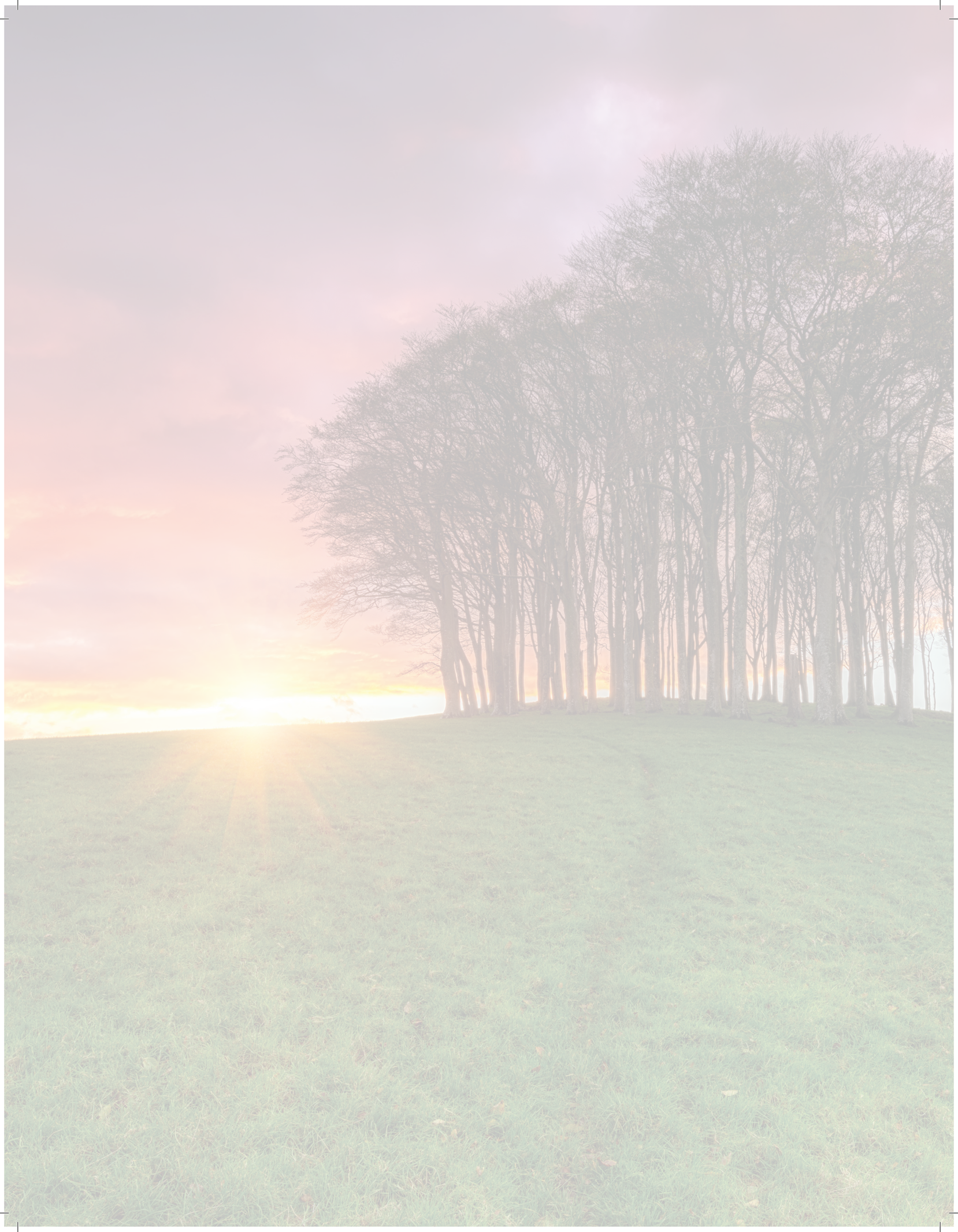
On the Doctrine of Discovery

The Canadian Council of Churches
Le Conseil Canadien des Églises

Rev. Dr. Néstor Medina



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In response to the Truth and Reconciliation Commission's Call to Action on the Doctrine of Discovery and *Terra Nullius*, the Canadian Ecumenical Anti-Racism Network (CEARN) of The Canadian Council of Churches commissioned Dr. Néstor Medina to reflect on the effects of the Doctrine of Discovery in the Americas. Néstor describes his essay as a modest attempt to outline the far-reaching implications of the Doctrine of Discovery for our understanding of history and its impact on today's global and social contexts.

CEARN is very grateful for Néstor's "modest" attempt. Around the table discussing how we experienced his writing, we heard such expressions as: "It's about time"; "Finally an essay that names it for what it is"; "A very valuable resource"; "Enlightening". Together, the members of CEARN affirmed the essay as a valuable contribution and reflective of their own understanding of the effects of the Doctrine of Discovery.

This essay accompanies the annotated bibliography of Canadian church responses to the Call to Action to repudiate the Doctrine of Discovery. Titled, Truth and Reconciliation and the Doctrine of Discovery, it was published by CEARN in September 2017.

Since 2001 the Canadian Ecumenical Anti-Racism Network has been the ecumenical location for shared work on undoing racism in Canadian churches.

The Canadian Council of Churches, founded in 1944, is now the broadest and most inclusive ecumenical body in the world, now representing 25 denominations of Anglican; Evangelical; Free Church; Eastern Orthodox and Oriental Orthodox; Protestant; and Catholic traditions. Together we represent more than 85% of the Christians in Canada.

For more information on the Canadian Ecumenical Anti-Racism Network (CEARN) visit the webpage at www.councilofchurches.ca/social-justice/undoing-racism/ or contact Peter Noteboom by email at noteboom@councilofchurches.ca.

This essay does not officially represent the positions or policies of churches who are members of The Canadian Council of Churches.

Peter Noteboom
Deputy General Secretary
The Canadian Council of Churches
September 2017

Rev. Dr. Néstor Medina

Néstor Medina is a Latino-Canadian theologian. He received his Ph.D. (2008) at the University of St. Michael's College, Toronto School of Theology, University of Toronto. His research focuses on the multiple points of intersection between people's culture, history, ethnoracial relations, faith traditions, theological knowledge and religious practices among Latinas/os in the U.S., Canada, and Latin America. He is the author of *Mestizaje: Remapping Race, Culture, and Faith in Latina/O Catholicism*, the winner of the 2012 Hispanic Theological Initiative's Book Award. More recently, he was the recipient of the Louisville Book Grant for Minority Scholars (2014-15) to work on his upcoming *Christianity, Empire, and the Cultural: (Re)Configuring Faith and the Cultural* (Brill, Forthcoming).

Introduction

The Doctrine of Discovery and the concept of *terra nullius* bring together a wide range of issues with great implications for many ethno-cultural communities in the world, including the colonizing projects of the Americas and consequent destruction of Indigenous peoples and cultures. "The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle – one culture's argument to support its conquest and colonization of a newly discovered, alien world."[1] Its common use in reference to the destruction of the Indigenous communities [2] of the Americas [3] deserves critical attention because its historical, legal, political and social implications, and its applications by different colonial forces over the years, are far reaching.

During the age of Western European imperialism, the use of this term meant that the lands belonged to the first nation that "discovered" them. As a consequence, at different times, often with severe detrimental effects on the Indigenous peoples, Western European nations violently expropriated their lands in today's Canada, the United States of America, Latin America and the Caribbean, Australia, New Zealand, the African continent, and parts of Asia. The impact of Western European imperialism and, more specifically, the Doctrine of Discovery was global.

There are at least four crucial historical aspects of the Doctrine of Discovery. First, the Doctrine of Discovery and the concept of *res nullius* (later *terra nullius*) constituted the initial ideological construct by which Western Europeans justified the seizing of the lands, territories, and resources of the (non-Christian) Indigenous peoples of the Americas and other continents. The year 1492 marks a momentous point in the history of Western European imperialism as Western Europeans set out to conquer, invade, and colonize the rest of the world.

