia nullius. If it would belong to someone, the freedoms would probably be restricted. On Earth, countries do not have the freedom of exploring, using and accessing another country's territory.

Related to caelestia nullius is the principle of *caelestia communis*. It exists an important difference between *caelestia nullius* and *caelestia communis*. The former meaning space belonging to no one and the latter meaning space belonging to everyone. 'Everyone' in this sense mean all humans.[117] The principles are slightly intertwined since space could be said to have been caelestia nullius at first and then transformed to caelestia communis when the UN unanimously adopted resolution 1721 and OSD in the early 1960s. In order to claim space as belonging to all mankind it seems reasonable to assume that it was not owned by anyone else before making the claim.

At an early stage of the development of space law, the principle of *caelestia communis* gained strength. Traditionally, the principle is referred to as res communis, meaning something belonging to everyone. Things that are seen as res communis could be air or water, a traditional view that existed in

[114] Wian (2015) p. 2514 and Pop & Jakhu (2008) *Who Owns the Moon? Extraterrestrial Aspects of Land and Mineral Resources Ownership*, p. 73.
[115] Nyman Metcalf (1999) p. 104.
[116] Bockstiegel, Kramer & Polley (1998) p. 7.
[117] Hickman, & Dolman (2002) pp. 6–7.

Roman law. Something placed on Earth by nature for everyone to enjoy.[118] The implication of space being caelestia communis is that space belongs to all states and that no state has more rights than others.[119] In order to make sense of space and the possibility of future human activities in space, early work on space law seems to have relied partly on analogies from other areas of international law. The analogies were mainly made from the Law of the High Seas and Antarctica. The most obvious similarities between the treatments of these three areas of law and space law are the principles of freedom of use and appropriation and the principle of res communis.[120] The idea of space being *caelestia communis* is still a core principle in space law. The principle is represented in all space law instruments and there is no opposition expressed about it in state practice.[121]

Conclusively, space according to the legal regulation seems to belong to human beings and human laws and principles are applicable to human activities in space.

3.4 Freedom of exploration, use and access

The freedom of exploration and the freedom to use space are found in Article I OST. Freedom of exploration means that there is no need for a state to ask for permission from other governments to proceed and explore space. Exploration means typically to launch satellites, perform experiments and generally finding out parts of space not yet explored. The freedom of use grants governments to both non-economic and economic use of outer space and celestial bodies. The use of outer space and celestial bodies for economic reasons include exploitation of them with the intention to make

[118] Gruner (2004) p. 323.
[119] Nyman Metcalf (1999) pp. 104–105.
[120] Nyman Metcalf (1999) pp. 118–120.
[121] Nyman Metcalf (1999) p. 106.

profit.[122] Even though an appropriation of for example the Moon is not allowed, it is allowed to appropriate resources from the Moon.[123]

According to Article VI OST, also non-governmental entities such as private corporations are granted the same freedom. Article VI OST prescribes that the state is responsible for both governmental and non-governmental entities. Strictly speaking, the freedoms are granted to states which in turn transfer the benefits of the freedoms to whoever they want.[124] More explicitly, the freedom to use outer space means that states are free to use it as long as the use does not interfere and restrain other states use of outer space.[125]

According to Article I OST celestial bodies shall be free to access. The freedom is a clarification of the freedom of exploration and use. The same Article clarifies that all celestial bodies are open to access for principally everybody, but in practice this only affects other space faring nations. Space stations that have access to celestial bodies are included in this freedom, meaning that the space station must be able to access to other states.[126]

The scope of the freedom of use in space is debated. As mentioned in this section, exploitation falls under use. And even if it is possible and lawful to construct a space station on a celestial body, it is not possible to cover the entire celestial body with a space station.[127] In the same way as a celestial body cannot be completely covered with research stations it is unthinkable to allow someone to exploit a part of space till extinction. Both these examples would probably be considered as appropriation or violate the principle of province of mankind.[128]

[122] Hobe (ed.) (2009) pp. 34–35.
[123] Nyman Metcalf (1999) p. 213.
[124] Hobe (ed.) (2009) pp. 34–35.
[125] Hobe (ed.) (2009) p. 175.
[126] Hobe (ed.) (2009) p. 36.
[127] Nyman Metcalf (1999) pp. 168–169.
[128] Hobe (ed.) (2009) pp. 53–54.

