
Pushing Back the Limitations of Territorial Boundaries

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Abstract

This article offers some critiques of the dominant approaches in international law to dealing with territorial boundaries. It demonstrates that these approaches are largely trapped within the framework of nineteenth-century colonial concepts. As a consequence, the international legal system — which is still largely constructed on ideas of a certain type of territorial sovereignty — recreates and affirms the dispositions by colonial powers, it privileges certain voices and silences others and it restricts the identities of individuals to the limits of state territorial boundaries. One effect of this is to reinforce the state-based framework of the international legal system, particularly in areas such as human rights and resource distribution. This article argues that there are alternative approaches to territorial boundaries that focus on relationships and not on imaginary constructs. These alternatives have institutional, structural and conceptual consequences for the international legal system.

We have been engaged . . . in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.¹

When Lord Salisbury said these words in 1890, it was at a time when territorial boundaries were being drawn across the world with little or no regard for natural or cultural boundaries. These boundaries were designed to reinforce an international system of absolute sovereignty of the state in which boundaries were derived from geo-military occupation of space as determined by consenting colonial powers. More than a century later, many of these territorial boundaries remain as they were drawn, despite the dramatic changes that have occurred to the international system and the significant challenges that have been made to the concept of sovereignty within

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¹ Lord Salisbury, speaking in 1890, as quoted in the Separate Opinion of Judge Ajibola, in *Territorial Dispute (Libya v. Chad)*, ICJ Reports (1994) 6, at 53.

precise boundaries. Yet these territorial boundaries, and the ideas that were behind them, still form the foundations for the present international legal system.

The primary components of the international legal system are states, and territorial boundaries are a key element in how states are defined by that system. While the boundaries determined by the international legal system are often artificially created and contested, they exist by the operation of the international legal system, which usually seeks to reinforce these boundaries and the concepts of territorial sovereignty inherent in them.² However, such a concept of international law as a state-based process 'is incapable of serving as the normative framework for present or future political realities . . . new times call for a fresh conceptual and ethical language'.³ Indeed, the trend in the last few decades has been towards decisional control over resources — human, natural, military or economic — which, in contrast to territory, are more susceptible to overlapping claims by non-state groups and to communal regulation by an international community. These developments have challenged the emphasis in the international legal system on the spatial dimension of sovereignty, disaggregated the competencies bundled up in the erstwhile monolithic concept of sovereignty, allowed new actors to claim these newly spun-off competencies and recast territorial sovereignty from a source of power to a basis of responsibility. In this context, the traditionally exclusive notions of statehood, sovereignty, and territory, formed within fixed boundaries, remain principally as devices for managing the permissible use of force.

This article will examine how the international legal system is being challenged by new approaches to understanding territorial boundaries. It will do this by looking at how international law defines territorial boundaries and sovereignty, and its effects on human and natural resources. It will be shown that, in respect of territorial boundaries, the international legal system is still largely caught within the framework of nineteenth-century concepts but that it is beginning to adapt to regimes of sharing that put certain resources beyond appropriation by states alone. It will be argued that international law in relation to territorial boundaries must be reconceived so that it is regulated in terms of an international society that is inclusive of all and allows all to find and use their voices within international society.

1 Definitions of Territorial Boundaries

Throughout the twentieth century, every edition of *Oppenheim's International Law* has maintained the same definition of territorial boundaries:

Boundaries of State territory are the imaginary lines on the surface of the earth which separate

² A legal system, of which international law is one type, is a process by which legal rules — or boundaries — are created in order to structure and organize societies and relationships. See F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (1991) 1; and Nedelsky, 'Law, Boundaries, and the Bounded Self', 30 *Representations* (1990) 162.

³ Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53–54.

the territory of one State from that of another, or from unappropriated territory, or from the Open Sea.⁴

These lines are not only imaginary; they are invented and created by the international legal system. This is seen in the words of Lord Salisbury quoted at the beginning of this article and in the approach to boundaries in Europe after the First World War, as expressed in the diary of a participant at the post-war Versailles conference:

May 8 1919 — During the afternoon [at the Quai d'Orsay] . . . the fate of the Austro-Hungarian Empire is finally settled. Hungary is partitioned by these five distinguished gentlemen — indolently, irresponsibly partitioned — while the water sprinkles on the lilac outside — while the experts watch anxiously — while AJB, in the intervals of dialectics on secondary matters, relapses into somnolence — while Lansing draws hobgoblins on his writing pad — while Pichon, crouching in his large chair, blinks owlshly as decision after decision is actually recorded . . . They begin with Transylvania, and after some insults flung like tennis balls between Tardieu and Lansing, Hungary loses her south. Then Czechoslovakia, and while the flies drone in and out of the open windows Hungary loses her north and east. Then the frontier with Austria, which is maintained intact. Then the Jugo-Slav frontier, where the Committee's report is adopted without change. Then tea and macaroons.⁵

This 'tea and macaroons' approach to drawing boundaries has led to long-term causes of conflict. Indeed, a large number of the disputes between states for which adjudication is sought involve a clarification of the precise boundary line (land and maritime) between states and require the judicial or arbitration body to apply international law to determine that boundary. For example, in a frontier dispute between two former colonies in Africa, the parties asked the International Court of Justice 'not to give indications [of equity, for instance] to guide them in determining their common frontier, but to draw a line, and a precise line'.⁶

From the perspective of the international legal system, the purpose of territorial boundaries is to clarify which entities are states and to separate states from each other, in order to structure that system. This is because '[a]t the basis of international law lies the notion that a State occupies a definite part of the surface of the earth, within which it normally exercises . . . jurisdiction over persons and things to the exclusion of the jurisdiction of other States'.⁷ The direct connection between territorial boundaries and sovereignty was made in 1910 when the Permanent Court of Arbitration held that 'one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminous

⁴ See L. Oppenheim, *International Law* (1st ed., 1905) 253. See also, for example, the eighth edition by H. Lauterpacht (1955) at 531; and the ninth edition by R. Jennings and A. Watts (1992) at 661.

⁵ H. Nicolson, *Peacemaking 1919* (1933) 328–329.

⁶ *Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986) 554.

