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1. Introduction

1.1. Man, Space, and Borders

In 1966, Robert Ardrey put a surprisingly simple question on the world's intellectual map: 'Is *Homo sapiens* a territorial species?'¹ For the self-made anthropologist the answer was unambiguously clear: 'Man ... is as much a territorial animal as is a mockingbird singing in the clear Californian night.'² Even if we are not ready to share the somewhat disquieting view that 'certain laws of territorial behaviour apply as rigorously in the affairs of men as in the affairs of chipmunks',³ and despite a number of important objections to any kind of (excessive) 'biological reductionism',⁴ it is (p. 226) probably correct to assume that unanimity prevails in the various branches of today's social science community that 'territoriality' does indeed constitute one of the key imperatives of human behaviour. This comes hardly as a surprise for two reasons. First, territory provides an undeniable (survival) value to all human beings—as a living space, as a repository for resources of vital importance, and finally as a *conditio sine qua non* for a vast array of world systems, such as the production of oxygen, the purification and storage of water, and others.⁵ And, second, controlling people and things territorially simply saves effort⁶ and thus provides the 'territory owner' with a clear 'evolutionary advantage'. It is certainly easier to supervise one's livestock by fencing it in than to follow each head of cattle around, and the most efficient way to control and protect human and natural resources of a given area is probably to patrol its outer margins.

With respect to his intellectual perception, man is also inextricably bound to spatiality.⁷

Space ... is a necessary representation a priori, which serves for the foundation of all external intuitions. We never can imagine or make a representation to ourselves of the non-existence of space.⁸ ... [I]f we take away by degrees from our conceptions of a body all that can be referred to mere sensuous experience ... the space which it occupied still remains, and this it is utterly impossible to annihilate in thought.⁹

No doubt, territory, space, boundaries, and borders are inescapable companions of every human being, both regarding his physical and intellectual existence.

1.2. Communities, Territory, and Boundaries

There is strong evidence that long before the transition of mankind to a sedentary lifestyle, 'territoriality' as a type of intraspecific competition was already a distinctive (p. 227) feature of most (semi-)nomadic hunter-gatherer societies.¹⁰ For prehistoric groups, claims to a certain territory to the exclusion of others ('*raumgebundene Intoleranz*'¹¹) aimed in particular at monopolizing food resources, but also other essentials for individual and group survival, including sexual partners. However, domination over space did in general not only serve such basic physiological needs, but satisfied higher levels on the hierarchy of needs as well.¹² This is in particular true for the pyramid's top level: the need to connect to something beyond the ego ('self-transcendence'). From the dawn of civilization up to the present day, spiritual needs are indeed satisfied not least by mythical or sacred places.¹³ Ever since, and almost everywhere in the world, places with special significance for a specific group of people have been made an almost indispensable accompaniment of the life of organized communities. Hence, as a rule, for human societies a bordered territory has always served a double function: It constitutes a basic prerequisite for survival and a means of identification ('*raumbezogene Identität*').¹⁴ Sociological research supports the assumption of a quasi-necessary correlation between limitations and identification: 'An individual system can observe and describe itself [only] if it can organize difference and limitation for this purpose.'¹⁵

No wonder, therefore, that the origin of the distribution of space among men was not only traced back to mythical ages—in the words of Ovid (recalling the bygone golden and silver ages of Saturn and Jupiter): 'The ground, too, hitherto common as the light of the sun and the breezes, the cautious measurer marked out with his lengthened boundary.'¹⁶ Territory and boundary-making have also been always intimately associated with religious and ethical concepts.¹⁷ 'And sing your praises, sacred (p. 228) Terminus: "You set bounds to peoples, cities, great kingdoms: Without you every field would be disputed ...".'¹⁸ Ovid's conception is

paradigmatic of a widespread ambivalence towards the phenomenon of bordered territory: On the one hand, it is tagged with a clearly negative connotation by setting it into a sharp contrast to the Arcadian world (Ovid) or, some 1800 years later, branding it as the work of an impostor, who wants one to 'forget that the Fruits of the Earth belong equally to us all, and the Earth itself to nobody'.¹⁹ On the other hand, a carefully bonded territory has always been viewed as a guarantee of peaceful relations between neighbouring individuals, social or political entities, and was even vested with metaphysical or supernatural legitimacy²⁰—even where religious doctrine actually raises a claim for universality.²¹ As the psalmist said to God, 'It was you who set all the boundaries of the earth' (Psalm 74: 17) and, in order to reconfirm a long-established territorial status quo, the Pentateuch commands, 'Do not move your neighbor's boundary stone set up by your predecessors in the inheritance you receive in the land the LORD your God is giving you to possess' (Deuteronomy 19: 14). The land thus promised to the Jewish people is further specified in Deuteronomy 34: 1–3²²—with far-reaching consequences, as we experience painfully, down to the present day.²³ The deeply rooted sanctification of boundaries by words and deeds, which can actually be traced back to royal inscriptions of early Mesopotamian civilizations and thus to the very first 'inter-state' treaty relations ever,²⁴ still resonates in the modern concept of the 'sanctity of boundaries'.²⁵

(p. 229) The time-honoured German words '*umfrieden/Umfriedung*' (fencing/fence) still bear witness to the once inseparable unity of the concepts of 'peace' (*Frieden*) and 'boundaries'—an etymological bridge which got lost in most other languages. It is indeed one of the great tragedies of the phenomenon of bounded territory that, designed to avoid strife among individuals and peoples, territory and boundaries have instead—in the long course of history—evolved into the prime cause for belligerent unrest in the world.²⁶

2. Early Records of Territory and Boundary-Making

The exercise of authority over land has been an indispensable prerequisite for politico-economic organizations of almost all times, at almost all places, and under almost all circumstances. A geographically defined territorial base was essential for small city-states (Greece) as much as for empires (Rome), and all forms of political organization in between these two extremes. No wonder, therefore, that when in the dim, dark past, two neighbouring political entities agreed to formalize their relations, issues regarding the designation of territory and its delimitation soon became a matter of primordial importance.

With the invention of scripture emerging from the mist of prehistory, the ancient kings of Mesopotamia are the first to provide us with relevant records.²⁷ The exciting account of a boundary dispute in the Presargonic period (approximately 2700–2350 bc) commences as follows:

The god Enlil, king of the lands, father of all the gods, by his authoritative command, demarcated the border between the gods Ningirsu [Lagaš] and Šara [Umma]. Mesilim, king of Kiš, at the command of the god Ištar, stretched the measuring rope on the field and erected a monument there.²⁹

(p. 230) In blatant disregard of king Mesilim's 'arbitral award', the rulers of Umma later 'smashed that monument and marched on the Eden district of Lagaš',³⁰ thus triggering an epic confrontation between the two Southern Mesopotamian city-states. Possession and agricultural usufruct of fertile lands (Guendena region), irrigation rights, and the quest for the drawing of a boundary-line to the greatest possible strategic and economic advantage were at the heart of the conflict, which did even not shy away from destroying 'the dedicated [?] chapels of the gods that were built on the [boundary-levee called] Namnunda-kigara'.³¹ Brief détente periods witnessed the conclusion of a parity boundary treaty (the earliest recorded example of an 'inter-state' agreement at all, in approximately 2470 bc), joint demarcation-works, and even the setting up of some sort of buffer zone (no man's land) in order to prevent future conflict.

Once again for the sake of peace, some 2500 years later (approximately 20 bc–23 ac) the Greek geographer Strabo, repudiating earlier views, strongly advocated a most accurate delimitation and demarcation of boundaries:

Where there are no precise boundary marks, columns, or walls ... it is easy for us to say such a place is Colyttus, and such another Melitè, but not so easy to show the exact limits: thus disputes have frequently arisen concerning certain districts. ... The reasoning of Eratosthenes, however, is still more absurd, when he declares that he sees no advantage in being acquainted with the exact boundaries of countries, and then cites the example of Colyttus and

Melitè, which prove just the contrary of his assertion. Surely if a want of certainty respecting the boundaries gave rise to war [as in the case of Thyrea and Orpus], a knowledge of the limits of different districts must be of practical importance.³³

It seems in fact that the ingredients of a conflict over territory or boundaries, the desire to overcome it by the most accurate drawing of lines, and, finally, the means to achieve this end have not changed much in the course of the last four and a half millennia.