3.5 Appropriation of space

The word *appropriation* is used in Article II OST but it does not exist consensus nor an exact definition of its meaning. Traditionally, appropriation have had the meaning of taking control over an area to use it exclusively and with a long-term intention.[129] As mentioned above it is clear that the difference between *use* and *appropriation* is not entirely clear. I will in the following use the meaning of appropriation as defined in Definition of terms in this thesis, and present aspects of it below.

3.5.1 Physical appropriation of parts of space

Whether something is even possible to appropriate is due to if it is possible to control and possess. The possibility to appropriate outer space has the problem of the difficulty of defining outer space due to the lack of landmarks. Article II OST and its prohibition of national appropriation is regarding *outer space* and *celestial bodies*. As an example of the difficulties of defining areas in space are the different opinions on the limits of air space contra outer space. In simple terms: where does the sky end and outer space start? Therefore, it is difficult to envisage an appropriation of parts of outer space. A celestial body has the advantage of being tangible and possible to locate.[130] Another aspect of the problem is the fact that space law is not clear on what constitutes a celestial body, which opens up for the possibility of circumventing the prohibition of Article II OST by appropriating asteroids or meteorites. This is, as much else in space law, not completely clear.[131]

As mentioned earlier, it can be said that the UN claimed jurisdiction of the whole outer space with its declarations adopted in 1961 and 1963. One of the main objections to this relies on the fact that the whole outer space is enormous and ever-expanding and human jurisdiction and legal regulation

[129] Gorove (1968) p. 352.
[130] Nyman Metcalf (1999) p. 155.
[131] Nyman Metcalf (1999) p. 161 and Pop & Jakhu (2008) *Who Owns the Moon? Extraterrestrial Aspects of Land and Mineral Resources Ownership*, p. 58.

cannot be applicable to the whole universe due to the absurdity of the claim.[132] Therefore, it is only reasonable to limit the jurisdiction to our solar system.[133] Even this is a liberal limitation since the furthest a human made space object has travelled is outside our planet system.[134] Therefore a starting point for appropriation would be to actually be able to physically access the object. In order to appropriate a celestial body in space one would have to be able to control it. In order to control a celestial body a starting point is to be able to reach it.

The conclusion is that if one is able to both reach a part of outer space or a celestial body and define it and maintain a presence, one would be able to theoretically appropriate it.

3.5.2 The legality of appropriation of space

Whether it is possible to legally appropriate anything in space has been and is under discussion. Within the field of space law there is an ongoing discussion on Article II of OST. The relevant Article prohibits national appropriation. The wording of the Article has opened up for a vivid discussion about its precise meaning. There are mainly three standpoints regarding appropriation in space. These are: OST allows appropriation, OST prohibits appropriation and appropriation is not legally enforceable. I will examine each three in order in the following sections.

3.5.2.1 Private and international appropriation

Whether one can decide if appropriation is allowed by OST is depending on what type of appropriation it is. National appropriation refers to when a state claims and takes control over a celestial body, which is clearly prohibited by Article II OST. This option will not be further discussed due to the clear language of OST. Private appropriation has the meaning of a private entity taking control over a celestial body. The third possibility is international

[132] Hobe (ed.) (2009) p. 32.
[133] Pop & Jakhu (2008) *Who Owns the Moon? Extraterrestrial Aspects of Land and Mineral Resources Ownership*, p. 49.
[134] NASA Jet Propulsion Laboratory webpage FAQ Have any human-made objects ever exited the solar system? https://voyager.jpl.nasa.gov/frequently-asked-questions/ [Accessed 08-12-2017]

appropriation which has not been thoroughly discussed within doctrine. The meaning of international appropriation means the appropriation of a celestial body by an international organization representing mankind.