⁷ J. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed., 1963) 7. See also Oppenheim (9th ed.), *supra* note 4, at vol. II, 563 ('definite portion of the globe which is subject to the sovereignty of a state').

with sovereignty'.⁸ In international law, ownership of territory is the concept used to determine sovereignty. As was held in the *Island of Palmas Case*:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.⁹

This 'point of departure' was reinforced by the international legal order that emerged after the Second World War. This order was built on the inviolability of national territory as a function of its central concern for international peace. The core of this legal order is the prohibition on the 'use of force . . . against the territorial integrity or political independence' of a state,¹⁰ which protects both the spatial and decisional aspects of sovereignty. A corollary is the prohibition against intervention in matters belonging to the domestic jurisdiction of states, though it pertains not to space but to autonomous decision-making.¹¹ Both these principles have been recognized as fundamental 'purposes' in the Charter of the United Nations, as reaffirmed in the authoritative Declaration of Principles of International Law, adopted by the UN General Assembly.¹² That Declaration included 'the duty to refrain from the threat or use of force to violate the existing international boundaries of any state or as a means of solving . . . territorial disputes and problems concerning frontiers of states', while restating the duty of non-intervention.

The International Court of Justice affirmed these principles as rules of customary international law in *Military and Paramilitary Activities (Nicaragua/United States)*.¹³ The Court expressly linked territorial sovereignty with the principle of non-use of force when it determined that '[t]he effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention'.¹⁴ Assistance by the United States to the Contras, a military group opposed to the Nicaraguan Government, as well as the direct United States attacks on Nicaragua's oil installations, the mining of its ports, and unauthorized overflight 'not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions

⁸ *North Atlantic Coast Fisheries (United Kingdom v. United States)*, Permanent Court of Arbitration, 11 *Reports of International Arbitral Awards* (1910) 167, at 180.

⁹ *Island of Palmas (The Netherlands v. United States)* 2 *Reports of International Arbitral Awards* (1928).

¹⁰ UN Charter, Article 2(4) ('All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . .').

¹¹ UN Charter, Article 2(7) (prohibiting the UN from 'interven[ing] in matters which are essentially within the domestic jurisdiction' of states).

¹² Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), 24 October 1970.

¹³ ICJ Reports (1986) (Merits).

¹⁴ *Ibid.*, at 128.

into its territorial and internal waters' and airspace.¹⁵ The Court also affirmed the non-spatial aspects of sovereignty in addressing the United States' argument that the Nicaraguan Government had established a totalitarian government. The Court said that the rule of non-intervention emanated from sovereignty, which entailed:

the freedom of choice of the political, social, economic and cultural system of a State. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.¹⁶

The Court acknowledged the links between sovereignty and the various systems within the state. This is consistent with the position that territorial boundaries are not just delimitations of the territory of a state and of state sovereignty but also define the inhabitants. While:

peoples have attachments to several levels of territorialism . . . the actual dominant structure is the State and so, as a generalization all the peoples on earth are defined by State levels within their boundaries.¹⁷

Further, states are perceived in international law as being the representatives of the inhabitants of the territory within each state's sovereignty, as in order to meet the definition of being a state, there must be a 'permanent population'.¹⁸ As one writer put it:

most acts of administration commonly relied on to establish sovereignty require the voluntary cooperation of the inhabitants, and, in frontier areas, involve the choice by the inhabitants between the facilities offered by each of the claimant States.¹⁹

Thus ethnicity, religion or moral practices become largely irrelevant as living space is determined by the state territorial boundary. As one intention of territorial boundaries is that they enhance 'group cohesion by psychologically sharpening the different identification of community members from others across the boundary',²⁰ the state is meant to be the only relevant identity for the inhabitants of a territory. Related to this, international law has developed intricate rules regarding the nationality of people in terms of their relationship to states, as determined by the

¹⁵ *Ibid.*, at 128.

¹⁶ *Ibid.*, at 133.

¹⁷ Amaral, 'New Reflections on the Theme of International Boundaries', in C. Schofield (ed.), *Global Boundaries* (1994) 16.

¹⁸ Article 1 of the Montevideo Convention on the Rights and Duties of States 1933.

¹⁹ Munkman, 'Adjudication and Adjustment — International Judicial Decision and the Settlement of Territorial and Boundary Disputes', 46 *British Yearbook of International Law* (1972–1973) 107.

²⁰ Suzuki, 'Self-Determination and the World Public Order: Community Response to Territorial Separation', 16 *Virginia Journal of International Law* (1976) 792–793. Boundaries are a psychological phenomenon with a social function: see F. Kratochwil, P. Rohrlich and H. Mahajan, *Peace and Disputed Sovereignty: Reflections on Conflict over Territory* (1985) 117.

degree of connection people have to the territory of a state.²¹ By determining who are its nationals, states also determine who are non-nationals: who is the ‘other’. Others do not have the same rights and obligations with regard to that state.

The consequence, at least for most states that emerged from colonial administrations, was that the new (independent) governments sought to assert powerfully the state identity above all other identities. Many of these governments argue:

against the maintenance of the traditional indigenous institutions, which they consider to be dangerous and anachronistic and [accuse] the tribalism, the regionalism, and the racism as being the bitter enemies of national-State building.²²

For example, in Indonesia, an archipelagic state of many cultures, religions and practices, once the Dutch colonizers left, successive governments have propounded a national language (*Bahasa Indonesia*) and an ideology (*pancasila*) that promote a pretended national unity.²³ One possible consequence of this ‘national-state building’ is that ‘State power wielded by the State’s functionaries might also be used to serve the particularistic interests of the rulers, that it might be used against the interests of the people and that it might take the form of repression’.²⁴ Indeed, the history of internal conflicts is replete with examples of repression by the state against a group within the state seeking to assert its separate identity from that of the state.²⁵

However, it needs to be recognized that ‘nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history’.²⁶ At the same time there is a significant development within the European continent, as will be discussed below, that creates a multi-level identity. Yet many identities transcend territorial boundaries, such as gender, religious or language identities, as do some peoples such as the Kurds, but these are only tolerated by the international legal system as long as they do not seek to challenge the sovereignty of the state.²⁷ Indeed, the international legal system may itself define

²¹ See *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports (1955) 4; and *Iran–United States Case No. A/18, 5 Iran–United States Claims Tribunal Reports* (1984–1) 251. Cf *Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda, 37 ILM (1998) 1399; and *Prosecutor v. Tadic*, International Criminal Tribunal for the Former Yugoslavia, 38 ILM (1999) 1518.

²² Amaral, *supra* note 17.

²³ A. Schwarz, *A Nation in Waiting: Indonesia in the 1990s* (1994).

