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Andrew Fitzmaurice

Excerpt

[More information](#)

## CHAPTER I

*Introduction*

This book concerns one of the most common explanations in Western political thought for the origin of property and, for that matter, the beginning of political society. That explanation for property and sovereignty is the law of occupation: namely, the notion that something which belongs to nobody becomes the property of the first person to take it. This book examines the history of the ways in which the idea of occupation was used by theologians, philosophers, publicists, jurists and colonisers over the course of several hundred years from medieval law through to the Space Race. My focus will be upon instances in which these people used the idea of occupation to debate the justice of European overseas empires. I focus upon empire in part because arguments of occupation held a central role for Europeans in their understanding of what they were doing in establishing empires. Moreover, the concept of occupation was equally important, as I shall show, to a sustained critique of and opposition to empire from the sixteenth century to the twentieth century. Whether as a justification or critique of empire, the law of occupation was a common denominator in European understandings of property, sovereignty and empire, tying these concepts into a complex and evolving interrelationship for the duration of modern European history.

For a generation now, historians and other scholars in the humanities and social sciences have shown that Western political thought was deeply implicated in the creation of modern European empires and the abuses associated with those empires. Canonical political theorists, such as Hugo Grotius, John Locke, Emer de Vattel, John Stuart Mill and Alexis de Tocqueville, developed their understandings of freedom, rights, free trade, sovereignty and the law of nations in the context of rationalising European states' overseas empires. My purpose in this book is to show that Western political thought was more fractured and divided than these accounts allow for. While there is no question about the complicity of Western political thought in empire, many writers on political thought over the past

500 years expressed grave doubts about the justice of empire. One of their principal tools in expressing those concerns was the idea of occupation.

While occupation remained central to understandings of property and sovereignty over the several hundred years covered by this book, my concern is above all with changes in those understandings over time. Two transformations, in particular, are salient. In medieval Europe, the idea of occupation, or *occupatio*, was used to explain how people came to have rights in things. Indeed, *occupatio* was one of the most important medieval explanations for the origin of rights, and discussions of occupation were amongst the earliest discussions of how a person could have a right in something. At the same time, it justified the idea of property. Thus, the earliest analyses of rights were also discussions of rights in property.<sup>1</sup> In these medieval texts we may therefore find the beginnings of a possessive rights discourse that came to dominate Western political thought.<sup>2</sup> As occupation assumed a great role in debates over European overseas empires, those discussions largely turned around a discourse of possessive rights. If we seek the ideological underpinnings of the possessiveness of modern European empires, a good place to start is with the medieval idea of occupation, but in these medieval analyses, occupation remained primarily a tool of legal and political discourse. The medieval theory of occupation as a theory of rights lacked an element that would drive the massive appropriations of territory that were characteristic of European expansion: namely, the link between the idea of occupation and economic progress. That economic element was established by the first transformation of the idea of occupation.

Prior to the seventeenth century, political discourse had little to say about economics and commerce other than to be sceptical of the corrupting effects of wealth upon the political process. With the growing

<sup>1</sup> Brian Tierney, *The idea of natural rights* (Grand Rapids, 1997); Richard Tuck, *Natural rights theories: their origins and development* (Cambridge, 1979).

<sup>2</sup> There are long-standing debates over the modern history of possessive discourse. One conclusion that can be drawn from these debates is that theories of possessive rights pre-dated the rise of liberalism in the nineteenth century. For some scholars, identifying ‘possessive individualism’ means pushing back the origins of liberalism to a time when the term did not exist. C. B. Macpherson, *The political theory of possessive individualism* (Oxford, 1962) is the most celebrated contribution to this interpretation. For others, such as Brian Tierney and Richard Tuck, the presence of possessive rights theories in medieval jurists’ writings indicates that there is more to liberalism than possessive rights. See also Jeremy Waldron, *The right to private property* (Oxford, 1988), p. 93, who argues that individualistic political theory is not exclusively the product of capitalism. This is not to diminish competing and also complementary traditions within Western political thought, such as those which concern duties: see Quentin Skinner, *The foundations of modern political thought*, 2 vols. (Cambridge, 1978).