The conclusion that it is acceptable to appropriate an object in space based on this argument can be reached through an e contrario reading of Article II OST:

> Outer space, including the Moon and other celestial bodies, is not subjected to *national* appropriation by claim of sovereignty, by means of use or occupation or by any means. [Emphasis added]

Of interest is the word 'national', implying that appropriation is allowed if it is not conducted under national cover. This interpretation has been supported by various authors but also contested by others. The supporters of this theory put emphasis on the notion that the word 'national' is used. It is seen as a way of narrowing down the applicability of the Article. Because the interpretation has made the Article's applicability exclusive to national appropriation it would be possible to appropriate parts of space as a non-state. Since Article II does neither mention explicitly private individuals or enterprises nor international organizations, it opens up for the possibility of appropriation.[135]

3.5.2.1.1 Private appropriation

Those who favor private appropriation, such as Stephen Gorove, come to the frank conclusion that a private entity could lawfully appropriate parts of space because of the lack of explicit prohibition.[136] This loophole theory is rejected by most authors, however.[137] One major flaw in Gorove's argumentation is the overlooking of Article VI OST. Article VI OST prescribes that states have the responsibility for activities in outer space and other celestial bodies, including the Moon. Activities include both activities

[135] Pop (2000) *Appropriation in outer space*, p. 276.
[136] Gorove (1968) p. 351.
[137] See for example Pop & Jakhu (2008) *Who Owns the Moon? Extraterrestrial Aspects of Land and Mineral Resources Ownership*, p. 63 and Nyman Metcalf (1999) pp. 165–166.

made by governmental as well as non-governmental organizations. Activities are not necessarily appropriation but it could be, see discussion in 3.4 Freedom of exploration, use and access. As mentioned earlier, the OST does not bind private entities per se, but private entities are forced to obey the OST due to the fact that a private entity is entitled to the freedoms set out in the OST via its supervising government. In theory, a private entity could appropriate i.e. a celestial body but its supervising state would be responsible for it and would most probably prevent the appropriation.

However, it would be too easy for states to circumvent the state-prohibition by licensing private companies to appropriate space. Those arguing in favor of this position refer to Articles VI and VII of OST since these Articles proclaim that states are responsible for national activities in space.[138]

Even if OST should not be regarded as prohibiting private appropriation and a private appropriation took place an appropriation wouldn't be able to stand for itself without any support of a state. Private property cannot exist without a state endorsing it. Since at least one state would have to endorse the appropriation, Article II OST would once again be an obstacle for the appropriation.[139]

3.5.2.1.2 International appropriation

With the current form of space regulation, the other possibility to appropriate would be via an international appropriation. An appropriation by the UN is possible for two reasons. Firstly, as mentioned, the e contrario reading of Article II supports the UN's right to appropriate a part of outer space or a celestial body. Since the UN is not a nation it circumvents Article II. Secondly, as UN is intended to represent all the nations in the world it could appropriate space with support of Article I OST. Article I OST includes the principle province of mankind and the res communis principle. Since the UN is supposed to represent the whole mankind it could in support of an e contrario reading of Article II and a direct reading of Article I OST

[138] Pop (2000) *Appropriation in outer space*, pp. 276–277.
[139] Pop (2000) *Appropriation in outer space*, pp. 277–278.

undertake an appropriation of outer space. If there is consensus about UN's activities among its member states, I cannot find any obstacles for UN to appropriate parts of space and act in accordance with existing regulation. Moreover, since Article I of OST states that use of space should be for the province of mankind, a UN led appropriation should therefore be valid only *if* it is for the province of mankind.[140]

3.5.3 Actual appropriation

In 1961 and 1963 respectively the UNGA adopted unanimously the resolution 1721 and the OSD. These documents set out that space is *caelestia nullius* and *caelestia communis*.[141] In practical terms this means that the UN has legal authority in space and that humanity collectively own the entire outer space and its celestial bodies. This has been largely criticized for being presumptuous and arrogant. One of the main points of the critique is the fact that the documents claim authority and ownership over parts of space which humanity is not reasonably able to access.[142] This is an especially pertinent critique given the fact that at the time of adopting the documents only two humans had been to space. Furthermore, at present date, human spacecraft have not even reached outside our solar system.[143] Therefore, it is reasonable to question the interpretation of the implication of UN's declarations.[144]