²⁴ *Ibid.*, at 8.

²⁵ P. Brogan, *World Conflicts: Why and Where They Are Happening* (1987). This is one reason why there is so much resistance by states to allowing the right of self-determination to include secession of a group within the state. ‘Many peoples today are deprived of their right of self-determination, by elites of their own countrymen and women: through the concentration of power in a particular political party, in a particular ethnic or religious group, or in a certain social class’: Statement by United Kingdom representative to Third Committee of the General Assembly on 12 October 1984, 55 *British Yearbook of International Law* (1984) 432.

²⁶ Kamenka, ‘Human Rights, Peoples’ Rights’, in J. Crawford (ed.), *The Rights of Peoples* (1988) 133. See also Allott, ‘The Nation as Mind Politic’, 24 *New York University Journal of International Law and Politics* (1992) 1361; Berman, ‘Sovereignty in Abeyance: Self-Determination in International Law’, 7 *Wisconsin International Law Journal* (1988) 51; and B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd ed., 1991).

²⁷ See Chinkin and Wright, ‘The Hunger Trap: Women, Food and Self-Determination’, 14 *Michigan Journal of International Law* (1993) 262.

which identities warrant protection. For example, in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, genocide is defined in relation to 'national, ethnical, racial or religious groups'.²⁸ Important though this Convention is, it does not include other groups, such as those defined by their language, their gender or their sexuality.²⁹ The traditional international legal system imagines that one voice speaks for all the people in the state. National unity triumphs over cultural diversity. Territorial boundaries are thus meant to determine identity and living space at the cost of diversity, multi-level sovereignties and real identities.

The international legal system has defined territorial boundaries in a way that links boundaries inextricably with state sovereignty. In this respect, sovereignty is seen as a power exercised by states over territory and over the people within the territorial boundaries as decided by states. International law thus operates as a distributive mechanism for determining which state can exercise sovereignty over a certain territory and people.

2 Boundaries and Decolonization

A challenge to the established pattern of the international legal system — as consented to by colonial powers — came with the successful movement of decolonization. Many new states emerged and began a process of reshaping the international legal system. One key change was the development of the right of self-determination, which was seen as both the rationale for the existence of the decolonized states and the means to undermine the existing international legal order. The right of self-determination is premised on the idea that peoples can 'freely determine their political status and freely pursue their economic, social and cultural development'.³⁰

At one level, this development was in keeping with the existing international legal order. The international legal system accepted that the right of self-determination applied to all colonies on the basis that the new state was seen as emerging from the existing colony and hence there was merely a transfer of pre-existing sovereignty.³¹ However, one of the consequences of allowing a voice for non-European powers in the international legal order was that the methods by which the colonial powers had established territorial sovereignty over the colonies was reviewed. When the European colonial powers had acquired lands in Asia, Africa and the Americas, there were several ways by which the acquisition was characterized under international

²⁸ Article 2.

²⁹ The two International Criminal Tribunals have had to develop new concepts of nationality in order for the Convention definition to be applied: see *Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda, 37 ILM (1998) 1399; and *Prosecutor v. Tadic*, International Criminal Tribunal for the Former Yugoslavia, 38 ILM (1999) 1518.

³⁰ Common Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966, No. 14531, 993 UNTS (1976) 3 (ICESCR), and the International Covenant on Civil and Political Rights 1966, No. 14668, 999 UNTS (1976) 171 (ICCPR).

³¹ In the *Namibia* Opinion, ICJ Reports (1971) 16, at 31, it was held that the 'development of international law in regard to [colonies] ... made the principle of self-determination applicable to all of them'.

law. The first was to consider the land *res nullius*, by assuming that there was no existing legal sovereign or ‘owner’ of the territory. The second, to the extent that these lands were actually inhabited by organized communities (and accordingly vested with sovereignty) was by conquest. The third was by consent between states, that consent being either express or implied and being purely between (often notional) governments. Finally, if any indigenous inhabitants were present but had not organized themselves in the form of states resembling those of the European colonial powers, then the inhabitants ‘were merely factually and not legally in occupation of the territory’, and so the territory would be treated as *res nullius*.³²

The right of self-determination changed this accepted pattern. It continued the movement towards making illegal the acquisition of territory by conquest, as not being in the interests of states.³³ It confirmed that territorial sovereignty required more than distant statements of intent and a few naval vessels. What was now required was sovereignty by ‘effective occupation’, being evidence of peaceful and continuous displays of actual sovereign powers within the boundaries of the territory.³⁴ Above all, the right of self-determination was used to reject the treatment of indigenous peoples as having been of no consequence for sovereignty. This rejection was most clearly made by the International Court of Justice in the *Western Sahara* Opinion, where it was held that the indigenous inhabitants, though being nomadic tribes, had some forms of legal ties with neighbouring peoples and that the territory was therefore not *res nullius* at the time of Spanish colonization.³⁵

While this discourse appeared to be conducted in the language of entitlement of peoples,³⁶ the underlying concern in the international legal system remained the preservation of the state and its territorial boundaries, usually by avoidance of inter-state recourse to aggression. So the right of self-determination was forced to yield repeatedly to the primacy of the claims of inter-state peace and security. A clear example of this is found in the applications of the principle of *uti possidetis juris*. This principle provides that states emerging from colonial administrative control must accept the pre-existing colonial boundaries.³⁷ The principle is conceptually derived from the rule that a change of sovereignty by itself did not change the status of a boundary.³⁸ However, Latin American states, upon becoming independent, had adopted it for the sake of stability, in order that the dissolution of the Spanish empire did not leave any land *res nullius* and hence fair game to a fresh round of territorial disputes. It also avoided the difficulties of establishing precise locations in poorly

³² M. Shaw, *Title to Territory in Africa: International Legal Issues* (1986) 31–32.

³³ This position is consistent with one of the purposes of the United Nations: to protect the territorial integrity and political independence of states: Article 2(4) of the United Nations Charter.

³⁴ *Island of Palmas (The Netherlands v. United States)* 2 *Reports of International Arbitral Awards* (1928) 839.

³⁵ *Western Sahara Advisory Opinion* ICJ Reports (1975) 12. See also S.J. Anaya, *Indigenous People in International Law* (1996).

³⁶ I. Brownlie, *Boundary Problems and the Formation of New States* (1996) 3, who notes that sovereignty ‘implement[s] the notion of entitlement’.

³⁷ *Ibid.*, at 5.