*Introduction*

3

commercial wealth of European nations in the seventeenth and eighteenth centuries, writers on politics increasingly sought ways to reconcile theories of politics with commercial life. The greatness and even the survival of modern states were now understood to be based upon wealth. This meant that European states sought political self-preservation not in military power, as had been the case for the Romans and Renaissance Italians, but in commercial power.<sup>3</sup> Modern history, according to David Hume, began in the seventeenth century when economics began to be perceived as an ‘affair of state’.<sup>4</sup> Scarcely any ancient writer, he observed, had anything to say about the relation between politics and economics, and ‘even the Italians have kept a profound silence with regard to it’.

The understanding of occupation was taken up in the new concern with political economy. In the sixteenth century, in the lectures and writings of Spanish theologians and jurists, particularly the so-called School of Salamanca, occupation was used to examine economic as well as political and legal questions. Between the seventeenth and eighteenth centuries, the idea of occupation was increasingly used – for example, by John Locke and Adam Smith – to explain the historical progress of human societies from a hypothetical state of nature to an agricultural state. These philosophers and historians would argue that it was through the occupation of land and goods that humans were able to preserve themselves and, in so doing, create civil societies. Indeed, the idea of occupation was pivotal to the development of an understanding of human history in terms of economic progress. Moreover, these early modern authors stressed that occupation could not simply be a taking of something ‘with the hands’, as it had been for medieval authors. Rather, they argued that occupation was only achieved by *use* or, in Locke’s terms, improvement. Thus, occupation introduced an understanding of property in terms of the exploitation of nature. This process of exploitation is what drove society from one step in history to the next.

Occupation was a key idea, therefore, for both the medieval understanding of rights and the early modern understanding of history as progress. The notion of a stage in human society that possessed superior rights to preceding stages was created by the combination of the two discourses of

<sup>3</sup> Istvan Hont, *Jealousy of trade: international competition and the nation-state in historical perspective* (Cambridge, MA, 2005); Andrew Fitzmaurice, ‘The commercial ideology of colonisation in Jacobean England: Robert Johnson, Giovanni Botero and the pursuit of greatness’, *William and Mary Quarterly*, 64(4) (2007), 791–820; Andrew Fitzmaurice, ‘Neither neo-Roman nor liberal empire’, *Renaissance Studies*, 26(4) (2012), 479–90.

<sup>4</sup> Hont, *Jealousy of trade*, p. 8.

rights and progress, in each of which occupation was a common element. And it was this concept of occupation, combining rights and progress, that provided an immensely powerful justification for modern empires. The most persistent idea driving European expansion was not religious righteousness, nor was it simply the superiority of European civilisation. Rather, it was the notion that states, and indeed humanity itself, could only preserve themselves through the exploitation of the earth's resources to which all people had a common right, but to which particular people gained superior and particular rights through their acts of exploitation or occupation. Therefore, the first great transformation of the idea of occupation was from being a term of legal and political discourse to also being central to economic discourse. It hardly needs to be pointed out that the current environmental predicament of the planet is the consequence of the development of an understanding of property in terms of the exploitation of nature, combined with the globalisation of the consequences of that understanding through its link to European expansion.

While early modern agents of empire pursued the occupation of territories outside Europe, they feared the wealth and commerce that occupation could produce or, defensively, they sought to portray their activities as being consistent with the politics of virtue. The use of *occupatio*, and Roman law more generally, to think about the justice of empire reflected, at least until the eighteenth century, Europeans' disposition to analyse what they believed to be the greatest ever empire, the Roman Empire, in order to understand the new empires they were creating.<sup>5</sup> Roman historians and moral philosophers taught that the means of establishing empire was through the exercise of martial virtues, but, as Sallust in particular pointed out, that conquest created riches and luxury which effeminised the same martial culture and led to decline.<sup>6</sup> As commercial society developed in the seventeenth and eighteenth centuries, philosophers and historians sought ways to overcome the neo-Roman fears that wealth was a cause of corruption. David Hume and Charles-Louis de Secondat, Baron de Montesquieu, inverted the Sallustian account of empire by arguing that the

<sup>5</sup> Anthony Pagden, *Lords of all the world: ideologies of empire in Spain, Britain and France* (New Haven, 1995); David Armitage, *The ideological origins of the British Empire* (Cambridge, 2000); J. G. A. Pocock, *Barbarism and religion: the first decline and fall*, vol. 3 (Cambridge, 2003); Andrew Fitzmaurice, *Humanism and America: an intellectual history of early English colonisation, 1500–1625* (Cambridge, 2003); Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman foundations of the law of nations: Alberico Gentili and the justice of empire* (Oxford, 2010); David A. Lupher, *Romans in a new world: classical models in sixteenth century Spanish America* (Ann Arbor, 2003).