The application of international law to space is Anthropocentric because it overlooks the possibility of a different interest to consider. It is reasonable to regulate human activities concerning humans and affecting humans with international law. It is reasonable since it only affects humanity. However, the consequence that all aspects of human activities in space should be regulated by international law is problematic according to me. It is

[140] Nyman Metcalf (1999) pp. 164–166.
[141] Resolution 1721 section A and OSD principles 1–2.
[142] Hickman & Dolman (2002) pp. 6–7, see also Landry (2012) p. 530.
[143] NASA Jet Propulsion Laboratory webpage FAQ Have any human-made objects ever exited the solar system? https://voyager.jpl.nasa.gov/frequently-asked-questions/ [Accessed 08-12-2017]
[144] Pop (2009) p. 49.

problematic since the free access and exploration of space affects others than the Earth and humans. Since the freedom of use includes exploitation of outer space it is possible that humanity exploit something belonging to someone else or someone with interest in the object.

3.6 Encounters with extraterrestrials

When discussing a hypothetical meeting with an extraterrestrial society there are mainly two scenarios that are brought up to discussion. The first one is that the encountered society is *below* our level of civilization. The other scenario is the possibility of the extraterrestrial society being at a *higher* level of civilization.[145]

Michel Smirnoff thinks that this gives the human two strategies. In the scenario of encountering a lower civilization, the human will have the role of uniting and guiding them. In case humanity encounter a higher form of civilization he stresses the importance of unity amongst humans in order to enhance the ability to defend ourselves from the extraterrestrials. Hence, if mankind is the higher civilization it would be friendly and respectful towards the extraterrestrials. If the opposite is the case, the extraterrestrials are assumed to be hostile.[146]

It is interesting to study the rather big difference in strategy and intention Smirnoff suggests that the higher society will have in an encounter with a lower form. It seems as if humanity is the higher civilization we would guide the extraterrestrials but if the extraterrestrials are the higher civilization they seem to be aggressive in Smirnoff's hypothetical world. On the other hand, it seems reasonable to make precautionary hypotheses.

The division of extraterrestrials in a civilizational order is also made by Seara Vázquez. Seara Vázquez considers two possibilities if the human

[145] Smirnoff (1961) p. 385.
[146] Smirnoff (1961) p. 385.

encounters extraterrestrial life. If the encountered life is politically organized and possess a distinct culture they should be recognized. However, despite the acknowledgment of recognizing the encountered, Seara Vázquez says that one must assess whether the extraterrestrials are capable of governing themselves or not. The other possibility is the one of the extraterrestrial life being unorganized politically rendering humanity the right to colonize the extraterrestrials.[147]

Another view, which seems more pragmatic, is that there is nothing inhibiting humanity to expand out of Earth or out over universe. Charles Chaumont bases this view with historic parallels to the Roman and British Empires, which both expanded vastly outside their original territory.[148]

Of course, there are scholars, such as Nyman Metcalf, arguing that in case of an extraterrestrial meeting the humanity does not have the right, morally nor legally, to conquer the extraterrestrial society.[149]

3.7 Summary

The present chapter has demonstrated that human made law is applicable not only to Earth but also to at least our galaxy. This is clear not only by the fact that humanity's activities in space are regulated by inter alia OST. Also, human made law are valid in space since principles that humanity consider fundamental, such as the right of self-defense, are applicable to the whole universe. It is not completely clear to what extent OST allows appropriation, however, according to my review of international space law, the universe already belongs to mankind. I have reached this conclusion by analyzing the way space law relates to space. It is stated, for instance, that humanity has the right to freely explore, use and access space. For example, the humanity is entitled to exploit parts of space, even though the extent of allowed exploitation is unclear. These rights derive from OST and are delegated to

[147] Seara Vázquez (1965) p. 239.
[148] Chaumont (1960) pp. 42–43.
[149] Nyman Metcalf (1999) p. 266.

all states and mankind and clearly indicates that space is available for humanity as a whole. Furthermore, the vivid discussion of encounter with extraterrestrials shows that humanity perceives space and potential inhabitants in ‘us’ and ‘them’ by dividing possible extraterrestrials in civilized or non-civilized.