Second, the violent invasion against the Indigenous peoples of the world as a result of the numerous encounters facilitated by the events of 1492 and afterwards was accompanied by the racialized ideological justification for the exploitation of local communities, including enslavement based on the perception of Western Europeans that the people they encountered were inferior and/or subhuman. The present condition of impoverishment and social exclusion experienced by the First Nations and Indigenous peoples in the Americas; the experience of discrimination and structural violence against black peoples, African descendants, and other (non-European) ethnic groups; and current racialized social, political, and economic structures are residual expressions of the racialized character of the Doctrine of Discovery. The ideas behind the Doctrine of Discovery continue to influence the way we organize our societies. In other words, there is a racioethnic component to the Doctrine of Discovery that needs to be highlighted. [4]

A third component of the Western European invasion was the religious justification for the eradication of Indigenous religious traditions, customs, and cultures. As Western Europeans imposed their imperial military might upon the peoples they invaded and enslaved, they began systematic projects of civilization that went hand-in-hand with evangelization. Enculturation into Western European cultures, as well as conversion to

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1 Robert J. Miller, Lisa LaSage, and Sebastián López Escarcena, "The International Law of Discovery, Indigenous Peoples, and Chile." *Nebraska Law Review* 89, no. 4 (2011): 824.

2 I use the terms Indigenous peoples or the Indigenous to speak generally of the communities that inhabited the lands prior to the arrival of the Europeans anywhere in the world. In this paper, the terms refer specifically to the communities in the various regions of the "Americas" (South, Central, and North America). I will use their regional or national proper names such as First Nations, Native Americans when the situation allows me to do so.

3 I want to emphasize that America is also a foreign name assigned to the lands on which Christopher Columbus stumbled. The First Nations, Indigenous communities or originary peoples had their own names with which they identified the land in which they lived. Examples are Weesekajack, Turtle Island, Abya Yala, or Aztlan.

4 See Néstor Medina, *Christianity, Empire, and the Spirit: (Re)Configuring Faith and the Cultural* (Leden, NL: Brill, Fortcoming).

Western European expressions of Christianity –often understood as constitutive of the civilizing project – worked together as forces in the slow process of the destruction of the various Indigenous cultures and religious traditions and practices.

To these three aspects, which date back to the end of the fifteenth century, one can add a fourth, expressed during the time the United States of America began to emerge as an imperial force. As the U.S.A. began to conceive of itself as the new world power, it also reinterpreted the Doctrine of Discovery and *terra nullius* and wove them together with the concept of Manifest Destiny. In Canada, the notion of Manifest Destiny was not a central theme, but the treatment of Indigenous peoples did not differ significantly from that of the United States of America. In fact, the governments of both nations inscribed the Doctrine of Discovery and *terra nullius* in the "rule of law." In both nations, the dark legacy of racialized discrimination of African descendants, Latinos/as, and Asians continues, along with discrimination against Indigenous peoples. Such expressions of discrimination and racism must be understood as part of the Western European and Anglo North Atlantic colonial project whose residual colonizing effects we still experience in our societies.

In this essay, I will highlight some key interconnected features of the Doctrine of Discovery and *terra nullius*, including their historical development, connection to international and national law, the theology informing the doctrine, and the responses of the churches over the years. I will focus primarily on how this doctrine has affected the Indigenous peoples of today's Canada and by extension those of the United States of America, but will allude to more global implications. This article is not a comprehensive analysis of the Doctrine of Discovery. Rather it is a modest attempt to outline its far-reaching implications for our understanding of history and its impact on today's global and social contexts.

Historical Antecedents

1. Roman Law, Ferae Bestia and *res nullius*

The Doctrine of Discovery and the concept of *terra nullius* have undergone a number of changes, too many to address here. Many scholars claim that the connection between the Doctrine of Discovery and *terra nullius* emerged only at the end of the 19th century. [5] However, while one cannot find the specific terminology in earlier documents, the laws, ideas, and principles that inspired and eventually became adopted as laws go as far back as the times of Roman antiquity.

The earliest source for discussing the connection between the Doctrine of Discovery and *terra nullius* is Cicero's treatise titled *On Duties* (*De Officiis*) (44 BCE).[6] In it, Cicero delineates the four ways by which ownership of land can be established. In Book One, verse 21, he wrote: "Nothing is private by nature, but rather by long occupation [*occupatio*] (as when men moved into some empty lands in the past), or by victory (when they acquired it in war), or by law [*lex*], by settlement, by agreement, or by lot [*sorte*]. The result is that the land of Arpinum is said to belong to the Arpinates, and that of Tusculum to the Tusculani. The distribution of private possessions [*possessiones*] is of a similar kind." [7]

Of these four, attention must be given to the acquisition of "empty land" because it resonates closely with today's concepts of *terra nullius*. According to Benton and Straumann, Cicero's acquisition by occupation is analogous to the private Roman Law doctrine of acquisition of "unowned things" (*res nullius*).[8] A more direct mention to "empty" or "unowned" land is found in the work of the Roman jurist Gaius (130-180 CE). In Book Two of his Institutes, verses 65-67,[9] he outlines the connection between the legal Roman system and things "unowned" (*res nullius*):

> Of some things we acquire ownership [*dominium*] under the law of nations [*ius gentium*] which is observed, by natural reason, among all men [*sic*] generally, of others under the civil law [*ius civile*] which is peculiar to our city. And since the law of nations is older, being the product of human nature itself, it is necessary to treat of it first. So all animals taken on land, sea, or in the air, that is, wild beasts, birds, and fish, become the property of those who take them. . . . **What presently belongs to no one *[quod nullius est]*** becomes by natural reason the property of the **first taker *[occupans]***. So far as wild animals and birds are concerned, it matters not whether they be taken on one's own or on someone else's land. . . . Any of these things which we take, however, are regarded as ours for so long as they are governed by our control [*custodia*]. But when they escape from our custody and return to their natural state of freedom, they cease to be ours and are again open to the first taker. [10]

Note that Gaius is referring primarily to the ownership (*dominium*) of captured animals. They were considered *res nullius*, deemed to belong to no one, and could be acquired by the first person to take them (the *occupans*). The principle of *thesauri inventio* (discovery of treasures) complements our discussion; it refers to instances when a person *discovers* a treasure which *had no traceable owner* and as a result was claimed by the finder.

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[5] It is important to note that by the middle of the 19th century British and Australian courts had embraced *terrra nullius* as a rationale for settlement in Australia without compensation to the Indigenous communities that first inhabited the land. Lauren Benton and Benjamin Straumann remind us that there is an entire genealogy to these terms, although some claim that there are no explicit claims of *terrra nullius* for example in the late 18th or 19th centuries in Australia. See their "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice," *Law and History Review* 28, no. 1 (February 2010): 10.

[6] Cicero, *De Officiis*, trans. Walter Miller (New York, NY: G.P. Putnam's Sons, 1928).

[7] I am using the translation by Benton and Straumann, "Acquiring Empire by Law," 13.

[8] Benton and Straumann, "Acquiring Empire by Law," 14.

[9] Gaius, *Institutes of Roman Law*, trans. Edward Poste, with a historical introduction by A. H. J. Greenidge, revised and enlarged by E. A. Whittuck (Oxford, UK: Clarendon Press, 1684).

[10] I am using the translation by Benton and Straumann, "Acquiring Empire by Law," 14-15. Emphasis mine.

Occupation and *thesauri inventio* were considered by Roman jurists to be natural forms of acquisition based not on civil law but on natural law and the *"ius gentium"* (the law of nations), which Gaius considered to be older. [11]

Gaius adds to this discussion another important piece of this puzzle, the Roman legal principle of the *first taker.* This principle receives fuller expression in Book Two of Justinian's (482-565 CE) *Institutes,* verses 1, 12. [12] Though he repeats Gaius in great detail, Justinian discusses the principle of the first taker under the law *Ferae bestiae* (wild animals). [13] As I explain below, Francisco de Vitoria draws from Justinian's explanation of *Ferae Bestia* and the principle of *res nullius* (things unowned) to counter the Spanish claims to entitlement of the lands of the Indigenous peoples of the Americas. [14]

To sum up, *res nullius* had a firm foundation in the Roman legal system. The concept of *terra nullius* was adapted from *res nullius* in its multiple uses.

2. "Discovery," *Res Nullius,* and *Terra nullius*

One cannot ignore the connection between the Doctrine of Discovery, *terra nullius*, Western European colonization, and how they were woven together with European expressions of Christianity. The development of Western European self-perceived superiority and eventual imperialism followed a sequence of small developments which cannot be addressed in this short article. However, one important aspect of this complex set of discussions is to note how Western European expressions of Christianity became interwoven with empire from the Constantinian era (4th century) onward. Wherever Western imperial forces went, Christianity went with them, often adopting imperialistic attitudes and approaches. Though not explicit, imperialism was at work when Pope Urban II made his famous speech at the Council of Clermont (1095), setting out the parameters for the First Crusade. His speech allowed Western Europeans to lay claim to any land occupied by non-Christians, particularly Muslims. The would later be an important principle when Spain was deciding if it should recognize the sovereignty of the non-Christian Indigenous peoples in the Americas.