<sup>6</sup> Pagden, *Lords of all the world*; Armitage, *Ideological origins of the British Empire*; Pocock, *Barbarism and religion*; Fitzmaurice, *Humanism and America*.

Cambridge University Press

978-1-107-07649-5 - Sovereignty, Property and Empire, 1500–2000

Andrew Fitzmaurice

Excerpt

[More information](#)*Introduction*

5

danger to civil society was not commerce, but the martial cultures that were needed to maintain the large landed empires.<sup>7</sup> Those empires generated conflicts such as the Seven Years' War (1756–63) that imposed burdensome taxes upon the metropolis. The critics opposed the occupation, or settlement, of large landmasses, as had been the case in the Americas, and proposed instead that European influence could be extended through commerce, or an empire of trade – the *douceur* of commerce, attributed to Montesquieu – without conquest.<sup>8</sup> Their hopes were realised, to some degree, in the ideologies and practices of the so-called 'second' empires of the nineteenth century that sought control over sovereignty rather than the large-scale settlement of land.<sup>9</sup>

The second transformation of the understanding of occupation was in a greater refinement of its application to the progressive idea of history and, in particular, the development of a concept that was appropriate to commercial empire rather than the continental empires of the Spanish, Portuguese, French and English in the Americas. While occupation was used in medieval discourse and in the sixteenth century to examine rights of property, and in the seventeenth and eighteenth century to explain the development of agricultural society, by the nineteenth century it was used

<sup>7</sup> Albert O. Hirschman, *The passions and the interests: political arguments for capitalism before its triumph* (Princeton, 1997), p. 60; Pagden, *Lords of all the world*, p. 115. See also Céline Spector, 'Was Montesquieu liberal?', in Raf Geenans and Helena Rosenblatt (eds.), *French liberalism from Montesquieu to the present day* (Cambridge, 2012), p. 68 on Montesquieu's portrayal of the harmful aspects of commerce.

<sup>8</sup> Spector points out that although Montesquieu establishes a 'correlation' between softness and commerce, he does not actually use the terms 'doux commerce' or 'la douceur du commerce' – these being attributed to him in the work of Albert Hirschman and Pierre Rosanvallon. See Spector, 'Was Montesquieu liberal?'

<sup>9</sup> On the decline of continental empires and the rise of commercial empires, see: John Gallagher and Ronald Robinson, 'The imperialism of free trade', *Economic History Review*, 6(1) (1953), 1–15; Pagden, *Lords of all the world*; Anthony Pagden, 'Empire and its anxieties', *American Historical Review*, 117(1) (2012), 141–8; Anthony Pagden, 'Fellow citizens and imperial subjects: conquest and sovereignty in Europe's overseas empires', *History and Theory*, 44(4) (2005), 28–46; Jörg Fisch, 'Law as a means and an end: some remarks on the function of European and non-European law in the process of European expansion', in W. J. Mommsen and J. A. De Moor (eds.), *European expansion and law: the encounter of European and Indigenous law in 19th and 20th-century Africa and Asia* (Oxford, 1992), p. 28; George Steinmetz, 'Imperialism or colonialism? From Windhoek to Washington, by way of Basra', in Craig Calhoun, Frederick Cooper and Kevin W. Moore (eds.), *Lessons of empire: imperial histories and American power* (New York, 2005), p. 140, who distinguishes modern territorial empires from 'imperialism'; Charles Maier, *Among empires: American ascendancy and its predecessors* (Cambridge, MA, 2006). Carl Schmitt, *The nomos of the earth in the international law of the jus publicum Europaeum*, trans. G. L. Ulmen (New York, 2003 [1950]) argues that European continental empires gave way to American informal empire, although, due to his focus upon land, he has little to say about European informal empires other than to acknowledge the doctrine of extraterritoriality and to observe: 'In the nineteenth century, special forms of European extraterritoriality and consular jurisdiction were developed for half-civilized and exotic countries' (p. 172).

Cambridge University Press

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Andrew Fitzmaurice

Excerpt

[More information](#)

to understand rights of sovereignty when European empires turned increasingly to political rather than material appropriations: that is, to controlling other peoples' land, labour and capital rather than supplanting or exterminating them through colonisation.