4 The Americas and space

In this chapter I will highlight the similarities between the colonization of the Americas and mankind's relation to space.

4.1 Terra and caelestia nullius

When the Europeans arrived to the Americas they considered the land to be terra nullius. Even though it was clear that the land was not unoccupied by humans the Europeans treated the land as empty. The Europeans did not consider the indigenous people's use of the land as sufficient for claiming the land. Even though cultivating of crops did occur in the Americas this was not enough to be considered a civilized society, according to the Europeans. In order to be regarded as a civilized society the Europeans required respect of natural law and customs. Natural law was defined by the Europeans. As the Christian Church proclaimed, heathens should be respected *if* they followed and obeyed to natural law. As the strongest argument for the Europeans' claim that the heathens breached natural law was the heathens exercise of human cannibalism and sacrifice.

When the UN adopted the OSD and Resolution 1721, the jurisdiction of mankind expanded into the entire outer space. The meaning of this is that human made laws are to prevail wherever human beings are able to set foot. This means that mankind perceives its body of law as prevailing even outside of Earth. In that sense, outer space is considered to be caelestia nullius because human law expanded to areas which mankind actually does not populate, control or has visited.

The Europeans considered their idea of natural law to be applicable to the non-European world. Today, mankind considers its idea of international law to be applicable to the non-terrestrial world. As the Europeans had ideas of what constituted natural law, humans today have ideas of which principles that are valid also in space, for example the right to self-defense. If

humanity persist in its belief that human law is applicable beyond Earth, the history will be repeating itself. Both during the colonization in the 15th century and during the current discussion on colonizing space, the focus of the discussions has been centered on the governing law of the time. During the 15th century the discussion was whether and how a just war was fought. Later, Wharton argued that Indians should be regarded as owner, but seemingly for the cause of making the Indians' land able to purchase. The legal scholars tried to find ways of justifying the huge land appropriation.

One clear link between the past and the future is the fact that the Americas was and space is regarded as belonging to no one. This is depending on the perspective taken. The Americas was regarded as *terra nullius* and space is considered to be *caelestia nullius.* There exists a slight difference in the points of views taken, however. The Americas was viewed from the European's perspective and can be said to have been Eurocentric. Space is viewed from the human's perspective and can be said to be Anthropocentric. From Europe's perspective, the Americas was terra nullius. From the perspective of the Earth, space is caelestia nullius.

As mentioned, Article II OST sets out that national appropriation is not allowed. Space is considered to be caelestia communis. Caelestia communis has the same implication as res communis: it belongs to everybody and nobody, it is the property of mankind. Space belongs to humanity as a whole, it is not owned by a specific country. Another example of this is Antarctica and the High Seas which both are regarded as res communis and thus belonging to mankind. They are not owned by a specific country, everybody has access to it. What constitutes control can be discussed. However, I would argue that humanity has taken control over the Earth and use it with long-term intention. Therefore, because humanity has made the claim that Antarctica and the High Seas are the property of mankind, mankind somewhat control them effectively and use them with long-term intention, the mankind as a collective has appropriated them. Even though they, correctly, have not been nationally appropriated, I argue that space,

Antarctica and the High Seas have been *internationally* appropriated. The humanity has made a claim to these areas by saying it belongs to everybody, implying all humans. If Antarctica and the High Seas are res communis and appropriated by mankind, then space is also appropriated by mankind by the same way of reasoning. If extraterrestrials would come to Earth and claim ownership over i.e. Antarctica, humanity would most likely object by claiming collective human ownership over Antarctica.