(p. 231) 3. Disambiguation: Territory, Boundaries, Frontiers

Land as such is no territory. A desert, a swamp, or an impenetrable forest do not make up for a frontier, and a natural barrier, such as a river or a mountain chain, does not constitute a boundary. Rather what is needed for a mere geographical feature to become 'territory' or 'boundary' is its reference to a man-made political structure: The twofold etymological root of the Latin word 'territorium' aptly demonstrates this intrinsic correlation: 'terra' (earth, land), and the suffix '-orium' denoting place.³⁴ And indeed, when first appearing in late Medieval Europe, the term 'territory' was to denominate a 'land under the jurisdiction of a city or town'. Alternative theories suggest derivation from the Latin word 'terrere' (to frighten, see also 'terrible'—thus territorium would mean 'a place from which people are warned off'); or consider 'torium' as the root from which derived words such as 'tower', 'tour', and 'torre', which conveyed in Medieval English, Old French, Italian, and Spanish the meaning of both 'a well-rounded building' and 'a position of strength'.³⁵ These various etymological hypotheses, however, are not contradictory but rather complementary. Control over a geographic area provides a community with a position of (economic) strength, which needs to be maintained by constant vigilance with a view to deter potential intruders. And it is finally not by chance that in its original usage, the concept of territory was assigned to smaller political entities alone, such as cities and towns, whereas the position of power of larger kingly or princely entities in Europe, deeply rooted in the Christian-Medieval theological-political cosmos, was still considered to rest primarily on allegiance of individuals and organizations, not territory.

It was only in the late 15th century that, seconded and driven by the Renaissance critique of hierarchy,³⁶ the dominant model of juridico-political power of a vertical, highly complex, and heterogeneous hierarchical character was superseded by the concept that political spaces are to be ordered along a horizontal plane, something which placed 'territory' centre stage in political thought.³⁷ Exclusive control over a (p. 232) distinct geographical area soon became not only an indispensable, but probably the most distinctive feature of the new ideal of exercising political authority: 'Lo Stato'.³⁸ With lasting effect, Machiavelli in his seminal work // *principe*,³⁹ along with other participants in Renaissance legal discourse, added to the Latin word 'dominium' with its firmly established Roman private law connotation a second, public law meaning; territory over which single and superior authority is exercised, thus heralding the modern concept of sovereign territoriality. Quite literally dismissing 'the ancient [Augustinian] doctrine by which the ruler ... existed for the realization of ... a superior moral purpose',⁴⁰ Machiavelli limited politics to the terrestrial world. However, it was still a long way to go to achieve complete congruency between the concepts of 'territory' and 'sovereignty' and thus to entirely eliminate from this domain of international law the Roman private law antecedents, remnants of which can still be found today—in particular regarding the modes of acquiring and losing territory. Regardless of the vast scholarly discussion on the exact legal relationship between a State and 'its' territory,⁴¹ the latter's pivotal role within the identity kit of modern statehood has never since seriously been challenged.⁴² 'It is because the State is a territorial organization that violation of its frontiers is inseparable from the idea of aggression against the State itself.'⁴³

Unanimity has always prevailed that all what is needed for a State to come into or to remain in existence is some sort of undisputed 'core territory'.⁴⁴ The nature and character of the outer margins of the physical substratum of statehood, however, has not only witnessed a considerable factual evolution (from boundary zones or borderlands to boundary lines), but is also characterized by certain conceptual as well as terminological ambiguities. The most important of these ambiguities concerns the use of the term 'frontier'. Deriving from the classical Latin root '*frons*' (front or forepart)—in later medieval usage developing into '*fronteria*', meaning front line of an army or line of battle⁴⁵—in European usage the term became virtually synonym(p. 233) ous with the term 'boundary'.⁴⁶ However, triggered by a seminal essay by Frederick Jackson Turner (1893),⁴⁷ a significantly different American approach ('frontier thesis') acquired considerable prominence in the New World and beyond. Turner held that the very idea behind the American frontier was less the European one of a fixed boundary⁴⁸ than rather that of a moving line of military and cultural advance

and retreat, which he called 'the outer edge of the wave—the meeting point between savagery and civilization'.⁴⁹ With this reinterpretation for expansionist purposes of a rather settled concept, Turner became one of the pioneers of the worldwide geopolitics movement,⁵⁰ which has succinctly been labelled as 'nothing but the ideology of imperialist expansion'.⁵¹ Although today no longer considered a 'serious starting point for historical inquiry',⁵² the 'frontier thesis' marks the intellectual antipode to the established, but everything but self-evident idea of the boundary or frontier as an immobile and, ideally, linear concept.

4. Territory and the State

Unanimity prevails that territoriality is a defining attribute of the Westphalian State and it is probably even correct to assume that a 'territory owner ethos' constitutes the most distinctive feature of traditional international law.⁵³ However, it (p. 234) must be recalled that it was only in the late 19th century that the existence of a territorial basis took centre stage in the perception of statehood. Indeed, as far as the spatial element as a *conditio sine qua non* for statehood is concerned, Georg Jellinek's seminal 'three-element theory' (territory, population, ultimate ruling power)⁵⁴ and other similar definitions from that period⁵⁵ find no equivalent in 17th- and 18th-century post-Westphalian writings. Still very much obliged to a social contract theory approach, both Grotius ('a perfect society of free men, united for the promotion of right and the common advantage')⁵⁶ and Vattel ('political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security')⁵⁷ laid emphasis rather on population, collective will, and government than on territory. Although both authors and their contemporaries did of course not abstain from treating various territorial and boundary issues, the fixation on territory as the main guiding and organizing principle of policy making is thus a rather recent phenomenon. The new perception of the existence of some sort of intrinsic and inextricable bond between the State and its territory may be illustrated by the fact that the second half of the 19th century witnessed the rather sudden end of the hitherto widespread and quasi-commercial practice of selling and purchase of State territory—the last important example probably being the United States 1867 Alaska purchase. Hence, regarding the 'upgrading' of territory, too, Westphalia did certainly not constitute a cataclysm but one, albeit important installment in the ongoing and century-long transitional process from medieval to modern statehood.

5. Territory and the Others

To claim territory is to deny it to others. However, as a rule, in inter-state relations claims of kind do not call into question the right as such of the competitor to dispose of a recognized territorial setting for the exercise of its sovereign powers. Hence, in a more categorical sense, the 'denial' referred to here is what one may describe as an essential ingredient of the predator competition launched by the State society against all Others who lay claim for title to territory. The delegitimization of all other forms of the exercise of supreme political authority in and over territory has indeed been a (p. 235) continuous feature of the evolution of the very distinct 'Westphalian' model of the symbiosis between a people and its territory. Colonialism in Africa is but one example, the removal of American Indians and the Māori from their historic lands others.

The history of the seizure of the African continent by European colonial powers—in the aftermath of the Berlin Africa Conference 1884 culminating in the so-called scramble for Africa⁵⁸—is a complex and multifaceted story of the delegitimation of pre-colonial political powers over territory and people. The status of the so-called Kings and Chiefs of Old Calabar, recently a key issue in a territorial dispute before the International Court of Justice,⁵⁹ may serve as just one significant example in this respect. In face of Nigeria's assertion to the contrary, the court assumed that a treaty eventually concluded in 1884 between these indigenous rulers and Great Britain was not 'governed by international law', since it was an 'agreement not between equals', 'not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory'.⁶⁰ Probably perfectly sound from a Westphalian perspective, the inevitable consequence of this legal assessment, however, was simple. There is no room for the recognition on the international plane of any different form of title to territory. 'At the international level the Kings and Chiefs of Old Calabar' thus 'disappeared from view',⁶¹ as did claims to 'their' territory. The law at the time, as confirmed by the court, conferred on Great Britain a full territorial title which it could eventually transfer to Germany some three decades later.

The long history of how Anglo-Americans justified the dispossession of Native Americans—somewhat obfuscated behind the broad smokescreen of a complex and contradictory controversy on the legal nature,

contents, and limits of aboriginal and other (territorial) title of American Indians in the United States—cannot be even sketched here.⁶² However, the gist of one crucial element of the entire issue was probably best captured in the US Supreme Court's 1831 landmark decision in the case *Cherokee Nation v Georgia*.⁶³ After an extended discussion of the nature of Indian tribal sovereignty, (p. 236) the majority held that Indian tribes had no standing to bring suit directly to the Supreme Court (against State legislation aiming at the removal of the Cherokee people from their historic lands), since they were neither a foreign nor an American State:

They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases; meanwhile, they are in a state of pupillage. Their relations to the United States resemble that of a ward to his guardian.⁶⁴

Although directly concerned only with a very limited procedural issue, the (highly disputed)⁶⁵ denial of sovereign statehood of Indian Nations by the court had far-reaching consequences. Deprived of the umbrella of sovereign statehood, the 'unquestionable, and, heretofore, unquestioned right to the lands they occupy'⁶⁶ proved of little value for the effective protection of the Cherokee Nation's title to their territory.