This is not to argue for a clear break between early modern continental empires and post-Enlightenment commercial empire. The foundations of commercial empires were in the Dutch and English East India Companies established in the early seventeenth century.<sup>10</sup> In the seventeenth century, Samuel Pufendorf rejected the idea that sovereignty could be occupied and restricted the possibility only to property, but when Enlightenment philosophers such as Jean-Jacques Rousseau embraced the idea of the occupation of sovereignty, they reached back to Hugo Grotius, who had developed the concept partly in relation to his work for the Dutch East India Company. Moreover, while the nineteenth century saw a growing emphasis upon 'free trade imperialism', to use John Gallagher and Ronald Robinson's term, it also witnessed the establishment or consolidation of new settler societies, for example, in Australia and New Zealand. By the end of the nineteenth century and the beginning of the twentieth century, a number of commercial protectorates, such as in Africa, were increasingly brought under direct forms of rule. Thus, the focus for occupation was constantly shifting between property and sovereignty.

It is possible, however, to identify a particular nineteenth-century preoccupation with the occupation of sovereignty in legal discourse – an attempt to develop a legal framework for commercial empires. The idea of occupation was used by nineteenth-century jurists to extend the progressive theory of history through the development of a hierarchical understanding of sovereignty. In light of the complex shifts between territorial and commercial empires, the notion of the occupation of sovereignty reflected these jurists' ideals as much as it articulated imperial realities. While many were prepared to concede that non-European peoples possessed forms of sovereign civil society, they claimed that those sovereignties were 'personal' and thus comparable with the feudal societies of medieval Europe. Territorial sovereignty, they argued, was only to be found in modern states. Such states were to be placed higher in the progress of

<sup>10</sup> This is not to argue that these companies were purely commercial enterprises. See Philip J. Stern, *The company-state: corporate sovereignty and the early modern foundations of the British Empire in India* (Oxford, 2011) on the sovereign political ambitions of the seventeenth-century English East India Company. On the links between corporations and political sovereignty more generally, see F. W. Maitland, *State, trust and corporation*, eds. David Runciman and Magnus Ryan (Cambridge, 2003); and Joshua Barkan, *Corporate Sovereignty* (Minneapolis, 2013).

Cambridge University Press

978-1-107-07649-5 - Sovereignty, Property and Empire, 1500–2000

Andrew Fitzmaurice

Excerpt

[More information](#)*Introduction*

7

history and therefore possessed superior rights, just as seventeenth-century Europeans had argued that agricultural society possessed superior rights to people living in a supposed state of nature. Having thus extended the progressive theory of history, these jurists argued that it would be possible to occupy the territorial sovereignty of lands where such sovereignty had not already been ‘taken’, including over the ‘personal’ sovereignties of Africa and Asia. This understanding of occupation was closely tied to and extended by the unequal treaties employed in the nineteenth century. Contrary to the Westphalian myth, the possibility that one form of sovereignty could be contained within another, in this case personal sovereigns subsumed within territorial sovereigns, like Chinese boxes, was no more alien to the nineteenth century than it was to the Italian jurist Bartolus of Saxoferrato (1313–57) in the fourteenth century.<sup>11</sup> The idea of occupation did not merely reflect these changes, but was also used to drive and shape them. It was in part the critique of the occupation of property in the first European overseas empires, which reached its peak during the Enlightenment, that inspired the development of a theory of imperial occupation restricted to sovereignty, and that idea in turn served to legitimise the commercial empires of the nineteenth and twentieth centuries.

We may well ask why European states felt it necessary to legitimise their expansion overseas. There were moments, as we shall see, for example, in the first year in which the Virginia Company established a colony in the Chesapeake in 1607, in which colonisers discussed whether justification was desirable or necessary, and concluded that silence on such questions was prudent. More frequently, modern European empires went to great lengths to justify their existence. The language of justice defined and extended what it was possible to do. Although empires are almost always autocratic to a degree, they nevertheless find it necessary to provide some form of self-rationalisation. Power may come from the barrel of a gun, but force cannot be successfully sustained, even in the more Machiavellian understandings of politics, as an everyday means of establishing political compliance (as Machiavelli himself stressed). Indeed, autocratic regimes need to work harder at establishing their legitimacy than do popular forms of government in which legitimacy is a premise of the political system. For

<sup>11</sup> Edward Keene, *Beyond the anarchical society: Grotius, colonialism and order in world politics* (Cambridge, 2002) argues that the Westphalian ideal of non-intervention and sovereign equality was reserved for relations between European states, while the notion of divisible sovereignty was employed for empire.