³⁸ *Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports (1962) 6.

mapped areas.³⁹ Similarly, this principle was formally adopted by the Organization of African Unity in 1964⁴⁰ and has been asserted by former colonial states.⁴¹ Indeed, *uti possidetis* is now considered 'a firmly established principle of international law where decolonization [is] concerned'.⁴² The aim of this principle is to achieve stability of territorial boundaries and to maintain international peace and security.

Yet, when the principle of *uti possidetis* collides with the right of self-determination, or, stated otherwise, when the claims of peace among states clashes with the claims of justice by peoples, then the international legal system has consistently allowed the claims of peace to prevail. This is seen in the Declaration of Principles of International Law, which affirmed in grand terms the right of peoples 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development',⁴³ and then qualifies this by stating that:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.⁴⁴

This preference for peace over justice and for boundaries over people was affirmed by the International Court of Justice in the *Frontier Dispute Case (Burkina Faso/Mali)*. The Court decided that:

At first sight [*uti possidetis*] conflicts outright with . . . the right of peoples to self-determination. In fact, however, the maintenance of the territorial *status quo* in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.⁴⁵

³⁹ Brownlie, *supra* note 36, at 6. See also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* ICJ Reports (1992) 92; and *Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986) 554, Separate Opinion of Judge Luchaire, at 652–654.

⁴⁰ The principle of *uti possidetis* was expressly adopted by the Organization of African Unity in 1964 (AGH/Res. 16(1)). See S. Sharma, *Territorial Acquisition, Disputes and International Law* (1997) 119–129; Bartos, 'Uti Possidetis. Quo Vadis?', 18 *Australian Yearbook of International Law* (1997) 37; and Shaw, 'Peoples, Territorialism and Boundaries', 8 *European Journal of International Law* (1997) 478.

⁴¹ In a current case before the International Court of Justice, *Land and Maritime Boundary Between Cameroon and Nigeria*, Cameroon has claimed that Nigeria has violated inherited boundaries.

⁴² *Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986) 554, at para. 20. The principle was applied to the European mainland during the break-up of the former Yugoslavia. In the opinion of the committee established by the European Community to consider legal questions arising from the conflict in the former Yugoslavia (the Badinter Commission), 'former boundaries became frontiers protected by international law' due to *uti possidetis*, unless there was contrary agreement (see 3 *European Journal of International Law* (1992) 185). However, this is clearly a wrong decision, as the former Yugoslavia was never a colony and the relevant boundaries in issue were internal federal boundaries, not pre-existing colonial boundaries: see Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission', 24 *Melbourne University Law Review* (2000) 50.

⁴³ See *supra* note 12. See also common Article 1 of the ICESCR and the ICCPR.

⁴⁴ *Ibid.*

⁴⁵ *Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986) 554, at 566–567.

So, however unsatisfactory 'from the ethnic, geographical or administrative standpoint'⁴⁶ are these inherited boundaries, the Court would not alter them on the basis of considerations of justice, equity or fairness.

Yet in the *Land, Island and Maritime Dispute Case*, it was noted that '*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes'.⁴⁷ Indeed, it is now clear that many of the new states were not as content with this principle as is often stated. For example, President Nyerere of Tanzania criticized the OAU's adoption of this principle when he said: 'we must be more concerned about peace and justice in Africa than we are about the sanctity of the boundaries we inherit.'⁴⁸ Of course, the adoption of this principle, which is aimed at maintaining peace, has not prevented wide-scale armed conflicts over boundaries in Africa and elsewhere. Significantly, when the 1949 Geneva Conventions were amended in 1977, their protection extended to wars of national liberation, being 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.⁴⁹

Despite this inequity at the heart of the principle of *uti possidetis*, the consequence of adopting this principle is that territorial boundaries operate inequitably and in favour of the colonial power's divisions of territory. In the end, the priority given by the international legal system to the principle of *uti possidetis* over the right of self-determination gives international legitimacy to unlawful and internal acts, purely on the basis that those acts occurred during the colonial era. In aiming to achieve stability, peace and security, the power of the new state is affirmed and it cannot be undermined by challenges to its boundaries. The power of the colonial state is affirmed as there is an allocation of 'power across time by entrenching the categories and generalizations of the past and thus dissipating the power of the present . . . [which] reflects the extent of decisional conservatism within the system'.⁵⁰ So the rules developed by the international legal system to deal with boundaries are affirming of the state structure of that system. Yet, as was seen in the opening quotation, many of these boundaries were created in ignorance of natural or cultural boundaries and merely to protect spheres of influence.⁵¹ By ignoring natural boundaries and by

⁴⁶ *Ibid.*

⁴⁷ *Land, Island and Maritime Dispute (El Salvador v. Honduras)*, ICJ Reports (1992) 355, at 388.

⁴⁸ As quoted in Radan, *supra* note 42, at 70.

⁴⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, at Article 1(4).

⁵⁰ Schauer, *supra* note 2, at 173. This criticism is developed by the 'Newstream' of critical legal scholars in international law, such as Kennedy, 'A New Stream of International Law Scholarship', 7 *Wisconsin International Law Journal* (1988) 1.

⁵¹ See *supra* note 1. One example of this ignorance is the Caprivi Strip in Namibia, which is a finger of land only 20 miles wide stretching to Zambia and Zimbabwe. This was included in the 1890s as part of the then German South West Africa 'due to poor geographical knowledge, since the intention had been to secure access to the Zambezi for the German colony, in the [mistaken] belief that an important communications route was involved': Shaw, *supra* note 32, at 51. See also E. Hertslet, *The Map of Africa by Treaty*, vol. 3 (3rd ed., 1910) 899–906.

ensuring that new states, and the boundaries of new states, are decided in the interests of the existing states, the international legal system recreates and affirms the dispositions by colonial powers.⁵² The sad irony is that, at their moment of triumph, the states that came into existence due to the process of decolonization, turned away from the right of self-determination and their own communal organizations towards an acceptance of both the very boundaries created artificially by past colonial powers and an international legal order based on precise territorial boundaries of states.