The encounter of the European concept of territorial sovereignty with a very different perception of governance (over land and people) has probably become most obvious in the 1840 treaty of Waitangi between the British Crown and the Māori, the indigenous population of what today is called New Zealand.⁶⁷ In the English text of article 1 of the treaty, Māori ceded 'sovereignty', whereas in the Māori text, the Māori gave the British merely a right of governance (*kawanatanga*).⁶⁸ As a result, Māori believed—and still do so—that they ceded to the Queen a limited right of governance only in return for the promise of protection, while retaining the authority they always had to manage their own affairs. However, not surprisingly, the European conception prevailed and although the 1975 Treaty of Waitangi Act paved the way for an investigation by individuals on their own behalf or on behalf of a group of Māori of treaty-based claims dating back to 1849,⁶⁹ the issue of (the legitimacy of the acquisition of) territorial sovereignty was obviously never seriously at stake.

(p. 237) 6. Title to Territory

6.1. General Aspects

The existence of distinct territorial entities, each with one single power to exercise supreme authority to the exclusion of all others, is not only the brand mark of the post-Westphalian idea of sovereign statehood.⁷⁰ To establish territory as the pivotal sounding board for the exercise of sovereign powers was in fact the very idea behind the paradigm shift away from the (medieval) concept of governance (personal jurisdiction). No wonder, therefore, that the disentanglement of spatially overlapping spheres of jurisdictional competences and activities soon became a matter of major concern for all States affected. In the, at best slightly exaggerated, words of Sir Robert Jennings: 'The mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis.'⁷¹ The objective of the newborn territorial State to exercise its sovereign powers both with the highest possible degree of effectiveness and autonomy was also a major reason for a remarkable reshaping of the highly fragmented political map inherited from medieval times. The creation of a contingent territory being considered a suitable means to further reduce mutual dependencies between adjacent political entities (transit rights and other servitudes), once omnipresent enclaves and exclaves, that is territories legally attached to a State with which it is not physically contiguous,⁷² were one by one erased from the political map. The formerly quite ordinary option for a joint exercise of sovereignty, too, became increasingly rare in practice and 'Condominia'⁷³ have now been reduced to somewhat quaint remnants of a distant past.⁷⁴

However, in order to translate into reality the absolutist dream of undivided exercise of sovereign power within clearly defined limits, it was first of all necessary to be aware of the exact scope and extent of territory claimed. Hardly astonishing, it was the Absolutist State par excellence, the France of Louis XIV, which in the 1670s (p. 238) pioneered in an arduous and meticulous surveying and mapping of its territory.⁷⁵ Using Gemma Frisius' technique of triangulation,⁷⁶ almost a century later the venture was crowned with the finalization of the first ever topographical map of an entire country.⁷⁷

6.2. Modes of Acquisition of Territory

Given the dynastic and feudal structure of medieval governance, it is hardly surprising that in the formative stages of rules governing title to territory private law analogies prevailed. Based on Roman law principles, classical international law thus knew of five modes of acquisition of territory. Occupation of *terra nullius*, prescription, cession, accretion, and subjugation (conquest).⁷⁸ However, while in principle doctrinally neat, the borderlines between these classical modes have always been blurred,⁷⁹ in particular regarding occupation and prescription. The Age of Discovery with its exponential growth of potential conflicts between European ‘conquistadores’ imperatively called for a new legal framework acceptable to all relevant actors of the time.⁸⁰ No wonder therefore that initial attempts of authoritatively distributing vast portions of the globe among two States only (Portugal and Spain) by sole virtue of Papal Bulls (*Romanus Pontifex* 1455, *Inter Caetera Divinae* 1493) were doomed to failure due to the resistance of powerful competitors, such as England, France, and the Netherlands. Alternative approaches, such as in particular the ‘first come, first served principle’ (discovery) always remained controversial too, due to the sweeping and often enough dubious character of many claims based on this title. It seems that as early as 1506, the Pope himself carefully shied away from his earlier pretensions, when explicitly confirming Spanish and Portuguese title to ‘discovered (p. 239) and occupied islands’ only.⁸¹ Effective occupation as a *conditio sine qua non* for legitimate title to territory—eventually becoming the leitmotif in acquisition-related discourse and practice—was indeed by no means an innovative idea: Bartolus de Saxoferrato in his early 14th-century *Tractatus de Insula* already vigorously maintained with respect to earlier papal donations: ‘But what is the law if he to whom the right is awarded neglects to occupy? The question is whether he loses that right? I answer: Yes; he loses his right of occupation if he defers it without due reason ...’.⁸² Some 600 years later, this dictum resonates in Max Huber’s seminal award in the *Island of Palmas Case* (1928), where the arbitrator underlined that discovery as such gives only an inchoate title, which, in order to become opposable to others on the international plane, must be followed by effective occupation.⁸³ Although it was always recognized that the necessary amount of *effectivité* may vary according to geographical and other circumstances,⁸⁴ in the past 200 years, state practice, international jurisprudence, and doctrine have never seriously called into question that the ‘continuous and peaceful display of territorial sovereignty’ is an indispensable prerequisite for a valid title arising from occupation and prescription alike.⁸⁵ Although a complex and multifaceted legal concept, the core idea underlying the *uti possidetis* doctrine (‘as you possess, so may you possess’),⁸⁶ which gained particular prominence in the struggle for independence of Latin American (19th century) and African (20th century) States, is also obliged to this very idea. The gist of the *raison d’être* for the existence of an inextricable bond between ‘possession’ and ‘sovereignty’ was again aptly articulated by Max Huber:

Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. ... International law ... cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.⁸⁷

(p. 240) 7. The Changing Character of Boundaries and Frontiers

The paradigmatic shift from the personalized nature of sovereign power to political spaces ordered along a horizontal plane had far-reaching consequences for the perception and construction of the outer margins of these spaces, too. When territory became the physical and legal embodiment of the legitimate exercise of highest-ranking political power,⁸⁸ boundary-making was suddenly placed centre stage in the thinking and acting of politicians and lawyers alike. ‘Frontiers are indeed the razor’s edge on which hang suspended the modern issues of war and peace, of life or death of nations’, as Lord Curzon still put it in his influential 1907 Romanes lecture,⁸⁹ tying in with a 150-year old Vattelian proposition: ‘Since the least encroachment upon the territory of another is an act of injustice, in order to avoid being guilty of it, and to remove all occasion of strife and dispute, the boundary lines of territories should be clearly and precisely determined.’⁹⁰ This unequivocal ‘invitation’ stimulated the gradual replacement of the widespread phenomenon of frontier zones of various type (march or mark, buffer zone, no-man’s land, *Grenzsaum*, and others) by the (modern) concept of linear boundaries,⁹¹ ‘that is to say to draw the exact line ... where the extension in space of the sovereign powers and rights ... meet’.⁹²

The comprehensive process of a linearization of boundaries also extended to rivers and mountain ranges, established natural boundary features since time immemorial. No longer considered of sufficient precision,

watercourse boundaries have since been made concrete by either the middle line or the Thalweg principle (centre of the main navigable channel), and in high mountain regions, the watershed principle gained prominence in order to draw a virtually invisible line separating with precision the respective spheres of sovereignty of neighbouring States: '[O]ne of the essential elements of sovereignty is that it is to be exercised within territorial limits, (p. 241) and that, failing proof to the contrary, the territory is co-terminous with the sovereignty ...'.⁹³

8. Dominion Over the Sea and its Seaward Limits⁹⁴

8.1. The Sea: Godly Domain or Legitimate Object of Human Aspirations?

From time immemorial, the open sea has inspired fear and respect as well as the curiosity of the restless, questing mind of courageous men and women. For millennia, a similar ambiguity has prevailed with respect to claims by littoral States to a maritime *Aquitorum*.⁹⁵ In ancient history, disapproval of a *dominium maris* was not only based on the sea's very nature—unlike the *terra ferma* resisting possession in the proper sense. Reluctance in this respect was also intrinsically tied to one of the grand themes of mankind, the encounter of man with the other, godly world: 'The Sea is His' as the Psalmist sings (Psalm 95: 5). And the unique 'Report of Wenamon' from the late 20th dynasty of Ancient Egypt (approximately 1086 bc) is unmistakable in its branding the sea as forbidden terrain for appropriation by earthly authority: 'The sea is his ... don't wish for yourself anything belonging to Amon-Re, [king of] the gods'. A similar attitude prevailed among Roman writers, who at times went even so far as to consider mere navigation as an offence against the gods: 'The race of man ... through forbidden wickedness [disregards that] God in his wisdom divided the countries of the earth by the separating ocean'.⁹⁷ However, divine warnings in this vein against the 'transgressional' hubris of men to reach out for domination of the sea served perfectly the Mediterranean community's more profane interest in free communication for commercial and, occasionally, also military purposes. No wonder therefore that (p. 242) the Antique world hardly knew of any jurisdictional claims over parts of the sea, and sea-related sets of legal rules, such as the *Lex Rhodia* (2nd century bc), were strictly confined to regulations indispensable for maritime trade, including the fight against probably the most serious challenge for seafaring nations: the scourge of piracy. Even if, for security and economic reasons, claims may occasionally have been laid on certain very limited offshore waters,⁹⁹ and irrespective of the Roman Empire's merely political and military, but certainly not legal, *mare nostrum* claim with respect to the Mediterranean as a whole, the overall picture that the Antique world, in Europe and elsewhere,¹⁰⁰ treated the sea as something clearly beyond the jurisdictional reach of States, remains unclouded. This maxim was so generally accepted that for the city of Byzantium, trying to impose tolls on shipping passing through the Bosphorus (220 bc), the immediate declaration of war by the Republic of Rhodes in response must have come hardly as a surprise. It was only the city's complete drawback from this audacious assault on the freedom of the seas which eventually prevented a full-size military confrontation: 'The Byzantines engage not to levy toll on ships bound for the Pontus, and on this condition the Rhodians and their allies shall be at peace with the Byzantines.'