Cambridge University Press

978-1-107-07649-5 - Sovereignty, Property and Empire, 1500–2000

Andrew Fitzmaurice

Excerpt

[More information](#)

global empires, force is further limited by the need to stretch resources over distance, so the cohering power of ideology assumes even greater importance. Moreover, justifications of empire were more likely to be aimed at metropolitan rather than subject audiences. The need to justify European empires reflected metropolitan concerns about the dangers of expansion, and a concern, with deep roots in Roman and Greek thought, that civil society should embrace a group of people in close communication with each other, without recourse to long journeys.<sup>12</sup> Opponents of empire, as we shall see, were quick to point to such dangers and to injustices.

Between the fifteenth and the seventeenth centuries, the Spanish justified their conquests in the Americas *as* conquests.<sup>13</sup> From the seventeenth century, the English, French and Dutch were more disingenuous than the Spanish in their understanding of what constituted legitimate expansion. They represented what would appear to any neutral observer as conquests – that is, the taking of something that belongs to somebody else – to be something altogether different. They claimed that they were taking things that belonged to nobody, albeit that the lands they took were inhabited by other peoples. They called this the ‘occupation’ of territory and they distinguished it from conquest. It is hard to legitimise taking things that belong to other people, but much easier to justify taking things that belong to nobody.

The disingenuous claim to occupy became the dominant justification of European empires between the sixteenth and twentieth centuries, albeit that imperial powers also used other important kinds of justifications for taking territory. With diminishing conviction, the Portuguese and the Spanish appealed to the Papal Bull *inter caetera* of 1493 and the 1494 Treaty of Tordesillas, which together partitioned the newly discovered lands of the world between the two powers – the West for Spain and the East for Portugal. While the Spanish also claimed the right of conquest, the French in seventeenth- and eighteenth-century New France made numerous agreements and alliances with various North American nations, although they made only one formal treaty.<sup>14</sup> English colonisers in North America, and subsequently the United States, made extensive use of

<sup>12</sup> Pagden, *Lords of all the world*, p. 61.      <sup>13</sup> *Ibid.*, pp. 64–6.

<sup>14</sup> On the Spanish claim to the right of conquest, see Pagden, *Lords of all the world*. On French claims, see Alain Beaulieu, ‘The acquisition of aboriginal land in Canada: the genealogy of an ambivalent system (1600–1867)’, in Saliha Belmessous (ed.), *Empire by treaty: negotiating European expansion, 1600–1900* (Oxford, 2014); and Brian Slattery, *French claims in North America 1500–1559* (Saskatchewan, 1980).



*Introduction*

9

treaties or land purchases (with varying degrees of integrity).<sup>15</sup> The Dutch relied upon treaties in the East Indies in the seventeenth century.<sup>16</sup> And in the nineteenth century, European states and companies made numerous treaties throughout Africa and the Pacific.<sup>17</sup> While explorers and politicians persisted with claims of discovery, jurists insisted that original title came from occupation and that derivative title came from conquest and cession. Their arguments increasingly had an impact upon practice. Even when claiming rights from cession, discovery and conquest, European powers often complemented these claims with the sometimes contradictory argument that they were taking something that, in any case, belonged to nobody. Moreover, increasingly from the eighteenth century, a distinction was made between the occupation of sovereignty, by which European empires claimed their titles, and the purchase of property through treaties, often employed by settlers themselves. This linking of occupation and treaty was common in North America in the eighteenth century and in Africa in the nineteenth century.

While all empires seek justification, the terms upon which they do so are contingent: that is, they are determined by the particular context and circumstances of each. The use of occupation to justify modern European empires was shaped by the Reformation. The concern with behaving justly to other peoples – or, rather, with being seen to behave justly – was not based upon a common sense of humanity, albeit that such notions were often employed in the justifications. Although the concern with justice contained a commitment to universal values, that commitment was motivated by narrow self-interest rather than universality for its own sake.