Another example of how Western European imperialistic self-perceived superiority was woven into Christianity is Pope Innocent IV's *Commentaria Doctissima in Quinque Libros Decretalium* (1240) when he asked if it was "licit to invade a land that infidels possessed or which belongs to them." [15] While his answer to this key question was negative, he insisted that war fought for the "defense" of Christians and for the "re-conquest" of Christian lands was justified. Since he understood Papal authority to be a natural and divine law, he believed that the pope had jurisdiction over all the kingdoms of the world. The impact of Innocent's ideas concerning the dispossession

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[11] Benton and Straumann, "Acquiring Empire by Law," 14-16 Benton and Straumann mention two other forms of acquisition of ownership: *usucapio* which referred to the acquisition of ownership (dominium) by taking possession (*possessio*) for a certain time; and res derelictae, which pointed to property that had been intentionally abandoned and which for all intents and purposes was unowned (*res nullius*).

[12] Justinian, The Institutes by Justinian, trans. Thomas Collet Sandars (London, UK: Longmans, Green, and Co., 1865).

[13] The text reads as follows:

> Wild animals, birds, and fish, and all animals, which live either on the earth, in the air and the sea, as soon as they are caught by any one, immediately become by the law of nations the property of their captor; for natural reason gives to the first occupant that which had no previous owner [*nullius est*]. And it is immaterial whether a man [*sic*] take wild beasts [*feras bestias*] or birds, upon his own ground or on that of another. Of course, anyone who enters the ground of another for the sake of hunting or fowling, may be prohibited by the owner, if he perceives the intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your power, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him [sic] who captures it. It is considered to have recovered its natural liberty, if it has either escaped out of your sight, or if, although not out of your sight, it yet could not be pursued without great difficulty. See Justinian, *The Institutes by Justinian*, 2: 12.

[14] There were at least five ways in which *res nullius* was used during the time of Western European imperialism. First, to support or deny claims to private property (e.g., an individual's claim to ownership of a plot of land); second, to undermine the claims to sovereignty in inter-imperial disputes (e.g., Spain versus Portugal); three, to counter monopolizing claims to the sea, rights of navigation (e.g., Spain claiming rights over the Atlantic ocean); four, to affirm issues of public ownership (e.g., land that is owned by the Crown); five, to undermine the claims to sovereignty of the New World by the Spaniards (Vitoria). See Benton and Straumann, "Acquiring Empire by Law"; Andrew Fitzmaurice, "The Genealogy of Terra Nullius," *Australian Historical Studie*s 38, no. 19 (2007): 1-15.

[15] Cited in Michael J. Kelly, "Response: The Catholic Intellectual Tradition in the Context of the Legal Academy," *Journal of Religion and Society* Supplement 6 (2011): 827.

of Muslims played a key factor in discussions among lawyers of the Spanish Crown. In the end, "dispossessing Native Americans was clearly analogous to dispossessing non-Christian natives of the Holy Land." [16]

Innocent's ideas had enormous influence. Michael Kelly reminds us that King Duarte of Portugal used Innocent's teaching when he sought the Pope's blessing for Portugal's conquest of the Canary Island in 1436. [17] In fact, Papal Bulls played a central role in guaranteeing Western European expansionism over Muslim lands as well as those of other people when the notion of "discovery" was added. In the fifteenth century, Pope Nicholas V promulgated the Bull *Dum Diversas* (1452), through which he granted the King of Portugal "full and free permission to invade, search out, capture, and subjugate the Saracens and pagans and any other unbelievers and enemies of Christ wherever they may be, as well as their kingdoms, duchies, counties, principalities, and other property . . . and to reduce their persons into perpetual servitude." The Bull displays the weaving together of military activity justified by religious attitudes, and was accompanied by the right to acquire new lands and hold exclusive economic trade rights. The Bull grants the Kingdom of Portugal the exclusive trade rights of the "newly-discovered" parts of West Africa in exchange for ongoing military efforts against the Saracens. [18]

By this period, the enslaving of non-Christian prisoners had become a common practice. The idea was considered more merciful than the execution of prisoners, while at the same time creating the conditions for the victors to benefit economically from the war. Three years later, Nicholas V issued *Romanus Pontifex* (1455), confirming that the lands along the coast of Africa fell under the dominion of the King of Portugal. The Bull reiterated the terms of *Dum Diversas* authorizing the Portuguese to subdue and enslave the Saracens, along with other pagans and unbelievers, who were considered "enemies of Christ." Note again the interconnection between Christianity, military activity, and economic benefits to the invading forces by way of enslavement. [19]

It is at this historical juncture that the Doctrine of Discovery became the ideological mechanism for granting all the lands not in the possession of a Western European (Christian) ruler. Not surprisingly, when Christopher Columbus arrived in the Americas in 1492, he applied the Doctrine of Discovery by performing a ceremony through which he effectively took possession of the lands he had just "discovered" on behalf of the Spanish monarchs. In effect, he took possession of all the lands of the Indigenous peoples not occupied by Christians. Pope Alexander VI confirmed the *rights* of the Western European imperial forces over the lands of the Americas when he issued *Inter Caetera* (May 4, 1493) to resolve the dispute between the Spanish and Portuguese over the right to possess the lands. This papal Bull, including the treaty of Tordesillas, is often discussed as demarcating merely the spheres of influence over the Americas for the Portugal and Spanish monarchs, without legal specification about property. [20] However, a careful examination of the Bull demonstrates that this document categorically states that any land not inhabited by Christians was available to be "discovered," claimed, and exploited by Christian rulers. The text reads:

"Should any of said islands have been *found* by your envoys and captains, give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps,

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16 Kelly, "The Catholic Intellectual Tradition," 84. See also Brett Bowden, "The Colonial Origins of International Law: European Expansion and the Classical Standard Civilization," *Journal of the History of International Law* 7, no. 1 (2005): 1-24.

17 Kelly, "The Catholic Intellectual Tradition," 84.

18 "The 'Doctrine of Discovery' and Terra Nullius: A Catholic Response." Concanan Inc. 2016. www.cccb.ca/site/images/stories/pdf/catholic%20response%20to%20doctrine%20of%20discovery%20and%20tn.pdf (accessed September 18, 2016). See also Terra Nullius, *Wikipedia*, https://en.wikipedia.org/wiki/Terra_nullius#cite_note-4 (accessed September 29, 2016).

19 Although the main point of the Bull was to forbid other nations from engaging in trade with the areas under the dominion of Portugal, it is important to note that it describes Saracens, pagans and other unbelievers as violent people, thus setting the tone for how Christians perceived and dealt with the Indigenous peoples of the Americas. See "The 'Doctrine of Discovery' and *Terra Nullius*: A Catholic Response."

20 Benton and Straumann, "Acquiring Empire by Law," 19.

places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands *found and to be found, discovered and to be discovered*....With this proviso, however, that none of the islands and mainlands, found and to be found, discovered and to be discovered, beyond that said line towards the west and south, be in the actual possession of any Christian king or prince...And we make, appoint, and depute you and your said heirs and successors lords of them with full and free power, authority, and jurisdiction of every kind…" [21]

The Bull continues by promoting the "evangelization" of the region: "The Catholic faith and the Christian religion be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself." [22] The Bull recognizes and grants Spain and Portugal dominion over the lands and the peoples of the Americas, and establishes the Catholic Church's ecclesiastical jurisdiction regarding missionary work. The interconnection between European Christianity and empire becomes obvious: the monopoly on trade given to Spain and Portugal within their respective boundaries was intended to compensate them for their investment in the work of evangelization of the "newly-discovered" lands. The rights of the Indigenous peoples are absent in *Inter Caetera* and Divine "natural" "law" and/or the law of the "superior" Western Europeans superseded any concerns for the Indigenous.