8.2. Mare liberum contra mare clausum

More than 1800 years later, the antique conception that no one has dominion or supreme control over the sea resonates in Hugo Grotius' seminal work *The Freedom of the Seas* (1608): 'The sea is a thing so clearly common to all, that it cannot be the property of any one save God alone.'¹⁰² However, at the time of writing, this principle had not only become increasingly strained in the real world. It was also subject of probably the first great doctrinal dispute in the history of international law:¹⁰³ Do States dispose of a jurisdictional prerogative in waters adjacent to their coast, and if this were so, to what extent? Whereas the first question was soon answered in the affirmative, the second remained on the international agenda up to the very recent (p. 243) past. The intellectual dispute was triggered by hard facts. At the turn of the 17th century, many seas in Europe had become economic areas of competition, in particular with regard to fishing. No wonder, therefore, that not only did a number of States lay—sometimes merely symbolic—claims on certain maritime areas;¹⁰⁴ some seas had actually become more or less effectively appropriated, notably the Baltic Sea (Sweden) and the British Sea (England and Scotland).¹⁰⁵ The question of control *vel* liberty of sea lanes, too, had grown into an issue of vital importance for the prosperity of entire nations. The egregious claims for exclusivity by Portugal and Spain regarding the use of major sea lanes vital for trade and commerce with the newly 'discovered' worlds did not remain unchallenged. Not surprisingly, the search for a balance between the

exercise of governmental authority over the sea and the idea of the freedom of the sea¹⁰⁶ soon evolved into one of the key issues on the political, strategic, economic and, not least, legal agenda of the international community.

The vigorous advocacy of Grotius for the open sea to be free for the use of all met with strong resistance by virtually the entire intellectual community of the time, including in particular his famous English counterpart John Selden,¹⁰⁷ and the controversy ‘waxed and waned through the centuries’.¹⁰⁸ However, it was never in dispute that coastal waters may be subdued to some kind of dominium by the littoral power. ‘The question at issue’—as Grotius himself admits—‘does not concern a gulf or a strait in this ocean, nor even all the expanse of sea which is visible from the shore.’¹⁰⁹ And in 1625 he clarified that ‘the empire of a portion of the sea ... [may reach] so far as those who sail in that part of the sea can be compelled from the shore as if they were on land’.¹¹⁰ It was, however, another Dutch jurist, Cornelius van Bynkershoek, who, by virtue of his *De dominio maris dissertatio* (1703), eventually became the leading authority for the determination of the extent of the maritime belt which may legitimately come under the sway of the littoral State: *Imperium terrae finis ubi finitur armorum potestas*. Open for future (technological) developments, it took several more decades before the deliberately vague criterion of effective exercise of State authority was translated into the rather rigid three-mile limit, the alleged ‘utmost range of a cannon ball’.¹¹¹ Although (p. 244) never really matching the actual state of weapon technology, as a matter of reasonableness and convenience, the three-mile limit soon became the widely accepted principle for the determination of the outer limit of the territorial sea.¹¹²

9. Going Vertical: Appropriation and Division of Airspace

Traditional international law serves as a mediator for at least potentially conflicting interests of States. No wonder, therefore, that as long as the airspace was virtually inaccessible to man, (international) lawyers and State practice alike did not pay much interest in the eventuality of a vertical dimension of the State's spatial domain. The same is true—*mutatis mutandis*—for the earth's interior, the public law status of which has never attracted more than very marginal attention at all, up to the present day. Our perception is indeed still very much the same as the one exposed (in a private law context) by William Blackstone in the 1770s already: ‘downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface ...’.¹¹³

It was only in the early 20th century that intellectual work slowly began to discover the airspace:

Whilst the technical expert from one century to another was engaged in investigating the problem of the navigation of the air, the jurist could afford to look on calm and unmoved as one experiment after another failed. ... So long as there were available only undirigible balloons, dangerous and expensive, absolutely unfit for regular traffic,^[114] aerial navigation was therefore necessarily confined to some very unfrequent ascents, such as attractions at exhibitions, for pleasure trips or scientific excursions and most occasionally for military purposes;^[115] (p. 245) it did not create situations and relationships demanding the immediate attention of the legislator.¹¹⁶

The main purpose of scattered 17th-century reflections on the subject¹¹⁷ was indeed merely to strengthen one's own position in the heated debate on sovereignty over the sea. Exploiting the argument of the ocean's (allegedly) inexhaustible resources for his vigorous freedom plea, Grotius observed, ‘The same thing would need to be said, too, about the air, if it were capable of any use for which the use of land is not required ...’.¹¹⁸ And Pufendorf on his part used exactly the same premise—the absolute inaccessibility of airspace—as a key argument for his opposite claim in favour of at least partial sovereignty over the sea ‘so far as nature allows’: ‘Mention is made of the fowls of the heaven as well, yet since man has been denied the ability to be in the air to the extent that he rest in it alone, and be separated from the earth, he has been unable to exercise sovereignty over the air ...’.¹¹⁹

Although occasionally discussed, the Roman law maxim *cuius est solum eius est coelum* did not, as matter of fact, succeed to transgress the limits of the private law domain.¹²⁰ Instead, unanimity prevailed that, at least as far as the public law sphere was concerned,¹²¹ the air was to be considered a *res omnium commune* and as such not susceptible of the exercise of any kind of sovereign rights by States.

It was only in the early years of the 20th century that a seminal paper by Paul Fauchille,¹²² together with two comprehensive reports presented at the 1902 Brussels Session of the Institut de Droit International (*Régime juridique des aérostats*),¹²³ revived the discussion on the issue without, however, forging new intellectual

paths. Clinging to the traditional argumentative pattern whereas *'l'air, par sa nature même, est insusceptible de propriété ou de souveraineté'*,¹²⁴ the overwhelming majority adhered (p. 246) to the succinct position that *'L'air est libre'*. Although security concerns soon gained some ground in the discussion of possible limitations of the freedom-of-the-air principle, the same remained not only widely accepted during the next few years,¹²⁵ but was even tagged by their protagonists as virtually 'uncontested'.¹²⁶ However, in a complete volte-face, the following decade witnessed a total abandonment of this solid legal doctrine: The successful launch by the Wright brothers of a power-driven and thus navigable aircraft (1903) and the potential consequences resulting from this technological revolution, sowed the first serious doubts over the correctness of the hitherto virtually unchallenged theory of unlimited aerial freedom.¹²⁷ And in the face of the devastating effects of First World War aerial warfare, it took hardly a year that States in the 1919 Paris Convention agreed on the following: 'The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the airspace above its territory.'¹²⁸

Complemented by the duty of States to 'accord [in times of peace and under certain conditions] freedom of innocent passage above its territory to the aircraft of the other contracting States', an entirely new balance was sought between the (prevailing) national interest and—now, if at all, only coming second—the concept of *res omnium commune*. Although it is thus incorrect to assume that these provisions 'simply registered a principle ... already sanctioned by customary international practice',¹²⁹ it is certainly true that the inclusion of airspace into State territory, reiterated and reconfirmed in the 1944 Convention on Civil Aviation,¹³⁰ soon entered the corpus of customary international law and has never seriously been challenged ever since. However, up to the present day no consensus could be reached on the exact location of the invisible frontier between airspace and outer space—unanimity prevailing that the latter should be kept free from sovereignty claims. Regardless of the never-ending dispute on this question,¹³¹ the so-called Kármán Primary Jurisdiction (p. 247) line of 1957,¹³² locating the upper limit of State territory at a height of approximately 83 kilometres, still serves as some sort of authoritative guideline. Basically used for the transit of spaceships, rockets, and missiles only, the functional approach chosen by Kármán, must still be considered of sufficient precision to avoid conflicts between aeronautic and astronautic uses in this remote space at the intersection of the Mesosphere and the Thermosphere.