3 Boundaries and Contested Sovereignty

This approach to territorial boundaries after decolonization by the international legal system confirms the power of the state and the acceptance of sovereignty being in the hands of states alone. It results in privileging certain voices and silencing others. It allows the elites in a territory to gain and exercise power, particularly political and economic power, at the expense of most of the people living in that territory. It also affirms a particular type of sovereign power found in Europe. The 'impermeability of statehood' and the 'territorial inviolability' of the state as a 'monolithic entity'⁵³ derive from conceptual baggage that originated from the age of princedoms.⁵⁴ As Louis Henkin has noted:

The excesses and excrescences of 'sovereignty' are due in part [to] the provenance of the term and its entry into the international political and legal vocabulary . . . The law of inter-prince relations, with its roots in religious law, natural law, Roman law and morality was later subsumed and assimilated into the modern law of nations, but it did not shed its origins and its princely paraphernalia.⁵⁵

The duty of personal loyalty of vassal to lord that lay at the heart of feudalism became the duty of allegiance to states and, similarly, the feudal bond to the land became the territorial scope of state power.⁵⁶ This translated respectively to *imperium* or authority (general power of government and administration) as well as *dominium* or title (public ownership of property within the state).⁵⁷

Yet there are different concepts of sovereignty. In Africa, for instance, the pre-colonial concept of society that persists today is based on personal allegiances to

⁵² See Cukwurah, 'The Organisation of African Unity and African Territorial and Boundary Problems, 1963–1973', 13 *Indian Journal of International Law* (1973) 176; Angie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard Journal of International Law* (1999) 1; and, generally, M. Bedjaoui, *Towards a New International Economic Order* (1979).

⁵³ Brierly, *supra* note 7, at 1–2.

⁵⁴ P. Allott, *Eunomia: A New Order for a New World* (1990) 246, notes that 'sovereignty in the interstate world came to be conceived simply as authority deriving from land-holding, a concept reminiscent of the so-called feudal systems of pre-modern societies'. See also Schachter, 'Sovereignty — Then and Now', in R. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1993) 671.

⁵⁵ L. Henkin, *International Law: Politics and Values* (1991) 9.

⁵⁶ Brierly, *supra* note 7, at 1–2.

⁵⁷ I. Brownlie, *Principles of Public International Law* (5th ed., 1998) 107.

tribes rather than territory, reinforced by the existence of ‘natural separation zones’ like deserts and forests that defined ‘frontier zones’ rather than strict territorial boundaries.⁵⁸ In former colonies in Asia, the indigenous sense of territory was porous and permeable, especially since fealty was between persons and not based on the ‘unambiguous mapping out of space’.⁵⁹ For example, in the dispute over certain islands in the South China Sea, several states have opposed China’s claims based on ancient imperial edicts, contending that the emperor during those days reigned over subjects, not territory, and even then by virtue of suzerain power to collect tribute from vassals, and not by sovereign command.⁶⁰ In many cultures there were pre-colonial ideas of the ruler as ‘king of his people, not of his people’s lands’⁶¹ and as engaged in the ‘governance of people rather than place’.⁶²

The state sovereignty view of European powers largely ignored, and then blocked out, these alternative concepts during the period of decolonization. However, international legal scholarship has revitalized the debate over sovereignty. For example, as Hilary Charlesworth makes clear:

The State constituted by international law is a bounded, self-contained, closed, separate entity that is entitled to ward off any unwanted contact or interference . . . Like a heterosexual male body, the State has no ‘natural’ points of entry, and its very boundedness makes forced entry the clearest possible breach of international law.⁶³

Thus she sees the international law concept of the state — which is itself an artificial construct — as a male construct that reinforces a particular view of territorial boundaries. This construct is seen in the approach taken to resist those who may wish to intrude into a territory, be it another state or a refugee.⁶⁴ Not only does the concept of state ownership inherent in the traditional approach of international law to territorial boundaries reinforce and privilege a certain view of the state, it is unable to deal sufficiently with alternative conceptions of sovereignty. As seen above, the development of the right of self-determination is an example of how the international legal system is not prepared to accept a concept once the sovereignty of the state is threatened. Once self-determination was sought to be applied beyond the colonial

⁵⁸ Shaw, *supra* note 32, at 1–2 and 27.

⁵⁹ Carston, ‘Borders, Boundaries, Tradition and States in the Malaysian Periphery’, in T. Wilson and H. Donnan (eds), *Border Identities: Nation and State at International Frontiers* (1998) 218.

⁶⁰ P. Kien-hong Yu, *A Study of the Pratas, Macclesfield Bank, Paracels, and Spratlys in the South China Sea* (1988); D. Dzurek, *The Spratly Islands Dispute: Who’s On First?* (1996); and M. Valencia, *China and South China Sea Disputes: Conflicting Claims and Potential Solutions in the South China Sea* (1995).

⁶¹ L. Ali Khan, *The Extinction of Nation-States: A World Without Borders* (1996) 62. See also C. McNeely, *Constructing the Nation-State: International Organizations and Prescriptive Action* (1995) 4.

⁶² Carston, *supra* note 59, at 8–9.

⁶³ Charlesworth, ‘The Sex of the State in International Law’, in N. Naffine and R. Owens (eds), *Sexing the Subject of Law* (1997) 251, at 259. See also H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

⁶⁴ See, for example, Johnsson, ‘The International Protection of Women Refugees: A Summary of Principal Problems and Issues’, 1 *International Journal of Refugee Law* (1989) 222; and Anker, ‘Women Refugees: Forgotten No Longer?’, 32 *San Diego Law Review* (1995) 772.

context, the international legal system resisted its operation. States claimed that the right cannot be exercised where territorial boundaries are in issue, as:

If every ethnic, religious or linguistic group claimed Statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.⁶⁵

This approach upholds the perpetual power of a state at the expense of the rights of the inhabitants, which is contrary to the clear development of the right of self-determination.⁶⁶ There is thus a struggle between the concept of sovereignty as being in the domain of states and a concept of sovereignty as being in the control of the people. The traditional international legal system has insisted that the former concept must have priority.

At the same time, globalization has begun to affect concepts of state sovereignty within the international legal system. As the World Bank has noted:

The State still defines the policies and rules for those within its jurisdiction, but global events and international agreements are increasingly affecting its choices. People are now more mobile, more educated, and better informed about conditions elsewhere. And involvement in the global economy tightens constraints on arbitrary State action, reduces the State's ability to tax capital, and brings much closer financial market scrutiny of monetary and fiscal policies.⁶⁷

It is still too early yet to be certain of the effect of globalization on the ownership of territory by states. States do still control, even if only by self-preserving agreements between them, the territory on which transnational corporations and others operate. But, as the World Bank report indicates, the exclusive territorial sovereign power of the state is being diminished and states are increasingly being shown to be unable to control the activities of transnational corporations.⁶⁸ It is important that the international legal system begins to reflect this situation.