The Portuguese arrived before the French and the British, [23] in the northern part of the Americas (today's Canada and the U. S.) but rather than settle there, they went on to colonize the region of today's Brazil. With the French came the Roman Catholics, and with the British came mainly Protestants. Neither group raised questions about the rights of the Indigenous peoples. As with the Portuguese and the Spanish, colonization included Western European enculturation and conversion to Western European expressions of Christianity, along with the taking of Indigenous lands. For example, the Marquis de la Roche travelled to North America in 1577 with instructions to "raid, seize and besiege" and make his own all the lands of which he could become master, "provided that they do not belong to our friends, allies and confederates to the Crown." [24]

J.H. Elliot deemphasizes the extent to which *res nullius* was an operative factor in the Americas, insisting that the principle was applied only to "thinly populated" areas. [25] Meanwhile David Armitage conflated *res nullius* and *terra nullius* when he wrote that the argument of vacancy (*vacuum domicilium*) or absence of ownership (*terra nullius*) became standard foundation for the British dispossession of Indigenous peoples in today's Anglo North America, Australia, and Africa from early 17th to well into the 19th centuries. [26] This brief excursion into the history of Western European imperialism and colonization demonstrates how the notion of "discovery" and the taking of the lands of the Indigenous communities of the Americas and elsewhere were intertwined. I propose that this was made possible because Europeans were operating with the principle of *res nullius*, by which they justified seizing the lands of the Indigenous inhabitants.

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[21] "The Bull *Inter Caetera* (Alexander VI), May 4, 1493. http://www.nativeweb.org/pages/legal/indig-inter-caetera.html (accessed September 23, 2016).

[22] See "The Bull *Inter Caetera* (Alexander VI), May 4, 1493. http://www.nativeweb.org/pages/legal/indig-inter-caetera.html (accessed September 23, 2016).

[23] The earliest recorded European exploration of Canada is described in the Icelandic Sagas, which recount the attempted Norse colonization of the Americas. As to the Portuguese, we still have reminders of their colonial presence in the names assigned to Labrador (after João Fernandes Lavrador) and Newfoundland (Terra Nova).

[24] Benton and Straumann, "Acquiring Empire by Law," 11-12.

[25] Cited in Benton and Straumann, "Acquiring Empire by Law," 5. See also J.H. Elliot, *Empires of the Atlantic: Britain and Spain in America, 1492-1830* (New Heaven, CT: Yale University Press, 2006), 6. The notion of "thinly populated areas" in the Americas has been challenged recently by Senator Murray Sinclair who claims that such phrases play an essential role in maintaining "the mythological doctrines of 'terra nullius' and 'discovery.'" See Jorge Barrera, "Sen. Murray Sinclair Blasts Globe and Mail for Propagating 'Racist' Fallacy." *APTN National News*, April 4, 2017.

[26] Benton and Straumann, "Acquiring Empire by Law," 6. See also David Armitage, *the Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), 97.

Doctrine of Discovery, the "Rule of Law" and Terra Nullius

1. Spain and Portugal

Papal Bulls were used to justify the taking of Indigenous lands in many places of the world. In Latin America, the attorneys who drafted the decree which formally instituted the *encomienda* system and which justified the enslaving of Indigenous people cited papal Bulls. [27] One of the most damaging decrees was *El Requerimiento* (The Requirement), a document drafted in 1513 by the Spanish Jurist Juan López de Palacios Rubio (an avid supporter of the monarchy's divine right to conquer). The Crown required the Spanish army to read this declaration out loud before they went inland. The document demanded the Indigenous to submit "voluntarily" to the Spanish crown. If they chose not to, the Spanish forces would be justified in engaging them in battle and destroying them. The Requirement affirmed the Spanish "divinely ordained right" to take possession of the *newly found* lands, and exploit both the land and its inhabitants. It effectively informed the Indigenous peoples that they must accept Christianity, the authority of the Pope, the Spanish monarchs, and the missionaries sent to preach the gospel to them. The Indigenous had to accept becoming subjects of the Spanish monarchy (to whom the Pope had granted the land that had been confiscated) or be considered enemies of Spain. [28]

The Spanish Crown replaced the Requirement with a series of edicts. [29] There was strong outcry by many including Fray Bartolomé de Las Casas, Bishop of Chiapas (1544-47) who condemned the violence exacted on the Indigenous. [30] Because of much resistance and condemnation of the violent ways in which the Indigenous peoples were treated, Spain convened the Valladolid debate (1550) and eventually proclaimed the *New Laws of Spain* (1542) by King Charles V, which effectively dissolved the *encomienda* system. [31]

As a result, the Spanish and Portuguese sought more solid arguments to claim dominion over the lands inhabited by non-Christians. The Church was never absent from these debates and decisions. The Spanish sought to secure their claim of dominion over the lands of the Indigenous peoples in today's Spanish-speaking Americas and the Caribbean. At the Valladolid debate, the discussion on the *entitlement* of Spain over the Indigenous peoples and lands took place at different levels. On one hand, drawing on Aristotle's well-known ideas on natural law, humanist and theologian Juan Ginés de Sepúlveda and his followers insisted that some people were naturally born for servitude. [32] The Notion of the divine right of the Spanish Crown to take

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[27] Miller, LaSage, and López Escarcena, "The International Law of Discovery," 836.

[28] The practical implications for refusing to accept the yoke of Spain were disastrous:
> "But, if you do not do this, and maliciously make delay in it, I certify to you that, with the help of God, we shall powerfully enter into your country, and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their Highnesses; we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them as their Highnesses may command; and we shall take away your goods, and shall do you all the mischief and damage that we can, as to vassals who do not obey, and refuse to receive their lord, and resist and contradict him; and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their Highnesses, or ours, nor of these cavaliers who come with us." (Juan López de Palacios Rubios, *The Requirement,* 1513. https://www.encyclopediavirginia.org/El_Requerimiento_by_Juan_Lopez_de_Palacios_Rubios_1513 [accessed July 26, 2017]).

[29] The Spanish Crown organized a number of *juntas* (administrative councils) to explore the legality of the Spanish invasion and occupation of the Americas. Three of them produced important documents concerning the treatment of the Indigenous peoples by the Spanish: The Junta de Burgos (1512), Junta de Valladolid (1513), and Junta de Madrid (1516).

[30] See Bartolomé de Las Casas, *A Short Account of the Destruction of the Indies*, ed. and trans. Nigel Griffin, introd. by Anthony Padgen (New York, NY: Penguin Books, 1992).

[31] Vitoria wrote his *De Indis* in 1532, which constituted a legal indictment of the Spanish Crown's illegitimate claim to the lands of the Americas and the natives as its subjects. See Francisco de Vitoria, "On The American Indians (*De Indis*)," in Political Writings, ed. Anthony Padgen and Jeremy Lawrance (New York, NY: Cambridge University Press, 1991), 231-92. Las Casas wrote his *Short Account of the Destruction of the Indies* in 1542 and was published in 1552. See Las Casas, *A Short Account of the Destruction of the Indies.*

[32] According to Hanke: "the Scottish theologian John Mair was the first to apply the Aristotelian doctrine of natural slavery to the natives of the Americas". Mair was also in favour of the deployment of force as "preliminary to the preaching of the faith" (Lewis Hanke, *El prejuicio racial en el Nuevo Mundo: Aristóteles y los Indios de Hispanoamérica,* trans. Marina Orellana [Santiago de Chile: Editorial Universitaria, S.A., 1958], 28).

possession of the lands was at play. Sepúlveda also argued that by invading and occupying the lands the Spanish were fulfilling their divine mandate to elevate the Indigenous people, and perhaps by such measures redeem them from their backwardness and save their souls. Sepúlveda and his followers justified the violent invasion of the Indigenous peoples and the imposition of Spanish (read European) civilization and Christianity. The violence against the Indigenous was not unjust, from this perspective. In fact, the Spanish could invade with *just cause* in order to save the souls of Indigenous peoples who were condemned and lost; theirs was a *just war*. [33]

On the other hand, to counter Sepúlveda's position, Francisco de Vitoria followed the logical implications of Aristotle's *Nicomachean Ethics*. He argued against Spanish claims and their sense of legitimacy on three key fronts: natural right, discovery, [34] and *res nullius*, [35] confirming the sovereign rights of the Indigenous people's polity. [136]This was the argument that Vitoria used in his *De Indis (On the Indians)* (1532). Note that Vitoria connected the operative principle of discovery, the law of the nations (*ius gentium*), and principle of *res nullius* (or things unowned) by drawing on the Roman law of the first taker or *Ferae bestiae.* [37] It is important to note that he deploys *res nullius* to argue against the invasion and occupation of the Indigenous lands by the Spanish. For him, the Indigenous were the true owners of the lands prior to the arrival of the Spanish. [38] He argued that the title of the lands "by right of discovery" was the very justification for which Columbus had set sail to search for "undiscovered" lands.