<sup>15</sup> Stuart Banner, *How the Indians lost their land: law and power on the frontier* (Cambridge, MA, 2005), pp. 49–95; Cynthia van Zandt, *Brothers among nations: the pursuit of intercultural alliances in early America, 1580–1660* (New York, 2008); Colin G. Calloway, *Pen and ink witchcraft: treaties and treaty making in American Indian history* (New York, 2013). For the Native American perspective on treaties, see Robert Williams, *Linking arms together: American Indian treaty visions of law and peace, 1600–1800* (New York, 1999).

<sup>16</sup> Peter Borschberg, 'Hugo Grotius, East India trade and the King of Johor', *Journal of Southeast Asian Studies*, 30(2) (1999), 225–48; Peter Borschberg, 'The seizure of the Sta. Catarina revisited: the Portuguese Empire in Asia, VOC politics and the origins of the Dutch-Johor alliance (1602–c.1616)', *Journal of Southeast Asian Studies*, 33(1) (2002), 31–62; Martine van Ittersum, *Profit and principle: Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies (1595–1615)* (Leiden, 2006).

<sup>17</sup> Many of these treaties were documented in E. Hertslet, *The map of Africa by treaty*, 3 vols. (London, 1967, first printed in 1909); and M. F. Lindley, *The acquisition and government of backward territory in international law* (London, 1926). See also C. H. Alexandrowicz, *The European-African confrontation: a study in treaty making* (Leiden, 1973); Mamadou Hebié, 'Les accords conclus entre les puissances coloniales et les entités politiques locales comme moyens d'acquisition de la souveraineté territoriale' (PhD dissertation, Graduate Institute for International Studies and Development, Geneva, 2012); and Belmessous (ed.), *Empire by treaty*.

Cambridge University Press

978-1-107-07649-5 - Sovereignty, Property and Empire, 1500–2000

Andrew Fitzmaurice

Excerpt

[More information](#)

The concern with justice arose from the desire of European states, both Protestant and Catholic, to derive their legitimacy from sources other than the Church.<sup>18</sup> This desire gained even greater impetus following the wars of religion and the Thirty Years' War (1618–48). These wars revealed that, when the legitimacy of states rested upon religious piety, they paid the price of fractured sovereign power, chaos and a massive waste of life. Out of their own desire for self-preservation, these states established a system of rules, the law of nations, which demanded that wars, and relations between peoples more generally, have some basis in law and justice.<sup>19</sup> These rules applied between European states, but their principles necessarily had to have some claim to universality or they risked falling back into the communal ideas that had fed more than a century of war.

In the pursuit of a secular basis to political justice, the idea of occupation was lifted from Roman private law and introduced into the nascent law of nations, or *ius gentium*, to address the legitimacy of *both* states and empires.<sup>20</sup> At the very start of the Reformation, and in response to the Protestant claim that the only just society is a godly society, the Spanish theologian Francisco de Vitoria argued that a just society is one that has shown an ability to exploit nature, one that has taken things and made them into property, and thus one that has occupied both physical and political space. It was on this basis that Vitoria condemned the arguments of the Spanish Conquistadors, who had claimed that their possession of true religion justified their conquests. While he may have been at risk of arguing his monarch out of an empire in the Americas, Vitoria was mindful that, as Holy Roman Emperor, Charles V was at risk of losing much of his European empire to Protestant rulers who based their legitimacy upon their godliness and who, upon the same claim, fought endless wars.<sup>21</sup>

Indeed, for many political leaders, jurists and philosophers, the security, stability and peace of their own state or intra-European empire was more important than the justification of extra-European empire. This did not mean that they always ignored overseas empires, although some did.

<sup>18</sup> Skinner, *The foundations of modern political thought*, vol. 2. For the implications of these concerns for early modern empires, see Pagden, *Lords of all the world*, pp. 47–9.

<sup>19</sup> Richard Tuck, *The rights of war and peace: political thought and the international order from Grotius to Kant* (Oxford, 1999).

<sup>20</sup> On private law sources for the law of nations, see: Hersch Lauterpacht, *Private law sources and analogies in international law: with special reference to international arbitration* (London, 1927); and Randall Lesaffer, 'Argument from Roman Law in current international law: occupation and acquisitive prescription', *European Journal of International Law*, 16(1) (2005), 25–58.

<sup>21</sup> Anthony Pagden and Jeremy Lawrence (ed.), *Vitoria: Political writings* (Cambridge, 1991).