In addition, the international legal system can countenance some shared sovereignty between states, as seen in shared ownership of parts of the sea (as will be discussed below). Even the International Court of Justice in the *East Timor Case* seemed prepared to countenance the possibility that there was more than one form of sovereignty over a territory.⁶⁹ Within Europe, there have been significant developments in sharing sovereignty.⁷⁰ The result is that the control of activities on its territory is no longer in the hands of national governments alone. However, while shared state sovereignty may be occurring within the international legal system, this

⁶⁵ B. Boutros-Ghali, 'Agenda for Peace', UN Doc. A/47/277-S/24111 (1992), para. 17.

⁶⁶ For further discussion, see McCorquodale, 'Self-Determination: A Human Rights Approach', 43 *International and Comparative Law Quarterly* (1994) 857.

⁶⁷ World Bank, *World Development Report 1997* (1997) 12.

⁶⁸ See further McCorquodale with Fairbrother, 'Globalization and Human Rights', 21 *Human Rights Quarterly* (1999) 735.

⁶⁹ *East Timor (Portugal v. Australia)*, ICJ Reports (1995), at para. 32, and the Separate Opinion of Judge Vereshchetin, at 137-138.

⁷⁰ This is fostered in particular by the principle of 'subsidiarity' and the development of the idea of 'a Europe of the Regions'. See Scott, Peterson and Millar, 'Subsidiarity: A "Europe of the Regions" v. the British Constitution', 32 *Journal of Common Market Studies* (1994) 47.

sharing is still both state and territory dependent. States resist any notions of shared (non-state-based) sovereignty not dependent on territory.

The present approach to the determination of ownership of territory by the international legal system is exclusive, partial and silencing. Territorial boundaries have become barriers. They determine and identify those within and those without the boundary, based on a particular concept of sovereignty. Indeed, many of the claims for self-determination arose because the unjust, state-based, international legal order failed to respond to legitimate aspirations by peoples. It is therefore necessary that territorial boundaries be reconsidered so that a more flexible system is devised. This flexibility will become imperative as the process of globalization gathers pace.

4 Boundaries and Internal Sovereignty

At the time when many territorial boundaries were being determined, it was assumed that a state had absolute power to act as it wished within its own boundaries. This internal power was sovereignty ‘writ small’, comprising specific legislative and administrative competencies.⁷¹ The international legal order was seen as being concerned with matters between states and not within states. This attitude was largely maintained under the United Nations Charter as Article 2(7) prohibited the United Nations (and all states) from ‘interven[ing] in matters which are essentially within the domestic jurisdiction’ of a state. As seen above, this was part of an approach to making international peace and security a priority and allowing sovereign states the power of autonomous decision-making. The International Court of Justice, for instance, in a case involving the mining of Albanian waters, in rejecting a state’s claim of a right of intervention in order to secure evidence in the territory of another state, observed that ‘[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations’.⁷²

However, this approach is unsustainable today. As the former United Nations Secretary-General, Boutros Boutros-Ghali, said:

The time of absolute and exclusive sovereignty . . . has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives.⁷³

As Boutros-Ghali makes clear, there is a connection between a state’s autonomy within the international legal system and a state’s political autonomy within its internal legal system so that there is good internal governance. These two systems are inextricably linked. The impact is even deeper than this as:

⁷¹ Brownlie, *supra* note 57, at 108.

⁷² *Corfu Channel (United Kingdom/Albania)*, ICJ Reports (1949) 34. See also *SS Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10.

⁷³ Boutros-Ghali, *supra* note 65, para. 17.

[c]omplete autonomy may have been acceptable in the past when no State could take actions that would threaten the international community as a whole. Today, the enormous destructive potential of some activities and the precarious condition of some objects of international concern make full autonomy undesirable, if not potentially catastrophic.⁷⁴

One area where the two systems are most obviously linked is in the area of human rights. How a state treats the people within its territorial boundaries is no longer a matter for that state alone but, as the Vienna Declaration of the 1993 World Conference on Human Rights, put it: ‘The promotion and protection of all human rights is a legitimate concern of the international community.’⁷⁵ The vast array of international human rights treaties and other documents testify to this development.⁷⁶ The rapid development of international tribunals and courts having jurisdiction over international crimes, such as war crimes, crimes against humanity, genocide and torture, is a reflection of this development.⁷⁷ At the same time, national courts have asserted their power to try human rights abuses committed in foreign states on the foundation of international human rights law. For example, in *Filartiga v. Peña-Irala*,⁷⁸ a United States court held liable a former Paraguayan police chief — detained while visiting the United States — for the torture and murder of a Paraguayan national in Paraguay. More recently, a Spanish court proceeded against the former ruler of Chile, Augusto Pinochet, for human rights violations in Chile, including the murder of Spanish citizens, and the United Kingdom House of Lords accepted that he could be extradited to Spain on this basis.⁷⁹

One human right that has been of particular relevance to the issue of internal sovereignty and territorial boundaries is the right of self-determination, which was discussed above. This is because the right of self-determination does not only protect peoples seeking to exercise their right by changing the relationship between themselves and other states — for example, by becoming an independent state — it

⁷⁴ Charney, ‘Universal International Law’, 87 *American Journal of International Law* (1993) 529, at 530.

⁷⁵ Vienna Declaration and Programme of Action on Human Rights, Article 4.

⁷⁶ See Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’, 82 *American Journal of International Law* (1990) 866.

⁷⁷ See, for example, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, annexed to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993); UN Security Council Resolution 955, UN Doc. S/RES/955 (1994); the Statute of the International Tribunal for Rwanda, Establishing the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994; and the Rome Statute of the International Criminal Court, UN Doc. A/CONF.83.9 (17 July 1998).

⁷⁸ 630 F 2d 876 (2d Cir. 1980) (Kaufman J). See Burley, ‘The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor’, 83 *American Journal of International Law* (1989) 461–493. See also *Trajano v. Marcos* 978 F 2d 493 (1992); ‘Re Estate of Ferdinand E. Marcos, United States: Court of Appeals for the Ninth Circuit Opinion (Alien Tort Statute; Extraterritorial Jurisdiction Over Torture)’, 32 ILM (1993) 106; and Steinhardt, ‘Fulfilling the Promise of *Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos’, 20 *Yale Journal of International Law* (1995) 65–103.