Vitoria was not challenging the principle of *res nullius*; rather, he used it to defend the Indigenous. Following the logic of the principle of discovery, he argued the Indigenous were the true public owners of the lands. In fact, he averred, "The law of nations…expressly states that goods which do not belong to anyone become the property of the first taker. Since the goods in question had an owner (namely, the Indigenous peoples) they did not fall under this title. [39] It is for this reason that some scholars argue that in the context of Spain and Portugal, the expropriation of the Indigenous lands in the Americas was mainly possession and occupation by brute force rather than by affirming the principle of *res nullius* or *terra nullius*, that is, by entitlement. [40] However, the degree to which the Spanish and Portuguese thought of themselves to be divinely entitled to these lands demonstrates that in fact an operative principle akin to *res nullius* or *terra nullius* fueled their drive to "discover" new lands over which they could become masters. [41]

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[33] Drawing on biblical imagery, Sepúlveda argued that just as the Roman Centurion Cornelius needed help to convert, and the cities of Sodom and Gomorra faced divine punishment for their depravity, so also was it good and necessary for the natives to accept the Spanish empire and obey the "good" citizens of Spain. He wrote: "Les sería un bien que aceptaran el imperio español y mudarse a la obediencia de ciudadanos buenos, civilizados y adictos a la verdadera religión, los hombres pésimos, bárbaros e impíos, quienes con las amonestaciones, leyes y trato de aquéllos podían alcanzar la piedad, la civilización y la salvación, con lo cual se cumpliría la obligación máxima de la caridad cristiana" (Juan Ginés de Sepúlveda, *Demócrates Segundo: De las justas causas de la guerra contra los Indios*, ed. and trans. Angel Losada [Madrid: Consejo Superior de Investigaciones Científicas: Instituto Francisco de Vitoria, 1951], 58).

[34] Vitoria wrote: "In the law of nations (*ius gentium*) . . . expressly states that goods which belong to no owner pass to the occupier. Since the goods in question here had an owner, they do not fall under this title. Therefore, . . . this title . . . provides no support for possession of these lands, any more than it would if they had discovered us" (cited in Benton and Straumann, "Acquiring Empire by Law," 21).

[35] As Benton and Straumann claim, "Vitoria...did not acknowledge title by discovery, accepting instead the principle of *res nullius,* through which he established the Indigenous had "true dominion, both in private and public affairs" (Benton and Straumann, "Acquiring Empire by Law," 21).

[36] Benton and Straumann, "Acquiring Empire by Law," 22.

[37] Benton and Straumann, "Acquiring Empire by Law," 22. Vitoria wrote, "[I]n the law of nations [ius gentium], a thing which does not belong to anyone [res nullius] becomes the property of the first taker, according to the law *Ferae bestiae* (Institutes 2, 1, 12); therefore, if gold in the ground or pearls in the sea or anything else in the rivers has not been appropriated, they will belong by the law of nations to the first taker, just like the little fishes of the sea" (Francisco de Vitoria, "On the American Indian," Question 3.1.4). Vitoria concluded that this principle derived from natural law, making it sufficient to be binding. But as Benton and Strumann explain, even if it were not part of natural law, the principle would still be binding, since even in cases where the *ius gentium* as contained in the *Institutes* and the *Digest* is not derived from natural law. See Ibid., 22. See also Fitzmaurice, "The Genealogy of Terra Nullius," 6-7.

[38] See Francisco de Vitoria, "On the American Indian".

[39] See Francisco de Vitoria, "On the American Indian," Question 3. Vitoria argued that the Spanish Crown could not invade these people because they had a natural human right to the titles of the lands and the riches therein. On this same basis, he insisted the Spanish Crown had no legitimate right to impose itself over these peoples and govern them. They had their own laws and were sovereign people. See also Francisco de Vitoria, "Relección de los indios recientemente hallados," in Relecciones teológicas, in *Relecciones Teológicas del P. Fray Francisco de Vitoria,* trans. D. Jaime Torrubiano Ripoll (Madrid, España: Librería Religiosa Hernández, 1917), 1-87.

[40] Benton and Straumann, "Acquiring Empire by Law," 30.

[41] We see this drive for "discovering" new lands in the accounts of Hernán Cortéz in México, Pedro de Alvarado in Guatemala, and Pedrarias Dávila in Nicaragua, to name a few.

2. English North America

The British (and French) in today's U.S.A. and Canada and parts of the Caribbean claimed the lands of the Indigenous peoples in much more explicit ways as being e*mpty, vacant, unused,* thus *unowned* (*terrae nullius*). The argument simply stated that if the lands were not put to "civilized" use – which generally meant widespread agriculture – then they could be considered unused and free to be claimed. [42] The colonial powers and subsequently the governments of Canada and the U.S.A. inscribed in the "rule of Law" the right to claim the lands of the Indigenous peoples. [43] The law functioned as a key mechanism by which the Indigenous peoples' lives, cultures, and traditions were controlled and governed, and their lands "administered" (read stolen) by the British colonial, Canadian, or U.S.A. governments. To be "Indian" was not just a marker of ethnicity or cultural background but also a legal term. Under the excuse of the rule of law, the British colonial society and Canadian governments claimed a "legal" "responsibility" and "care" for the Indigenous peoples. It was the banner behind which the imposition of European cultures and versions of Christianity were justified and explained, resulting in the disenfranchisement of these communities by the newly formed societies.

a. The United States of America

The Doctrine of Discovery has been part-and-parcel of the ways in which the U.S.A. government has applied the rule of law to Indigenous peoples, lands and territories. One could argue that the U.S.A. constitution enshrined in it protection for all its citizens since the Fifth Amendment reads: *No person shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* In 1788, the U.S.A. government confirmed its intended relationship with Native Americans. As it formed the first Northwest Territory (out of today's Ohio, Indiana, Illinois, Michigan and Wisconsin), legislation clearly stated in Article III: *"The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed."* However, only seven years later (1794), the government sent a regiment led by General "Mad" Anthony Wayne to conquer a confederation of American tribes who were attempting to hold on to their lands. [44] To accelerate the removal of Native Americans from their lands, [45] the *Indian Removal Act* came into effect in 1830, authorizing the President to remove the remaining Eastern Indians to lands west of the Mississippi. [46]

The Doctrine of Discovery was crucial in the development of U.S.A. laws that denied land rights to Native Americans. The famous Supreme Court case of Johnson v. M'Intosh (1823) comes to mind, in which the court dismissed the rights of Native Americans to own land. [47] The court decision stripped them of all rights to their independence even though the case did not directly involve any Native Americans. The case was a contest between two settlers, both of whom argued to have title of ownership to a piece of land in Indiana. Joshua Johnson could trace his title to a settler who bought land from the Piankeshaw Nation in 1775, while M'Intosh traced his title to the same piece of land through purchases from the Piankeshaw Nation by the

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[42] When John Locke wrote his essay "Of Property" in the seventeenth century, he contended that only labour can provide ownership, so that if land were not cultivated it could not be claimed. See John Locke, *Second Treatise of Government.* Chapter 5. http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf (accessed July 26, 2017).

[43] Lindsay G. Robertson, *Conquest by Law, How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York, NY: Oxford University Press, 2005).

[44] At the Battle of Fallen Timbers, a band of 800 Native Americans was slaughtered and 5,000 acres of crops were destroyed. The tribes of the region were forced into a treaty that limited them to the northern region of what is today Ohio. It took 20 years to recover from the loss of lives and property.

[45] In 1802, President Jefferson signed the *Georgia Compact* which stated that in exchange for land (what is today Alabama and Mississippi), the federal government would remove all Native Americans within the territory of Georgia "as soon as it could be done reasonably and peacefully."

[46] Between 1838 and 1839, under President Andrew Jackson, 15,000 Cherokee Indians were forcibly taken from their land, herded into makeshift forts, and forced to march – some in chains – a thousand miles to present-day Oklahoma. Over 4,000 Cherokee died from hunger, disease, and exhaustion on what they called N*unna daul Tsuny* or the *Trail of Tears*. By the late 1840s, almost all Native Americans had been moved to lands west of the Mississippi.

[47] See "Johnson V. M'Intosh, 21 U.S.A. 543 (1823)" Justia. USA Supreme Court, https://supreme.justia.com/cases/federal/us/21/543/case.html (accessed October 5, 2013). See also Blake Watson *Buying America from the Indians: Johnson v. McIntosh and the History of Native Land Rights* (University of Oklahoma Press, 2012).