10. Spaces Beyond State Territory

Old maps occasionally designated uncharted territories (*terra incognita*) with the Latin phrase *hic sunt leones*. These times have long gone by and more than a century ago imperialistic expansion has brought the scramble for State dominion over the earth's landmasses to an end. The post-Second World War decolonization process (re-)distributed the territorial heritage of colonialism among newly independent States, without, however, leaving any blank spots of stateless domain on the world map, let alone creating new ones. Today, the only remaining exception in this respect is the 14 million km² Antarctic Continent. By virtue of the 1959 Antarctic Treaty,¹³³ pre-existing and partly overlapping territorial claims raised by a number of States were frozen (article IV), thus barring recognition of territorial sovereignty of any State over all land and ice shelves south of 60 degrees South (article VI). With respect to extra-terrestrial territories, a similar approach is followed. 'Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.'¹³⁴ These treaty regimes, together with the one in existence for waters beyond national jurisdiction ('The High Sea'¹³⁵), show a growing awareness of States that if history has taught us one lesson, then it might be that distributing competences and responsibilities by drawing lines on the ground between omnipotent and basically selfish political (p. 248) entities is probably not the ultimate response to the urgent problems of an ever-more interdependent humankind.¹³⁶

11. Conclusion

To be certain, Westphalian territoriality is not dead. On the contrary, territoriality is broadly respected today by all States, whereas in the past only a handful of (Western) powers enjoyed full territorial sovereignty.¹³⁷ For roughly the last 500 years, a bordered territory has been considered a suitable framework to organize governance over people. However, in recent years there are increasing signs that the traditional and rather categorical symbiosis between territory and power may no longer lay a legitimate claim for exclusivity. This is hardly deplorable since from an international law perspective, possession and transfer of territory have never been considered an end in itself. *L'obsession du territoire* of modern States¹³⁸ was always meant to serve

people, not vice versa. One may recall in this context Robert Jennings's statement of timeless relevance: 'A territorial change means not just a transference of a portion of the earth's surface and its resources from one regime to another; it usually involves, perhaps more importantly, a decisive change in the nationality, allegiance, and way of life of a population.'¹³⁹

Recommended Reading

- Anderson, Malcolm *Frontiers: Territory and State Formation in the Modern World* (Cambridge Polity Press Cambridge 1996).
- Blum, Yehuda *Historic Titles in International Law* (Martinus Nijhoff The Hague 1965).
- Blumann, Claude 'Frontières et limites. Rapport général' in Société Française pour le Droit International (ed) *La frontière. Colloque de Poitiers 1979* (Pedone Paris 1980) 3–33.
- (p. 249) Buchanan, Allen and Margaret More *States, Nations, and Borders. The Ethics of Making Boundaries* (CUP Cambridge 2003).
- Castellino, Joshua and Steve Allen *Title to Territory in International Law: A Temporal Analysis* (Ashgate Aldershot 2002).
- De Visscher, Charles *Problèmes de confins en droit international* (Pedone Paris 1969).
- Fulton, Thomas W *The Sovereignty of the Sea* (W Blackwood and Sons Edinburgh 1911).
- Gottmann, Jean *The Significance of Territory* (The University Press of Virginia Charlottesville 1973).
- Hill, Norman *Claims to Territory in International Law and Relations* (OUP London 1945).
- Jennings, Robert Y *The Acquisition of Territory in International Law* (Manchester University Press Manchester 1963).
- Johnston, Douglas M *The Theory and History of Ocean Boundary-Making* (McGill-Queen's University Press Kingston 1988).
- Kolers, Avery *Land, Conflict and Justice: A Political Theory of Territory* (CUP Cambridge 2009).
- La Pradelle, Paul Gouffre de *La frontière, étude de droit international* (Les éditions internationales Paris 1928).
- Larkins, Jeremy *From Hierarchy to Anarchy. Territory and Politics before Westphalia* (Palgrave Macmillan New York 2010).
- Milano, Enrico *Unlawful Territorial Situations in International Law. Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff Leiden 2006).
- Sassen, Saskia *Territory, Authority, Rights. From Medieval to Global Assemblages* (Princeton University Press Princeton 2006).
- Schoenborn, Walther 'La nature juridique du territoire' (1929) 30 *Recueil des cours* 81–190.
- Shaw, Malcolm (ed) *Title to Territory* (Ashgate Dartmouth 2005).
- Shaw, Malcolm *The International Law of Territory* (OUP Oxford 2013 forthcoming).

Footnotes:

- ¹ *The Territorial Imperative. A Personal Inquiry into the Animal Origins of Property and Nations* (Atheneum New York 1966) at 4.
- ² *ibid* 5; for a critical assessment of Ardrey's thesis (territory as a genetically determined form of behaviour and the single most influential force in driving human action) V Reynolds 'Open Groups in Hominid Evolution' (1966) 1 *Man* 441–52; and A Tildwell *Conflict Resolved? A Critical Assessment of Conflict Resolution* (Continuum London 1998) at 45 ff.
- ³ *The Territorial Imperative* (n 1) 4.
- ⁴ In recent years anti-reductionist views have gained some ground: D Ruben *The Metaphysics of the Social World* (Routledge London 1985); and the seminal paper by J Fodor 'Special Sciences (or: The Disunity of Science as a Working Hypothesis)' (1974) 28 *Synthese* 97–115; more recently E Svertlov 'Is Biological Reductionism Losing Ground? What is Next?' (2006) 76 *Herald of the Russian Academy of Sciences* 339–51; multidisciplinary debate in D Charles and K Lennon (eds) *Reduction, Explanation and Realism* (OUP Oxford 1992).
- ⁵ A Kolers *Land, Conflict, and Justice. A Political Theory of Territory* (CUP Cambridge 2009) at 8.
- ⁶ R Sack *Human Territoriality. Its Theory and History* (CUP Cambridge 1986) at 22.
- ⁷ In-depth discussion G Hatfield *The Natural and the Normative: Theories of Spatial Perception from Kant to Helmholtz* (MIT Press Cambridge 1990); F Dolins and R Mitchell (eds) *Spatial Cognition, Spatial Perception*.

Mapping the Self and Space (CUP Cambridge 2010); whether or not spatial conception is pivotal to cognition in general, is again open to debate: S Levinson 'Studying Spatial Conceptualization across Cultures: Anthropology and Cognitive Science' (1998) 26 *Ethos* 7–24.

⁸ I Kant *The Critique of Pure Reason* (MD Meiklejohn trans) pt 1, ss 2, no 2.

⁹ *ibid* ('Preface' 2nd edn 1787); the 'a priori' function attributed to space in Kant's transcendental aesthetics bears a striking similarity to the role territory is playing with respect to the conception of modern statehood.

¹⁰ From the rich anthropological literature G King 'Society and Territory in Human Evolution' (1976) 5 *Journal of Human Evolution* 323–31; J Stevenson *Dictionary of Concepts in Physical Anthropology—'Territory'* (Greenwood Press New York 1991) 395–401; for a vigorously interdisciplinary approach *Human Territoriality* (n 6); D Delaney 'Territory and Territoriality' in R Kitchin and N Thrift (eds) *International Encyclopedia of Human Geography* (Elsevier Amsterdam 2009) 196–208.

¹¹ A Gehlen 'Philosophische Anthropologie und Verhaltensforschung (1968)' in KS Rehberg (ed) *Arnold Gehlen. Gesamtausgabe* (Klostermann Frankfurt 1983) vol 4, 216–21 at 217.

¹² Obviously, reference is made here to A Maslow's pyramid of needs, one of the most cognitively contagious ideas in the behavioural sciences: 'A Theory of Human Motivation' (1943) 50 *Psychological Review* 370–96; fully developed in A Maslow *Motivation and Personality* (Harper New York 1954).

¹³ From the overwhelming literature see eg S Hashmi 'Political Boundaries and Moral Communities: Islamic Perspectives' in A Buchanan and M Moore (eds) *States, Nations, and Borders. The Ethics of Making Boundaries* (CUP Cambridge 2003) 181–213 at 186ff (sacred space in the Qur'an and Sunna); for creative perspectives on the spatiality of nature, culture, and religion, which aim at demonstrating that the self and its surroundings are ontologically part of each other: S Bergmann et al (eds) *Nature, Space and the Sacred. Transdisciplinary Perspectives* (Ashgate Farnham 2009).

¹⁴ P Weichhart *Raumbezogene Identität. Bausteine zu einer Theorie räumlich-sozialer Kognition und Identifikation* (Franz Steiner Verlag Stuttgart 1990).

¹⁵ N Luhmann *Social Systems* (Stanford University Press Stanford 1995) at 266.