⁷⁹ *Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet*, 38 ILM (1999) 581.

also concerns the right of peoples within a state to choose their political status (as well as economic, social and cultural development), the extent of their political participation, and the form of their government. The right of self-determination thus has an internal aspect.⁸⁰ So a state that does not protect the right of internal self-determination is in breach of international law. Some writers have argued that, because ‘the possession of territory [is] a precondition for the exercise of legitimate political authority on the international level’,⁸¹ a government that does not protect the right of internal self-determination should not be considered to be a legitimate government.⁸² Added pressure is being created by the demand by some of the developed states and the globalized economic institutions, such as the World Bank and the International Monetary Fund, as well as transnational corporations, that ‘good governance’ be a condition of their investment in developing states.⁸³

It is vital that the tightly woven connection between territorial boundaries of states and internal sovereignty be untangled. This would enable much more nuanced possibilities in conflict situations. It would allow the possibilities, for example, of allowing Serbian nationality to a person born and resident in the state of Bosnia-Herzegovina or by the imaginary use of the structures established in 1998 in Northern Ireland where two states are involved.⁸⁴ Within Europe, there are now a series of different levels of political power, albeit still largely dependent on the boundaries of the states within the European Union. These stretch from local or regional areas (offering political autonomy to some peoples — such as the Scots — as an exercise in internal self-determination) to national governments (with state power), to the European Union decision-making bodies that are able to respond to regional, national and European voices. The consequence is that the sovereignty or political autonomy of each state within the European Union is not absolute. This multi-level, shared sovereignty is not strictly limited to a state’s boundaries and could be a means to reduce the potential for conflict over territory. This could occur as:

[a] combination of local autonomy or federalism with a regional system of political and economic integration, coupled with an effective international supervision of individual and minority rights, can take much of the pressure out of territorial questions. A curtailment of the

⁸⁰ State practice shows the application of an internal right of self-determination as seen in the international community’s response to denials of this right to blacks in Southern Rhodesia and in South Africa. Security Council Resolutions 216 and 217 (1965) and 232 (1966) with respect to Southern Rhodesia and Security Council Resolutions 282 (1970), 392 (1976), 417 (1977) and 473 (1980) with respect to South Africa.

⁸¹ Kratochwil, Rohrlich and Mahajan, *supra* note 20, at 3.

⁸² See T. Franck, *The Power of Legitimacy Among Nations* (1990) 236–237. Also in the European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 4 *European Journal of International Law* (1993) 72, there is the requirement that a potential new state has constitutional guarantees of democracy and of ‘the rights of ethnic and national groups and minorities’ before recognition by the European Community states would be granted.

⁸³ See Forsythe, ‘The United Nations, Human Rights, and Development’, 19 *Human Rights Quarterly* (1997) 334.

⁸⁴ United Kingdom, Northern Ireland and Ireland Agreement (10 April 1998), 37 *ILM* (1998) 751.

predominant role of the State will also make the question of which national government has control over a particular province or locality appear less important.⁸⁵

This approach would foster an alternative to the concept ‘of human beings that envisions their freedom and security in terms of bounded spheres’.⁸⁶ Above all, it would remind the international community that ‘it is for the people to determine the destiny of the territory and not the territory the destiny of the people’.⁸⁷

5 Boundaries and the Global Commons

With sovereignty over territory comes the power of distribution, particularly the distribution of natural resources. All natural resources, whether located under the soil or under the sea, whether living or non-renewable, are deemed to be in the control of the state.⁸⁸ There is a much-proclaimed right of permanent sovereignty over natural resources, which is based on sovereignty over the adjacent land territory.⁸⁹ The international legal system initially placed limitations on this sovereignty. Hugo Grotius wrote that ‘certain things, such as the sea both as a whole and in its principal divisions, cannot become subject to private ownership’.⁹⁰ His reasoning was that the oceans are so vast that ‘it suffices for any possible use on the part of all peoples, for drawing water, for fishing, for sailing . . . [and only] a thing which has definite limits . . . [can be occupied and not] liquids [which] have no limits in themselves . . . [and] is not bounded by a boundary of its own substance’.⁹¹ For Grotius, lakes, ponds and rivers can therefore be acquired — as well as bays, because they are ‘shut in by lands’ on both sides — but not the open sea, which he considered to be free and open to navigation.⁹²

The economic interests of states, deepened by advances in technology, has meant that Grotius’ position is no longer tenable in the international community. It has also meant that the determination of maritime boundaries is crucial as conflict over access to natural resources increases.⁹³ One way that some states have dealt with this is seen in the Antarctic Treaty of 1959.⁹⁴ This effectively suspended the respective

⁸⁵ Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’, 4 *European Journal of International Law* (1993) 447, at 469.

⁸⁶ Nedelsky, *supra* note 2, at 163.

⁸⁷ Judge Dillard, Separate Opinion in *Western Sahara Opinion*, *supra* note 35, at 122.

⁸⁸ See, for example, Articles 1 and 2 of the Convention on the Territorial Sea and the Contiguous Zone 1958; and Article 2 of the United Nations Convention on the Law of the Sea 1982.

⁸⁹ See General Assembly Resolution 1803 (XVII) and the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX)). Economic self-determination has been used in the context of sovereignty over natural resources: see common Article 1(2) of the ICESCR and the ICCPR.

⁹⁰ Grotius ‘Of Things Which Belong to Men in Common’, in *De Jure Belli Ac Pacis* (1646, translated 1738).

⁹¹ *Ibid.*, at 186–191 and 210–211.

⁹² *Ibid.*

⁹³ Many of the territorial boundary disputes decided by the International Court of Justice are about maritime boundaries. In regard to other conflicts over natural resources, there is, for example, a dispute between Israel and Jordan over access to water from the Sea of Galilee: see ‘Israel Holds Back Water for Jordan’, *Guardian Weekly*, 21 March 1999, 4.