United States of America government 1805. The decision against Johnson was unanimous. Chief Justice John Marshall wrote that the Christian European nations had assumed complete control over the lands of America during the "Age of Discovery." As he saw it, when the U.S.A. won its independence in 1776, it inherited authority over these lands from Great Britain, "notwithstanding the occupancy of the natives, who were heathens…"

Two interconnected issues emerge; first, the ruling impaired the rights of Native Americans as independent nations, even though the court's decision acknowledged them as the rightful occupants of the land, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion. However, it denied their rights to complete sovereignty as independent nations and their power to dispose of the land at their own will. [48] They were only tenants or residents of the land, which belonged to the U.S.A. Consequently, the original sale of land by the Piankeshaws was invalid because the Indigenous peoples were not the lawful owners. Second, the Supreme Court confirmed the Doctrine of Discovery as the idea that the "discovery" of a non-European land by representatives of a European monarch gave that monarch an exclusive right to buy lands from the Indigenous peoples of the area. Since the U.S.A. government was the successor to the British monarch who "discovered" this area, only the U.S.A. government had the right to buy lands from the Piankeshaw Nation. M'Intosh had won!

The Doctrine of Discovery still governs United States of America in relation to Native Americans. It has been cited in court as recently as 2005, in the decision City of Sherrill v. Oneida Indian Nation of N.Y. The Doctrine of Discovery also inspired U.S.A. imperial and expansionist projects. In 1845, John L. O'Sullivan gave the Doctrine of Discovery a unique U.S.A. flavor when he coined the term Manifest Destiny to defend the U.S.A. entitlement of Oregon and the annexation of Texas. In his editorial, "The True Title," in the *New York Morning News*, at the end of 1845, he wrote:

"Away, away with all these cobweb tissues of rights of discovery, exploration, settlement, contiguity, etc… [The American claim] is by the right of our manifest destiny to over spread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty… such as that of the tree to the space of air and the earth suitable for the full expansion of its principle and destiny of growth." [49]

Manifest Destiny embodied the imperial impetus of the U.S.A. [50] It confirmed the sense among U.S.A. citizens of an inevitable natural (and divine) right to expand the nation and to spread (share) "freedom and democracy," though only to those deemed capable of self-government, which certainly did not include Blacks, Native Americans or other nations. Only three years after O'Sullivan's ominous statement, the United States of America invaded Mexico and took possession of half of the country (today's states of Arizona, New Mexico, Utah, Colorado, and California). Only 40 years later, the U.S.A.-Spanish war of 1898 culminated in Cuba, Puerto Rico and the Philippines falling under its colonial protectorate. The U.S.A. had confirmed itself as the new imperial power.

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[48] For other cases arguing for the Indigenous peoples as "dependent nations" see Cherokee Vs Georgia (1831); Oliphant v. Suquamish Tribe 435 USA 191 (1978).

[49] Cited in Frederick Merk and Lois Bennister Merk, *Manifest Destiny and Missions in American History: A Reinterpretation* (Cambridge, MA: Harvard University Press, 1963), 31.

[50] See Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark and Manifest Destiny,* foreword by Elizabeth Furse (Wesport, Conn: Preaeger Publishers, 2006). The ideology of Manifest Destiny is often confused with the "Monroe Doctrine" as stated by President James Monroe in 1823, which, for a number of years, was part of U.S.A. foreign policy. Though an extension of the ideas that gave birth to the notion of Manifest Destiny, the doctrine effectively turned the rest of the Americas and subsequently the non-European world into a backyard for U.S.A. political, economic, and military interventionism. The object was to ensure sufficient control or influence on foreign nations to protect the political and economic interests of the U.S.A.

b. Canada

In Canada, questions of the Doctrine of Discovery played a somewhat different role. As France ceded the territories of New France to Great Britain, historically marked by the Treaty of Paris (1763), [51] King George III claimed British territory in North America to be under the dominion of Britain in his Royal Proclamation that same year. This Royal Proclamation set out guidelines for the relationship between England and the First Nations, explicitly stating that Indigenous people's title had existed and continues to exist, and that all land would be considered Indigenous land until ceded by treaty. The Proclamation "forbade settlers from claiming land from the Indigenous occupants, unless it is first bought by the Crown and then sold to the settlers. The Royal Proclamation further sets out that only the Crown can buy land from First Nations." [52] It did not, however, stop some British officials from making claims on Indigenous lands using the Doctrine of Discovery and *terra nullius*. For example, Joseph Trutch, the first Lieutenant Governor of British Columbia, insisted that First Nations had never owned land, and thus could safely be ignored. He worked assiduously to prohibit Indigenous people's land claims and to reduce lands previously reserved for them by the British Crown. [53]

Through the creation of Canada with the British North America Act of 1867, things changed drastically for Indigenous communities. Only two years after its birth as a nation, the Canadian government issued the *Gradual Enfranchisement Act* (1869) which sought to force Aboriginals to abandon their "Indian" status by adopting Western European culture and languages. The British North American Act transferred the "responsibilities" of the Indigenous peoples to the Canadian government. In many ways, this Act was a rehashing of the *Gradual Civilization Act* (1857) proclaimed years earlier, while the territories were under British dominion. *The Enfranchisement Act* and the *Gradual Civilization Act* were later consolidated under the *Indian Act* (1876), which became the principal piece of legislation regulating the relationship between the First Nations, Inuit, and Métis and the Government of Canada. Though not explicitly stated, it is not difficult to see that the ethos of the Doctrine of Discovery and principle of *terra nullius* informed the content of the *Indian Act.* While it has been amended several times to remove discriminatory sections, this single racialized piece of legislation continues to perpetuate colonizing structures that seek to disarticulate Indigenous cultural traditions.

In terms of how the Doctrine of Discovery played out in Canadian law, we have to look to the recent Supreme Court of Canada decision of R v Sparrow (1990). It is a crucial decision because it is the first time that the highest court in the Canadian legal system had a chance to deal directly with section 35(1) of the Constitution Act of 1982, in which, for the first time, the protection of Aboriginal and Treaty Rights were enshrined in the Constitution of Canada. Three important complementary points from this historic decision are worth mentioning as they bring together elements of the Doctrine of Discovery, the rule of law, and Indigenous land claims. First, the Supreme Court begins to explain its decision by acknowledging that British policy towards the Indigenous population was as one of "respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness." Second, the Court states: "There was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands [were] vested in the Crown." [54] Third, the Court draws on both the Royal Proclamation and the case of Johnson v. M'Intosh to support the idea of sovereignty and entitlement to the Indigenous lands by the Crown.

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[51] Earlier sections had been ceded with the peace Treaty of Utrecht (1738). The Treaty of Paris marked the end of the Seven Years War. In North America, it was known as the French and Indian War. Through this treaty, France ceded all of its lands in North America to Britain and Spain.

[52] See http://indigenousfoundations.arts.ubc.ca/home/government-policy/royal-proclamation-1763.html (Accessed September 30, 2016).

[53] See Robin Fisher, "Joseph Trutch and Indian Land Policy," B. C. Studies 12 (Winter 1971-72): 3-33.

[54] See "R v. Sparrow" *Judgements of the Supreme Court of Canada,* 1990, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do (accessed October 3, 2016).

As already explained, to resolve the case of Johnson v M'Intosh, the U.S.A. Supreme Court drew on the Doctrine of Discovery to affirm the British (Europeans) and their successors (the U.S.A. government) as the ones entitled to the lands of the Indigenous peoples. By drawing on such an important case from U.S.A. legal history, Canada effectively also traced land disputes in Canada to the Doctrine of Discovery. It is not surprising that while the R v. Van der Peet (1996) decision says the law must help "the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown." (s.31), it is also clear that it is the rights of the Indigenous peoples that need proving in the courts; the sovereignty of the Crown is taken as a given. [55]

Such claims to the sovereignty of the Crown, I would argue, rest on the Doctrine of Discovery, European colonialism and the occupation of Indigenous lands considered *terra nullius*. The Doctrine of Discovery was institutionalized in law and policy, on national and international levels, and lies at the root of the violations of Indigenous peoples' human rights, both individual and collective. This has resulted in state claims to the massive misappropriation of the lands, territories and resources of Indigenous peoples and systematic attempts to destroy their cultures and traditions. [56]

3. Australia

For the most part, colonial dominion was the precipitating factor that voided Indigenous peoples' ability to dispose of their lands as they saw fit, along with their claim to ownership. The principle of law as imposed by imperial forces became the central mechanism governing the colonial approach to Indigenous lands all over the world. For example, in Australia the courts alluded to *terra nullius* as the principle governing land disputes between settler and Indigenous groups (*Rex v Tommy* (1827), indicating the Indigenous inhabitants were subject only to English law. The Court further reinforced this decision in *Rex v. Boatman or Jackass and Bulleyes* (1832) and *Rex v. Ballard or Barrett* (1829). In the same way, Governor Bourke of New South Wales cited the significance of *terra nullius* for the treaty between John Batman and Wurundjeri elders (1835). According to him, the treaty was invalid because Indigenous Australians could not sell or assign land, nor could an individual person or group acquire it, other than through distribution by the British Crown. Other cases from the region display how the land had been considered "deserted and uncultivated" despite the presence of Indigenous peoples living in the areas in question. [57]

As I have shown, the Doctrine of Discovery and the dispossession of Indigenous lands have a direct connection with Western European and Anglo North Atlantic imperialism and expansionism. [58] The operative principle was that of *res nullius*, which was reified as the law of the first taker at the end of the 18th century.[59] The principle was applied in various ways in different contexts, but as I indicated earlier, the move from *res nullius* to *terra nullius* took place by way of analogy. No early documents actually use the term.