4.2 Freedom to explore

Another connection between the colonization of the Americas and the treatment of outer space is the idea of freedom of exploring. Article I of OST states that mankind has free access and is free to explore outer space. The same was claimed by the Spanish, they claimed that they had the right to travel to and within the Americas and discover it. If the Spanish were not correctly treated by the indigenous people, the Spanish claimed that they had the right of fighting just war against the indigenous people. Just war existed when there was a breach of natural law. Breach of natural law occurred for example by exercising human cannibalism and sacrifice.

In outer space mankind has the freedom to explore, use and access it. It means that mankind claims the right to travel wherever in space and use and access whatever it finds. OST does not discuss the eventuality of encounter with extraterrestrial life but some authors have suggested that if it would occur humanity has the right to use force against them. As proof of this, the legal principle of self-defense as existing in outer space is often brought forward as an argument. As made evident after the 9/11 terrorist attacks in New York and Washington D.C. in 2001, this principle can also be pre-emptive even though it is controversial.[150] Thus, a state, or mankind as a whole, could in the case of a meeting with extraterrestrials justify the use of force with the right to self-defense.

[150] Gray, Christine, *The Use of Force and the International Legal Order* in Evans (ed.) (2010) pp. 628–632.

It may seem harmless that humans have free access and the right to freely explore and use space. Especially since space law is understood to be permeated with the principle of using outer space for peaceful purposes. As showed, the principle seems to be aimed at maintaining peace among humans. The principle does not explicitly aim towards non-terrestrial objects or subjects. Instead the principle is mainly Anthropocentric by its focus on human relations and actions affecting other humans and thereby disregards the possibility of implications for other than humans. Further, even though it exists a principle of maintaining peace and using outer space for peaceful purposes, there is still the possibility of just war via self-defense.

However, the same argument was used by the Spanish when they started to explore the Americas. When the Spanish were hindered to continue to explore this territory, they used the hindrance as a cause to use force. Therefor it is not completely without risk to use the argument of free exploration. If we were confronted by some sort of life which claims that humans do not have the right to explore freely, I would suggest that mankind would probably use force to claim our *peaceful right*. The peaceful right to explore and use space, which humanity has constructed and which humanity have decided unilaterally that it should have validity outside of Earth. If we use the same argument in space, which there are discursive signs that we will, this would be a repetition of history.

4.3 The continuing dichotomy of 'us' and 'them'

During the colonization in the 15th century the Europeans divided the world into two: the Christian world and the non-Christian world. The Europeans received the blessing from the Pope to proceed with the christening of heathens and the colonization was justified in the name of Christianity. Christian countries *could* colonize a non-Christian country without the

blessing of the Pope but faced the risk of excommunication. The Europeans used the dichotomy of civilized and uncivilized by claiming that the indigenous people were not civilized. The colonization was justified by the sake of bringing civilization to the rest of the world. The Europeans were confronted with something new and unknown to them. One way of deducing that the Europeans saw the Americas as something new is to study the European naming of the land. The Europeans named the Americas with their own perspective in mind and named it after a European traveler. It renders the conclusion that throughout history the European perspective has been a very central one.

Today, it exists a dichotomy of humanity and extraterrestrial. When Smirnoff discussed the possible outcome of a meeting with extraterrestrial life he brought up the dichotomy of the civilized and non-civilized society. If the extraterrestrials were civilized they should be respected but if they were not they would be possible to subjugate. Humanity decide whether the extraterrestrials are civilized or non-civilized. According to Smirnoff the non-civilized extraterrestrials should be guided by humans. The appropriation of space is done by humanity for the sake of humanity, either by exploring, collecting resources or finding a suitable place to establish a settlement. Any country in the world *could* theoretically nationally appropriate the Moon or any other celestial body. However, that country would then breach international law and face sanctions of the UN and other countries. The vivid discussion about whether Article II OST allows appropriation or if the same Article prohibits any form of appropriation resembles the Europeans' legal scholarly discussion about the ways of justifying appropriation of non-European land.