¹⁶ Ovid *Metamorphosis* (H Riley trans) book I, MNs 135 and 136.

¹⁷ See the most inspiring contributions in *States, Nations, and Borders* (n 13).

¹⁸ Ovid *Fasti* (A Kline trans) book II, MN 658–60.

¹⁹ JJ Rousseau *Discourse upon the Origin and Foundation of the Inequality among Mankind* (R and J Donsley London 1761) at 97.

²⁰ HW Nicklis 'Von der "Grenitze" zur Grenze. Die Grenzidee des lateinischen Mittelalters (6–15. Jhdt.)' (1992) 128 *Blätter für deutsche Landesgeschichte* 1–29 at 3.

²¹ On the Islamic tradition: K Abou El Fadl 'The Unbounded Law of God and Territorial Boundaries' in *States, Nations, and Borders* (n 13) 214–27.

²² For an unconventional approach see M Weinfeld *The Promise of the Land: The Inheritance of the Land of Canaan by the Israelites* (University of California Press Berkeley 1993).

²³ See, however, for two remarkably different views on the Biblical perception of the land of Israel: M Lorberbaum 'Making and Unmaking the Boundaries of Holy Land' in *States, Nations, and Borders* (n 13) 19–40; and D Statman 'Man-Made Boundaries and Man-Made-Holiness in the Jewish tradition' in *States, Nations, and Borders* (n 13) 41–53.

²⁴ J Cooper 'International Law in the Third Millennium' in R Westbrook (ed) *A History of Ancient Near Eastern Law* (Brill Leiden 2003) vol 1, 241–51. Two and a half millennia later, the *gromaticus* (land surveyor) Siculus Flaccus records in detail how Roman boundary stones (*termini*) were sanctified. S Flaccus *De Conditionibus Agrorum* (1st/2nd century AD) at 11; Nilklas, 'Von der "Grenitze" zur Grenze' (n 20) 6, reports of the medieval use of carrying precious relics all around a parcel of land in order to provide its limits with divine force. With special emphasis on the involvement of the Germanic pantheon in boundary-making: J Grimm *Kleinere Schriften* (Dümmlers Verlagsbuchhandlung Berlin 1865) vol 2, ch 2 ('Deutsche Grenzalterthümer'), 30–74 at 53 ff.

²⁵ A status-quo promoting norm meant to ensure stability of international relations even and in particular in case of fundamental political changes, such as revolutions and decolonization (embodied eg in arts 3 of the

1963 Organization for African Unity Charter).

²⁶ See also N Hill *Claims to Territory in International Law and Relations* (OUP London 1945) at 3: 'The relations between modern states reach their most critical stage in the form of problems relating to territory.'

²⁷ Meticulous edition of royal inscriptions D Frayne *The Royal Inscriptions of Mesopotamia: Early Periods, Volume 1: Pre-Sargonic Period (2700–2350 bc)* (University of Toronto Press Toronto 2008).

²⁸ Detailed analysis A Altman 'Tracing the Earliest Recorded Concepts of International Law. The Early Dynastic Period in Southern Mesopotamia' (2004) 6 *Journal of the History of International Law* 153–72 at 158 ff; JS Cooper *Reconstructing History from Ancient Inscriptions: The Lagash-Umma Border Conflict* (Undena Publications Malibu 1981).

²⁹ Royal Inscriptions (n 27) 195. It is noteworthy that the Sumerian godfather Enlil bears the title 'king of all lands', which does not only provide his particular reign with a distinctively spatial dimension, but also constitutes a reflection of the territory-based political organization in the mortal world as such.

³⁰ *ibid* 195.

³¹ *ibid* 196.

³² For details G Steiner 'Der Grenzvertrag zwischen Lagaš and Umma' (1986) 8 *Acta Sumerologica* 219–300; A Altman 'How Many Treaty Traditions Existed in the Ancient Near East?' in Y Cohen, A Gilan and JL Miller (eds) *Pax Hethitica. Studies on the Hittites and their Neighbours in Honour of Itamar Singer* (Harrassowitz Verlag Wiesbaden 2010) 17–36.

³³ *Geography* (Loeb Classical Library ed and HL Jones trans) (William Heinemann & Co. London 1917) book I, ch IV, ss 7 and 8. Interesting insight on the significance of territory in the ancient Greek world: I Malkin 'Land Ownership, Territorial Possession, Hero Cults, and Scholarly Theory' in RM Rosen and J Farrell (eds) *Nomodeiktēs. Greek Studies in Honor of Martin Oswald* (University of Michigan Press Ann Arbor 1993) 225–34.

³⁴ WW Skeat *The Concise Dictionary of English Etymology* (Wordsworth Hertfordshire 1993) at 499. According to others, the correct reference would be to the suffix '-torium', which seems to have meant 'belong to' or 'surrounding' (J Gottmann *The Significance of Territory* (The University Press of Virginia Charlottesville 1973) at 15), a proposition, however, which could not be confirmed.

³⁵ *The Significance of Territory* (n 34) 15.

³⁶ Illuminative explanations by J Larkins *From Hierarchy to Anarchy. Territory and Politics Before Westphalia* (Palgrave Macmillan New York 2010) at 101 ff.

³⁷ Territory and its limitations have of course already been important elements in the tool-box of political actors in the European Middle Ages and the most powerful of them aspired indeed to some status of 'final authority'. However, these aspirations were not essentially territorial in character (for a detailed discussion: S Sassen *Territory, Authority, Rights. From Medieval to Global Assemblages* (Princeton University Press Princeton 2006) at 31 ff).

³⁸ *ibid* 123 ff.

³⁹ Published posthumous (1532); unpublished Latin version (*De principatibus*) 1513.

⁴⁰ FH Hinsley *Sovereignty* (2nd edn CUP Cambridge 1986) at 110.

⁴¹ It is somewhat symptomatic that this rather abstract discussion with very limited practical value was almost exclusively a domain of German and, in particular, Austrian scholars, complemented by some significant—albeit rather isolated—French (L Delbez 'Le territoire dans ses rapports avec l'état' (1932) 39 *Revue Générale de Droit International Public* 705–38) and Italian (D Donati *Stato e territorio* (Athenaeum Roma 1924)) contributions; W Schoenborn 'La nature juridique du territoire' (1929) 30 *Recueil des cours de droit international de La Haye* 81–190 at 85 ff (with complete references).

⁴² A distinct and very specific US sense as 'organized self-governing region not yet a state' was first attributed to the term in 1799.

⁴³ C de Visscher *Theory and Reality in Public international Law* (Princeton University Press Princeton 1957) at 197 f.

⁴⁴ *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 *Annual Digest Public Intl L* 11 at 15.

⁴⁵ JT Juricek 'American Usage of the Word "Frontier" from Colonial Times to Frederick Jackson Turner' (1966)

110 Proceedings of the American Philosophical Society 10–34.

⁴⁶ Derived from the Medieval Latin words *'bodina, butina'*.

⁴⁷ 'The Significance of the Frontier in American History' (1893) paper read at the meeting of the American Historical Association in Chicago 12 July 1893.

⁴⁸ 'The American frontier is sharply distinguished from the European frontier' see FJ Turner *The Frontier in American History* (Henry Holt New York 1921) at 3.

⁴⁹ *ibid.*

⁵⁰ The term itself was coined in 1899 by R Kjellén (Sweden); major protagonists include F Ratzel, K Haushofer (Germany), H Mackinder (UK), and NJ Spykman (US).

⁵¹ F Neumann *Behemoth: The Structure and Practice of National Socialism* (OUP New York 1942) at 147; see also R Strausz-Hupé *Geopolitics: The Struggle for Space and Power* (GP Putnam's Sons New York 1942). With striking openness, Turner later admitted to his 'imperial philosophy': 'For nearly three centuries the dominant fact in American life has been expansion. With the settlement of the Pacific coast and the occupation of the free lands, this movement has come to a check. That these energies of expansion will no longer operate would be a rash prediction; and the demands for a vigorous foreign policy, for an interoceanic canal, for a revival of our power upon the seas, and for the extension of American influence to outlying islands and adjoining countries, are indications that the movement will continue' ('The Problem of the West' in *The Frontier in American History* (n 48) 219 (first published (1896) 78 *The Atlantic Monthly* 289–97)).

⁵² GH Nobles 'Breaking into the Backcountry: New Approaches to the Early American Frontier, 1750–1800' (1989) 46 *The William and Mary Quarterly* 641–70.

⁵³ International law serves 'to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other': P Allot *Eunomia. New Order for a New World* (OUP Oxford 1990) at 324.

⁵⁴ *Die Lehre von den Staatenverbindungen* (Alfred Hölder Wien 1882) at 22.