The earliest documented use of *terra nullius* (or *territorium nullius*) internationally was in 1887 when F. de Martitz was commissioned by the Institute of International Rights to reflect on this question. In his report

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[55] In practical terms, the default understanding of the Canadian legal system is that the territory is Crown land (even if Crown officials and settlers have never set foot on it), unless an Indigenous community proves to a court's satisfaction that it has exclusive occupation or control of a territory. Second, even if an Indigenous community can prove that they have title or a treaty right, "that right is always potentially subject to infringement by the Crown" (Senwung Luk, "Ditching the doctrine of discovery and what it means for Canadian Law" Blog http://www.oktlaw.com/blog/ditching-the-doctrine-of-discovery-and-what-that-means-for-canadian-law/ (accessed September 20, 2016]).

[56] See "The Doctrine of Discovery" and *Terra Nullius*: A Catholic Response," http://www.cccb.ca/site/images/stories/pdf/catholic%20response%20to%20doctrine%20of%20discovery%20and%20tn.pdf (Accessed September 13, 2016).

[57] Other cases that draw on the concept of *terra nullius* from the New South Wales Supreme Court are *Rex v Murrell and Bummaree* (1836), Cooper v Stuart (1889) and, more recently, the controversial case of *Milirrpum v Nabalco Pty Ltd*, (1971).

[58] Fitzmaurice, "The Genealogy of Terra Nullius," 1.

[59] Ibid., 8.

he insisted that all regions "which do not find themselves effectively under the sovereignty or the Protectorate of one of the States which form the community of the law of nations, no matter whether this region is inhabited or not, will be considered as *territorium nullius*." [60] Rejecting the rights of the Indigenous peoples, he asserted: "It is an exaggeration…to talk about the sovereignty of savage or half-barbarian peoples." [61] The term also emerged in international law during the dispute of Spitzbergen between Sweden and Russia in 1871. While the actual dispute contains allusions to the law of the first taker, it was not until 1908 that the Italian international jurist Camille Piccioni used the term in 1909 to describe the island. The term has appeared in other instances. For example, the International Court of Justice (1961-1970) used the language of *terra nullius* to refer to the Western Region of the Sahara Desert. [62]

I close this section by noting an important tension: while *res nullius* was often used to argue that a particular land or peoples could not be occupied, as in the case with Vitoria, "*territorium nullius* was clearly intended to be used to declare that certain territories could be subject to occupation, although it too was employed by critics of colonization." [63] Both terms trace their lineage to the natural law of the first taker.

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[60] Cited in Fitzmaurice, "The Genealogy of Terra Nullius," 10-11.

[61] See Fitzmaurice, "The Genealogy of Terra Nullius," 4-5.

[62] Fitzmaurice, "The Genealogy of Terra Nullius," 12.

Bible, Theology and the Doctrine of Discovery

The interwoven character of Christianity with Western European cultures, identities and self-perceptions shaped the encounter between Europeans and the Indigenous peoples of the Americas. There is no doubt that the Bible and Western versions of Christianity influenced how Europeans saw the lands of the Americas where biblical imagery functioned as an interpretive reference point. The Spanish thought that the entrance of the Orinoco River in today's Venezuela corresponded with the biblical Garden of Eden. When they found tall people in the Caribbean, they thought of them as relatives of the biblical Philistines. As the Spanish and Portuguese sought to make sense of the Indigenous peoples in relation to the creation event, some also came to think of them as related to the 12 tribes of the people of Israel. [64] These and other biblical images can be found in the writings of the Spanish and Portuguese *conquistadors*, all of which fed into the self-perceived *right* of "Christians" to take the lands.

The British were also influenced by paradisiacal imagery in the Bible. The King James Bible itself was inspired by the stories recounted by the early arrivals to the "New World." [65] Five key biblical-theological motifs can be found that were instrumental in justifying the taking of Indigenous lands and which corresponded with the Doctrine of Discovery. First, early settlers carried with them the hope of Christianity. They also brought along a supersessionism which combined with the European self-perception of superiority. During the Middle Ages, a shift had taken place in the way some European Christians saw themselves. Many, including Martin Luther, thought that Christians were the new Israel, replacing biblical Israel. [66] Experiencing diaspora, the settlers who arrived in the Americas interpreted their experiences as those of the people of exiled Israel. These ideas can be found among some church traditions. Notions of cultural and racial superiority prevented early European settlers from seeing the rich civilizations and cultures around them. Instead, they saw the inhabitants as savages, marked them for exploitation, and took their lands.

Second, because settlers saw themselves as the "new Israel," an ethos of divine chosenness emerged. The settlers began to think of themselves as the people of Israel going into the "promised" land of Canaan. They saw the lands as the "patrimony" promised to them, and viewed the Indigenous peoples as the Canaanites, whom they needed to eradicate or displace in order to inherit the lands. [67] They saw the Indigenous as obstacles to building the "New Jerusalem."

Third, the cultural mandate in the Genesis account inspired the move westward. Settlers interpreted the Genesis 9:7 mandate to "be fruitful and multiply" as a call to occupy the "uninhabited" lands; they were a gift of God to the "Christians." The social landscape changed rapidly because of increased European immigration, which caused many not to find jobs or land to farm. The biggest pull to the west was the "promise" of finding new land and being able to "purchase" it at low prices. While many saw this move west with optimism, the rapid waves of settlers contributed to encroaching, displacement, and ultimately the loss of Indigenous lands.

Fourth, there was a clash between Indigenous and European attitudes toward the land. As an extension of misplaced biblical notions of "dominion" over creation, many Western Europeans saw the land as a resource to

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[63] Fitzmaurice, "The Genealogy of Terra Nullius," 12.

[64] Phelipe Guamán Poma de Ayala, *La obra de Phelipe Guamán Poma de Ayala*, editado y compilado por Arthur Posnansky (La Paz, Bolivia: Editorial del Instituto "Tihuanacu" de Antropología, Etnografía y Prehistoria, 1944), Folio 97-120.

[65] Adam Nicolson, *God's Secretaries: The Making of the King James Bible* (New York, NY: Harper Collins Publishers, 2003).

[66] Eric W. Gritsch, *Martin Luther's Anti-Semitism: Against His Better Judgment* (Grand Rapids, MI: William B. Eerdmans, 2012).

[67] See Stephen T. Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, Colo: Fulcrum Publishing, 2008).

be exploited. Furthermore, influenced by John Locke's "Labour Theory of Property", they viewed the "mixing of labour" with land as a source of ownership. Indigenous ideas of respect for the land and living in harmony with creation were replaced with strong attitudes in favour of the exploitation/extraction of natural resources which continues today with profound destructive implications.

Fifth, following the mandate to evangelize the Indigenous peoples, Western Europeans (British and French) understood that Western style education was central to evangelization. Churches sought the support of the government to make it compulsory to take the Indigenous children away from their communities in order to ensure their assimilation (read advance) into the European colonial societies. Because of the "responsibility" of the Canadian government for Indigenous peoples, Indigenous children were declared wards of Canada. In order to accomplish both education and evangelization, churches participated in the forceful removal of Indigenous children from their communities, and in the severing of all connections to their ethnic and cultural traditions. The intention of evangelization and education was to remove the "Indian" and to save the human.