The Europeans divided the world in a European and non-European world, by various means. The Americas was non-Christian and non-civilized according to the Europeans. Humanity has divided the universe in a terrestrial and an extraterrestrial world. Scholars of today debate the possibility of extraterrestrial life being either civilized or non-civilized,

intelligent or unintelligent – in relation to humanity. Both the Europeans and humanity treat the 'new' as something to freely explore and gain advantages from. Both the Europeans and humanity are guided by an organization deciding guidelines on how to deal with the 'new'. The Europeans were guided by the Christian Church and its Papal bulls mapping out what territories are available and what to do with them and their inhabitants. Today, humanity is guided by the UN and its treaties and declarations mapping out how to use space and how it should benefit humanity. In this regard, humanity has replaced the Europeans and the UN has replaced the Church.

The European culture and the culture of the indigenous people differed in many ways and the Europeans came to the conclusion that their culture was civilized and the culture of the indigenous people was non-civilized. The Europeans had a perception of what constituted a civilized society, which included culture, agriculture, manufacturing and natural law. The Europeans were unable to accept the indigenous people's way of living and construction of society as a satisfactory civilized society. A consequence of the European inability to recognize the encountered cultures was a division of the world in 'us' and 'them'. This in turn incapacitated the indigenous people's right to their land and made it possible for the Europeans to appropriate it. Therefore, it is troubling to study the discussion of human encounters with extraterrestrials where legal scholars divide the extraterrestrial life in a civilized and a non-civilized. This is risky since what constitutes being civilized is determined by humanity, thus humanity makes the same error of perception as the Europeans. Humanity is thereby facing the risk of having actually encountered extraterrestrial life already although humanity have not recognized it as life. Whether something should be regarded and recognized as life is probably depending on how much it resembles of us.

The law constructed today is intended mostly for humans. In most legal systems only humans and human associations are seen as legal subjects and

agency is mostly reserved for what humanity define as humans or made by humans, such as corporations. Whether something should be considered to constitute as a legal subject or a human with agency is defined by humanity. The Europeans did not regard the indigenous people as legal equals because they breached natural law which was defined by the Europeans. Natural law was used to justify the Europeans' behavior and legally disqualify the indigenous people of their rights. The Europeans reevaluated their view on indigenous people and later gave them the recognition of being legal subjects and equals. This indicates that it is hazardous to assume that what we today define as a legal subject with agency, and what is excluded from that definition, will remain the same in the future. Today, there is a discussion whether we should give nature the same legal status as human associations such as companies or the UN. Celestial bodies, for example, are seen as objects but it would be risky to assume that they will by certainty remain so. I would argue that humanity is making the same mistake today as the Europeans did during the colonization.

4.4 Conclusion

To answer my principal research question *What are the similarities and the differences between the colonization of the Americas and unlimited human access to space?* I have come to following conclusions.

There is a striking resemblance in the Eurocentrism in the colonization of the Americas and the Anthropocentrism in space law. The centrism of the both is demonstrated in their application of their own law to what is perceived as new. The Europeans applied their idea of natural law on the indigenous people and the Americas, implying that the land was without owner. Humanity has applied its own law to the outer space. The Americas was free to explore and use for the Europeans, if the indigenous people hindered this freedom it was a cause for just war. Space is seen by humanity as without owner and free to explore and use.

Another similarity is the fact that the dichotomy of ‘us’ and ‘them’ exists both in the colonization of the Americas and space law. As showed, the Europeans saw their civilization, religion and view on law as a standard for the rest of the world. The Europeans divided the world in a Christian and non-Christian world and later this was replaced with civilization and non-civilization. Basically, it meant a European and a non-European world. Humanity has made its laws and principles prevailing in the universe and legal scholars of space law have divided extraterrestrial life in civilized and non-civilized. This shows that the dichotomy of us and them is present in space law.

I argue that very much imply that humanity is about to make the same mistake in space as the Europeans did in the Americas. The only difference from the two examples are the names of the actors and what stage the examples are from. Europeans are replaced by humanity, indigenous people are replaced with extraterrestrial life and the Americas is replaced by space. Humanity’s relation and access to space is only at the very beginning of human colonization of space. Perhaps it can be compared with when Christopher Columbus first arrived in the Americas.

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