⁵⁵ Eg A Rivier *Principes du Droit des Gens* (A Rousseau Paris 1896) vol 1, at 45–51.

⁵⁶ H Grotius *De jure belli ac pacis* (1625) book 1, ch 1, para XIV.

⁵⁷ E de Vattel *Le droit des gens* (1758) Preliminaries, para 1.

⁵⁸ For an overview see J Lonsdale 'The European Scramble and Conquest in African History' in R Oliver and GN Sanderson (eds) *The Cambridge History of Africa* (CUP Cambridge 1985) vol 6, 680–766 and HL Wesseling *Divide and Rule: The Partition of Africa, 1880–1914* (Praeger London 1996).

⁵⁹ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Jurisdiction) [2002] ICJ Rep 303. On this particular aspect of the judgment: M Craven 'International Law and its Histories' in M Craven, M Fitzmaurice and M Vogiatzi (eds) *Time, History and International Law* (Martinus Nijhoff Leiden 2007) 1–25 at 19 ff; E Milano *Unlawful Territorial Situations in International Law. Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff Leiden 2006) at 74 ff.

⁶⁰ *Cameroon v Nigeria* (n 59) para 205.

⁶¹ J Crawford *The Creation of States in International Law* (2nd edn OUP Oxford 2005) at 314.

⁶² Recently (although not uncontroversial) S Banner *How the Indians Lost Their Land. Law and Power on the Frontier* (Belknap Cambridge MS 2005).

⁶³ *Cherokee Nation v Georgia* 30 US 1, 5 Pet 1 (1831).

⁶⁴ *ibid* 17 (Chief Justice Marshall delivering the Court's opinion).

⁶⁵ *ibid* 53 (Justice Thomson, dissenting): 'Testing the character and condition of the Cherokee Indians by these rules [reference is made to Emer de Vattel's notion of statehood], it is not perceived how it is possible to escape the conclusion, that they form a sovereign state.'

⁶⁶ *ibid* 17.

⁶⁷ For an in-depth historical analysis: C Orange *An Illustrated History of the Treaty of Waitangi* (2nd edn Bridget Williams Books Wellington 2004); with a wider (legal) perspective M Belgrave, M Kawharu and D Williams *Waitangi Revisited: Perspectives on The Treaty of Waitangi* (2nd edn OUP Oxford 2005).

⁶⁸ (Local) chiefs (*Rangatira*) exercising autonomy and authority over their own domains only (*rangatiratanga*), the Māori were simply unfamiliar with the concept of a supreme ruler of the whole country. The somewhat

unfortunate (while artificial) recurrence to the term *kawanatanga* made reference to the role of the *Kawana* (Governor of New South Wales), whose jurisdiction then extended and was confined to British subjects in New Zealand.

⁶⁹ Public Act 1975 No 114; amended in 1985, 1988 (twice), 1993, 2006, and on 16 December 2010, the Act established the Waitangi Tribunal and, for the first time ever, gave the 1840 treaty recognition in New Zealand domestic law.

⁷⁰ For details, see B Fassbender 'Sovereignty and Constitutionalism in International Law' in N Walker (ed) *Sovereignty in Transition* (OUP Oxford 2003) 115–143.

⁷¹ *The Acquisition of Territory in International Law* (Manchester University Press Manchester 1963) at 2.

⁷² P Delsalle and A Ferrer (eds) *Les Enclaves Territoriales aux Temps Modernes (XVIIe–XVIIIe siècles): Actes du Colloque de Besançon* (Presses Universitaires Franc-Comtoises Besançon 2000).

⁷³ For details: A Coret *Le condominium* (Pichon & Durand-Auzias Paris 1960).

⁷⁴ Established by art XXV para 4 s 2 of the General Treaty of the Final Act of the Congress of Vienna (signed 9 June 1815) (1815) 64 CTS 453: '... the rivers themselves, in so far as they form the frontier, shall belong in common to the two powers', concretized the following year and reconfirmed in 1984 (see art 1 para 2 of the Treaty between the Federal Republic of Germany and the Grand Duchy of Luxembourg concerning the course of their common border of 11 July 1959 (BGBL 1960 II, 2077)), the Moselle River and its tributaries still constitute a condominium between Luxembourg and Germany (for details see DE Khan *Die deutschen Staatsgrenzen* (Mohr Siebeck Tübingen 2004) at 476 ff).

⁷⁵ Conducted by four generations of the Cassini family: Jacques Dominique (1625–1712), Jacques (1677–1756), César François (1714–84), and another Jacques Dominique (1748–1845).

⁷⁶ In his *Libellus de locurum*, included in the enlarged 1533 edition of his ground-breaking '*On the Principles of Astronomy and Cosmography ...*' (*De principiis astronomiae cosmographicae*), Frisius (1508–55) not only described the theory of trigonometric surveying but also proposed to use it as a method of accurately locating places (ND Haasbroek *Gemma Frisius, Tycho Brahe and Snellius and their Triangulations* (Netherlands Geodetic Commission Delft 1968) at 16ff).

⁷⁷ At the rather precise scale of 1:86,400. Increased access and familiarity with maps and mapping did not only enhance military, local and state administration (A Godlewska *Geography Unbound: French Geographic Science from Cassini to Humboldt* (University of Chicago Press Chicago 1999) at 129), but has also made a significant contribution to change the way in which the State was conceptualized as such.

⁷⁸ M Shaw 'Territory in International Law' (1982) 13 *Netherlands Yearbook of International Law* 61–91 at 79.

⁷⁹ G Schwarzenberger 'Title to Territory: Response to a Challenge' (1957) 51 *American Journal of International Law* 308–24 at 310.

⁸⁰ For details, see the contribution by A Fitzmaurice, 'Discovery, Conquest, and Occupation of Territory', in this volume.

⁸¹ '*Ea quae*' Bull of Pope Julius II (with respect to the Antilles Islands).

⁸² *Consilia, quaestiones et tractatus* (Venice 1585) at 137 ff; translation by FA von der Heydte 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law' (1935) 29 *American Journal of International Law* 448–71 at 450 f.

⁸³ *Island of Palmas Case (Netherlands v United States of America)* 2 Rep Intl Arbitral Awards 829 at 846; DE Khan 'Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations' (2007) 18 *The European Journal of International Law* 145–70 at 158 ff.

⁸⁴ For references from the rich jurisprudence: *Territory in International Law* (n 78) 83.

⁸⁵ Possessionless claims, such as the so-called Hinterland theory, have indeed never been recognized as a viable title. For just one example from State practice: 'Letter of Count Hatzfeld to Baron von Marschall of 14th May 1890' in ETS Dugdale (ed) *German Diplomatic Documents 1871–1914* (Methuen London 1929) vol 2, 32–4 at 32 f: 'Lord Salisbury ... observed that the Hinterland theory, which had been invented by us ... had not been accepted in International Law.'

⁸⁶ For details S Rattner 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90 *American Journal of International Law* 590–624.

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⁸⁷ *Island of Palmas Case* (n 83) 838 ff.

⁸⁸ It is, however, important to recall that territory and its limitations have of course already been important elements in the tool-box of political actors in the European Middle Ages and the most powerful of them aspired indeed to some status of 'final authority'. However, these aspirations were not essentially territorial in character (in-depth discussion Territory, Authority, Rights (n 37) 31 ff; D Willoweit *Rechtsgrundlagen der Territorialgewalt* (Böhlau Köln 1975) at 276).

⁸⁹ Lord Curzon of Kedleston 'Frontiers' in *Oxford Lectures on History, 1904–1923* (Clarendon Press Oxford 1924) vol 1, 1–58 at 7.

⁹⁰ *Le droit des gens* (n 57) book II, ch VII, para 92.

⁹¹ For a classical, albeit not uncontroversial analysis of the entire process regarding *Mittleuropa* still H Helmolt 'Die Entwicklung der Grenzlinie aus dem Grenzsaume im alten Deutschland' (1896) 17 *Historisches Jahrbuch* 235–64.

⁹² *Aegean Sea Continental Shelf Case (Greece v Turkey) (Judgment)* [1978] ICJ Rep 35 MN 85.

⁹³ *The North Atlantic Coast Fisheries Case (Great Britain v United States of America)* 11 Rep Intl Arbitral Awards 167 at 180.

⁹⁴ For details see the contribution by D Bederman 'The Sea', in this volume.

⁹⁵ Term coined by W Graf Vitzthum *Handbuch des Seerechts* (Beck München 2006) at 69.

⁹⁶ JH Breasted *Ancient Records of Egypt* (The University of Chicago Press Chicago 1906) vol 4, at 274 ff (paras 557 ff). To be sure, Wenamon (ab)used the alleged godly prerogatives to corroborate Egyptian hegemonic aspirations in the Eastern Mediterranean.