Apologies from Churches

As I have mentioned, there were Christians who did not support the European colonial invasion of the Americas. Nor did they remain silent in the face of atrocities against Indigenous peoples. Las Casas, Vitoria, and Antonio de Montesinos are three names of a long list of clerics and lay people who opposed the abuses and violence against the Indigenous peoples of the Americas. [68]

As early as 1537, Paul III issued *Sublimis Deus,* which affirmed God's love for all humanity, including the Indigenous peoples. By affirming that they have the ability to come to the Catholic faith, he effectively rejected ideas that the Indigenous are subhuman – dumb brutes created for "our service," that they are incapable of receiving the Catholic faith, and therefore could be enslaved or deprived of their possessions. [69] Similarly, Pope Urban VIII (1623-1644) formally excommunicated anyone still holding Indigenous slaves. He tackled the abuse of the Indigenous peoples in *Commissum Nobis* (1639) and Benedict XIV condemned the enslavement and abuse of Indigenous peoples in *Immensa Pastorum* (1741). Benedict XIV explicitly confirmed the teachings of Paul III and declared the automatic excommunication of any Catholic involved in the slave trade. This condemnation was affirmed later by Gregory XVI's apostolic letter *In Supremo* (1839) where he condemned the very institution of slavery in Africa and the Americas. It was followed by a similar document by Pope Leo XIII, *In Plurimis* (1888).

These encyclical and official papal documents demonstrate a development in the Catholic Church's view of the Indigenous peoples of the Americas. In Canada, more recently, John Paul II (1987) addressed a gathering of Indigenous people at Fort Simpson, Northwest Territories, recalling the words of Paul III in 1537, when he affirmed the rights of the Indigenous peoples of those times, and asserted, "they could not be enslaved or deprived of their goods or ownership." [70] During his visit to the Dominican Republic (1992), the pope went apologized to Indigenous peoples for the "pain and suffering" caused to them during the 500 years of the church's presence on the continent. In 2015 during his visit to Bolivia, Pope Francis reiterated the apology issued by John Paul II, and asked for "forgiveness, not only for the offenses of the church herself, but also for crimes committed against the native peoples during the so-called conquest of America." [71] He added, "I say this to you with regret: many grave sins were committed against the native peoples of America in the name of God. . . . Like St. John Paul II, I ask that the Church 'kneel before God and implore forgiveness for the past and present sins of her sons and daughters'." [72]

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[68] In addition to Las Casas, there were a good number of clerics who opposed the Spanish invasion and occupation of the Americas. Among them are Antonio de Valdivieso of Nicaragua (1544-1550), Cristobal de Pedraza of Honduras (1545-1583), Pablo de Torres of Panama (1547-54), Juan del Valle of Popayan (1548-63), Fernando de Uranga of Cuba (1552-56), Tomas de Casillas of Chiapas (1552-97), Bernardo de Alburquerque of Oaxaca (1559-79), Pedro de Angulo of Vera Paz (1560-62), Pedro de Agreda of Coro (1560-80), Juan de Simancas of Cartagena (1560-70), Domingo de Santo Tomas of La Plata (1563-70), Pedro de la Pena of Quito (1666-83), and Agustin de la Coruna of Popayan (1565-90). These bishops risked everything. They "were expelled from their dioceses, imprisoned, expatriated and suffered death for the Indians... The idealists – if we may use the expression – of the liberation of the Indians were the theologians of the Convent of San Esteban in Salamanca....only three of the bishops mentioned above were not Dominicans." Cited in Pérez García and Martínez Real, *In Evangelical Solidarity with the Oppressed,* 23.

[69] Paul III wrote:

> We . . . consider. . . that the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it. . . . We define and declare . . . that . . . the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and have no effect." (Pope Paul III, *Sublimus Deus* (Encyclical on the Enslavement and Evangelization of Indians), 1537. http://www.papalencyclicals.net/Paul03/p3subli.htm (accessed September 25, 2016]).

[70] John Paul II, Address at Fort Simpson, NWT (September 20, 1987). John Paul II made a very similar statement, also citing Paul III, at the Yellowknife Airport on September 18, 1984 when fog prevented his plane from landing in Fort Simpson during his first papal visit to Canada. See "The 'Doctrine of Discovery' and *Terra Nullius*: A Catholic Response. Concanan Inc. 2016. http://www.cccb.ca/site/images/stories/pdf/catholic%20response%20to%20doctrine%20of%20discovery%20and%20tn.pdf (Accessed September 25, 2016).

[71] See "Pope Apologizes for Church's 'Offenses' against Indigenous" *New York Post*, July 9, 2015, http://nypost.com/2015/07/09/pope-apologizes-for-churchs-offenses-against-indigenous/ (accessed August 15, 2016).

[72] See "The Doctrine of Discovery" and *Terra Nullius*: A Catholic Response," http://www.cccb.ca/site/images/stories/pdf/catholic%20response%20to%20doctrine%20of%20discovery%20and%20tn.pdf (Accessed September 13, 2016).

Implicit in some of these papal documents is the connection between the lands of the Indigenous peoples, the Doctrine of Discovery, and Western European colonization. More to the point, the Bull *Inter Caetera*, the papal document where the Doctrine of Discovery is crystallized, made headlines throughout the 1990s and in 2000, when many Catholics petitioned Pope John Paul II to formally revoke it and recognize the human rights of Indigenous "non-Christian peoples." In the case of *Inter Caetera*, in 2010 the Holy See declared at the United Nations that "*Inter Caetera* has already been abrogated" and is "without any legal or doctrinal value." [73] It is not surprising that the Truth and Reconciliation Commission in Canada has called for the repudiation of the Doctrine of Discovery and *terra nullius* because they impede the affirmation of the rights and sovereignty of the First Nations, Métis, and Inuit.

In Canada, the Catholic, Anglican, Presbyterian, and United Church at their various levels of church leadership have extended their apologies to the Indigenous peoples for the role they played in the residential schools, and the concomitant destruction of Indigenous cultures and traditions. Other churches like the Mennonites and Pentecostal Assemblies of Canada have also expressed their apologies. These and other churches are now working toward exploring the implications of repudiating the doctrine of the discovery for their church communities. Prime Minister Stephen Harper (2008) apologized for the role of the Canadian government in the Residential schools. The Indian Residential Schools Settlement Agreement (IRSSA) made it possible for the creation of the Truth and Reconciliation Commission (TRC) to take place. Local church communities and national church bodies are now grappling with the implications of the recommendations of the TRC as they struggle to come to terms with their complicity and endeavor to discern a pathway toward reconciliation.

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[73] See "The Doctrine of Discovery" and *Terra Nullius."*

[74] Fitzmaurice claims:

> "The cultural disposition that produced *terra nullius*, particularly attitudes to the exploitation of nature and the belief that property is created by use, permeated the entire experience of European expansion. It was for this reason that the legal history that produced terra nullius was able to stand for some time as a reasonable account of how Europeans justified colonisation in Australia. *Terra nullius* was not just a description of those justifications…but their product" (Fitzmaurice, "The Genealogy of Terra Nullius," 14).

Final Comments

Repudiating the Doctrine of Discovery is not a stand-alone action. The Truth and Reconciliation Commission in Canada invites us to repudiate it in Call to Action #49. The goal of the TRC is restoration of right relations between the First Nations, Métis, and Inuit and settler groups, as well as later immigrant groups. As I have insisted, the Doctrine of Discovery along with the principles of *res nullius* and subsequently *terra nullius* are deeply connected to Western European and Anglo North Atlantic colonization. The structures of colonization were rooted in domination, occupation, a racialized hierarchical cataloguing and organization of entire populations, and the commodification of natural resources. [74] These elements continue to have profound effects on the way our societies, including in Canada, are organized. They also shape the way peoples from different ethnocultural backgrounds interact with each other. A repudiation of the Doctrine of Discovery and *terra nullius* beckons us into a stance against all forms of racialized discrimination and in support of social, economic, and political justice and equality. It is also a key measure toward recovering a relationship of balance with creation.

As we have seen, the history of Christian law helps us to understand how many people who were part of the structures of colonial power undertook monstrous acts in the name of liberty. It is true that some people were sincerely governed by ideals of Christian discovery. Even as far back as Columbus, there were religious and political leaders, as well as ordinary citizens, who knew better and worked against racism, colonization, and slavery. Yet this insight into the prevailing ideas of the day does not excuse heinous behaviour, especially on the part of some who knowingly acted out of self-interest, greed, and bigotry. In the context of Canada, it is astonishing that a country founded on the "rule of law" could move from a policy of establishing treaties with Indigenous peoples to one of complete domination and destruction of their traditions and cultures. The Doctrine of Discovery played a central role in this shift, and its repudiation can bring us closer to restoring right relationships with the Indigenous peoples.

The following is a list of the multiple church organizations, institutions, and communities who have offered their apologies to the First Nations, Métis and Inuit.

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