⁹⁷ Horace *Odes/Carmine* book 1, ch 3, 21–6; C Phillipson *The International Law and Custom of Ancient Greece and Rome* (Macmillan London 1911) vol 2, at 369 f: 'the Romans regarded the sea with horror ... and so, to navigate it has usually thought to be an offence against the gods ...'.

⁹⁸ For details W Ashburner *Nomos Rhodion Nautikos. The Rhodian Sea-Law* (Clarendon Press Oxford 1909).

⁹⁹ Treaties among Greek City States (5th century bc): Thucydides *The History of the Peloponnesian War* (431 bc) ch V.

¹⁰⁰ RP Anand arrives at virtually the same conclusion for the Asian world (*Origin and Development of the Law of the Sea* (Martinus Nijhoff The Hague 1982) at 10 ff).

¹⁰¹ Polybios (c 200–120 bc) provides a full account of this episode: *Historiai* (WR Paton trans) (Loeb Classical Library 1922) book 4, at 52.

¹⁰² H Grotius *The Freedom of the Seas* (1608) at 34.

¹⁰³ The so-called battle of books: Expression ('*bataille de livres*') coined by E Nys *Les origines du droit international* (Castaigne, Thorin & Fils Bruxelles 1894) at 262; see also, E Nys 'Une bataille de livres: Episode de l'histoire littéraire du droit international' in E Nys *Etudes de droit international et de politique* (Castaigne, Fontemoigne Bruxelles 1901) vol 2, 260–72.

¹⁰⁴ Eg Venice in the Adriatic, symbolized by an annual picturesque ceremony of 'espousing' (G Pace *De dominio maris adriatico* (1619)); Genoa on part of the Ligurian Sea (PB Borgo *De dominio serenissimae genuensis reipublica in mari ligustico* (1641)). For details JHW Verzijl *International Law in Historical Perspective* (AW Sijthoff Leyden 1971) vol 4, at 11 ff.

¹⁰⁵ On the so-called King's Chambers and other claims to the Dominion of the British Seas see still unmatched TW Fulton *The Sovereignty of the Sea* (William Blackwood and Sons Edinburgh 1911), offering an amazing amount of 17th to 19th century State practice.

¹⁰⁶ DP O'Connell *The International Law of the Sea* (Clarendon Press Oxford 1982) vol 1, at 1.

¹⁰⁷ *De mare clausum* (1635 trans 1663).

¹⁰⁸ *The International Law of the Sea* (n 106) 14 ff with a succinct explanation of the distinction between imperium and dominium, crucial for the understanding of Grotius's writings.

¹⁰⁹ *The Freedom of the Seas* (n 102) 37.

¹¹⁰ *De jure belli ac pacis* (n 56) book II, ch 3, para XIII.

¹¹¹ US Secretary of State Jefferson, letter of 8 November 1793 (JB Moore *A Digest of International Law*

(Government Printing Office Washington 1906) vol 1, at 702).

¹¹² Only in the late 20th century definitively replaced by today's 12 mile limit (UNCLOS (The United Nations Convention on the Law of the Sea) (1982) art 3).

¹¹³ *Commentaries on the Laws of England* (Clarendon Press Oxford 1766) vol 2, ch 2, at 18; referred to by H Lauterpacht (ed) *Oppenheim's International Law* (8th edn Longmans, Green & Co New York 1955) at 462, as an 'universally recognized rule of the Law of Nations'. For details see *Die deutschen Staatsgrenzen* (n 74) 642 ff.

¹¹⁴ The first free ascent of humans took place in Paris on 21 November 1783 in a hot-air balloon, constructed by the brothers Josef and Etienne Montgolfier (Pilatre de Rozier and Marquis d'Arlandes).

¹¹⁵ Isolated incidents of an early military use (battle of Fleurus 1794, siege of Venice 1849, battle of Solferino 1859) did not trigger any juridical reflections. The rather extensive use of balloons in the relief of the besieged city of Paris (Franco-German War 1870/71), however, led to some interesting juridical disputes, in particular in the field of international humanitarian law (threat of Bismarck to execute as spies all aeronauts). For extensive references see *Die deutschen Staatsgrenzen* (n 74) 622 ff.

¹¹⁶ JF Lycklama à Nijeholt *Air Sovereignty* (Nijhoff The Hague 1910) at 1.

¹¹⁷ JS Dancko *De jure principis aereo. disputatio inauguralis* (Anhalt-Zerbst 1687) is probably the very first, although eccentric treatment of the subject (Synopsis of the original Latin text and German translation by Institute of Air and Space Law (Cologne University 2001)); a century later, J Pütter *Erörterungen und Beyspiele des teutschen Staats- und Fürstenrechts* (1793) vol 1, 10 f touches upon the issue in the context of the (hypothetical) distribution of competences between the (German) *Reich* and its constituent units (*Länder*).

¹¹⁸ *De jure belli ac pacis* (n 56) book II, ch 2 and 3.

¹¹⁹ 'De jure naturae et gentium. Libri octo' (1672) in JB Scott (ed and trans) *The Classics of International Law* (Clarendon Press Oxford 1934) vol 17, book IV, ch V, para 5.

¹²⁰ JC Cooper 'Roman Law and the Maxim "Cujus est solum" in International Air Law' in IA Vlastic (ed) *Explorations in Aerospace Law* (McGill University Press Montreal 1968) 54–102.

¹²¹ For an opposite view (albeit for private law purposes) *Commentaries on the Laws of England* (n 113) 18.

¹²² 'Le domaine aérien et le régime juridique des aérostats' (1901) 8 *Revue Générale de Droit International Public* 414–85.

¹²³ P Fauchille 'Régime juridique des aérostats' (1902) 19 *Annuaire Institut de Droit International* 19–86; E Nys (1902) 'Régime juridique des aérostats' 19 *Annuaire Institut de Droit International* 86–114.

¹²⁴ P Fauchille 'Régime des aérostats et de la télégraphie sans fil' (1906) 21 *Annuaire Institut de Droit International* 293–329 at 295.

¹²⁵ K Hutchinson *Freedom of the Air* (Public Affairs Committee New York 1944) at 4. Still in 1910, Germany and France vigorously advocated for the time-honoured principle of a virtually unlimited freedom of the air.

¹²⁶ 'Régime des aérostats et de la télégraphie sans fil' (n 124).

¹²⁷ A proposal by Westlake, reverting explicitly to the 'cujus est solum ejus est usque ad coelum' principle to grant States a restricted 'droit de souveraineté sur l'espace aérien au-dessus de son sol' ('Régime des aérostats et de la télégraphie sans fil' (n 124) 299) was rejected by great majority at the IDI's Gent session (ibid 305). A similar position was held by H Hazeltine *The Law of the Air* (University of London Press London 1911).

¹²⁸ Convention Relating to the Regulation of Aerial Navigation (signed 13 October 1919, entered into force 29 March 1922) 11 LNTS 173, art 1.

¹²⁹ JHW Verzijl *International Law in Historical Perspective* (AW Sijthoff Leyden 1970) vol 3, at 75.

¹³⁰ Convention on International Civil Aviation (signed 7 December 1944, entered into force 5 March 1947) 15 UNTS 295 (so-called 'Chicago Convention').

¹³¹ For details R Goedhart *The Never Ending Dispute: Delimitation of Air Space and Outer Space* (Editions Frontières Gif-sur Yvette 1996); G Oduntan *Sovereignty and Jurisdiction in Airspace and Outer Space: Legal Criteria for Spatial Delimitation* (Routledge New York 2012).

¹³² Developed by the Hungarian engineer and physicist Theodor von Kármán (1881–1963), this line relies on

aerodynamic criteria: Where the thinning air does no longer allow the wings to generate enough lift to make an aircraft, travelling right below orbital velocity, to stay up, we have crossed the border between airspace and outer space.

¹³³ The Antarctic Treaty (signed 1 December 1959) 402 UNTS 71.

¹³⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 27 January 1967 (opened for signature 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, art 2.

¹³⁵ United Nations Convention on the Law of the Sea 1833 UNTS 397, art 89: 'No State may validly purport to subject any part of the high seas to its sovereignty.'

¹³⁶ Recent developments indicate the emergence of new forms of even long-lasting 'territorial administration' by non-State actors. However, this complex issue is clearly transcending the history-oriented approach of this volume.

¹³⁷ K Raustiala 'The Evolution of Territoriality: International Relations and American Law' in M Kahler and BF Walter (eds) *Territoriality and Conflict in an Era of Globalization* (CUP Cambridge 2006).

¹³⁸ G Scelle 'Obsession du territoire' in JHW Verzijl (ed) *Symbolae Verzijl* (Martinus Nijhoff The Hague 1958) 347–61.

¹³⁹ *The Acquisition of Territory in International Law* (n 71) 3.