⁹⁴ 402 UNTS (1961) 71.

territorial claims of its parties, which thereby accepted the ‘limited assertion of full sovereign rights’⁹⁵ and subjected themselves to a new regime of joint development. This system of ‘suspended claims’⁹⁶ responded to the inadequacy of the regime of title available under international law, because it was difficult to apply the traditional modes of acquiring territory, especially due to the harshness of Antarctic conditions, the remoteness of areas claimed, the fragility of its ecosystem, and the fact that the contested areas had no indigenous population.⁹⁷ By 1967, this regime was rejected as oligarchic and inadequate for regulating a different global common: that of outer space. The Treaty on the Outer Space, the Moon and Other Celestial Bodies provides that ‘outer space, including the Moon and other celestial bodies is not subject to national appropriation by claim of sovereignty’⁹⁸ and shall be ‘the province of all mankind’.⁹⁹ By virtue of these principles, the exploration and use of outer space shall, on the one hand, be free to all states without discrimination and on the basis of equality and, on the other, be solely for ‘the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development’.¹⁰⁰

The United Nations Convention on the Law of the Sea of 1982 (UNCLOS 1982) took matters further and is authoritative due to its history of protracted codification and its many parties. It ‘unbundled’ the resources of the sea that, until a few decades earlier, had been classified either as the territorial sea, being that band of waters adjacent to the land mass, or as the high seas, wherein the only principal stakes were, as in Grotius’ time, navigation and fishing. These old stakes were broken down to their different aspects and new stakes were created. For example, innocent passage is contrasted to military use and surface passage to submarine passage, while varying degrees of sovereignty were recognized. These sovereignties meant that the ‘contiguous zone’ was subject to sovereignty for customs, fiscal, immigration and sanitation law and a newly recognized ‘exclusive economic zone’ was subject to sovereign rights solely for economic purposes dealing with the ‘living and non-living’ natural resources of the sea, the sea-bed and its subsoil. New stakes were recognized or developed, with the sea-bed and subsoil extending from the land mass, which had not

⁹⁵ Article IV.

⁹⁶ Mangone, ‘Unrecognized Boundaries in the Antarctica Case’, in Institute of International Public Law and International Relations of Thessaloniki (ed.), *National and International Boundaries* (1985) 145.

⁹⁷ D. Rothwell, *The Polar Regions and the Development of International Law* (1996) 1–9. See also C. Joyner and S. Chopra (eds), *The Antarctica Legal Regime* (1988); E. Sahurie, *The International Law of Antarctica* (1992); and P. Beck, *Who Owns Antarctica?: Governing and Managing the Last Continent* (1994).

⁹⁸ Article 2.

⁹⁹ Article 1.

¹⁰⁰ *Ibid.*

been claimed by any state until the 1940 Truman Declaration by the United States,¹⁰¹ being subject to regulation. Entirely new interests were recognized, namely, scientific research and the protection of the environment. The Convention went further, as it provided in Part IX that the sea-bed and ocean floor were ‘the common heritage of mankind’,¹⁰² and thus inalienable,¹⁰³ immune from claims of sovereignty by any state,¹⁰⁴ and the rights to which are ‘vested in mankind as a whole, on whose behalf the [Deep Seabed] Authority [thereby created] shall act’.¹⁰⁵ Article 140 requires that any development activities on the deep sea-bed take into account the needs of developing states and that there would be an equitable sharing of financial and other economic benefits from this development, no matter which state or corporation undertakes the development.¹⁰⁶ Thus UNCLOS 1982, drafted by states, could be seen as partly an attempt to address some of the long-term inequities in the international legal system already referred to above and partly a reinforcement of territorial sovereignty.

However, most of the developed states, such as the United States and the United Kingdom, refused to ratify the Convention at all due to disagreement with the provisions relating to the deep sea-bed. They threatened to upset the whole process of clarification of the rules regarding maritime territory that had been developed by the Convention. After more than 10 years of dispute about this issue, an ‘Agreement’ was reached to deal with the deep sea-bed.¹⁰⁷ This Agreement, which is meant to be merely an ‘interpretation’ of how Part XI is to be implemented, though it is in reality a Protocol to the Convention, is significantly different from the relevant provisions of the Convention and is designed to override those provisions. For example, issues such as transfer of technology and providing financial benefits to developing states have been dispensed with or put in economic rationalist terms, so that technology can now only be obtained on ‘fair and reasonable commercial terms and conditions on the open market’.¹⁰⁸ As a consequence, far from operating as a common heritage of mankind, the ‘deep sea-bed mining industry is now being offered a stable, market-orientated legal regime ... The ideology of the 1970s has given way to sound commercial principles.’¹⁰⁹ A bold idea has been limited by a few economically powerful states. Thus the control of those resources is in the hands of a few and the market is by no means free. Certain powerful states are privileged and other states, and most peoples, are silenced.

¹⁰¹ Truman Declaration, Proclamation on the Continental Shelf of 1945, 10 Fed. Reg. 12,303, at 12,304 (1945).

¹⁰² Article 136.

¹⁰³ Article 137(2).

¹⁰⁴ Articles 1 and 137(1).

¹⁰⁵ Article 137(2).

¹⁰⁶ There was also to be a transfer of technology to developing states: Article 144.

¹⁰⁷ Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea 1994, 33 ILM (1994) 1099.

¹⁰⁸ Section 5 of the Annex to the Agreement.

¹⁰⁹ Anderson, ‘Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea’, 44 *International and Comparative Quarterly* (1995) 313, at 318–319.

In respect of 'global commons' there have been glimpses of alternative visions as to how to deal with natural resources freed from restrictive territorial boundaries. The sheer scale of the environmental issues has meant that significant international cooperation has been necessary irrespective of the limits of territorial boundaries. The International Court of Justice has recognized the 'obligations of states to respect and protect the natural environment',¹¹⁰ with one judge noting that:

The marine environment belongs to all, and any introduction of radioactive waste into one's territorial waters must necessarily raise the danger of its spread into the wider ocean spaces that belong to all . . . If such danger can be shown *prima facie* to exist or be within the bounds of reasonable possibility, the burden shifts onto those who claim such action is safe to establish that this is indeed so.¹¹¹

However, any developments in international environmental law have still occurred largely within the framework of a state-based international legal system in which states define their own responsibility and their own territorial obligations. This limits the potential scope of their obligations, as states do not tend to take action against each other due to fear of reciprocity,¹¹² and use economic power to restrict their obligations.

Even the crucial role of indigenous peoples in ensuring sustainable development has been considered irrelevant in state-based economic terms. They simply do not have sufficient 'state-like' sovereignty to be able to negotiate for a more equitable role in dealing with natural resources.¹¹³ The irrelevance of non-states in the distribution of resources is seen starkly in a decision of the International Court of Justice in a case about a maritime delimitation between Denmark and Norway. As part of its claim for a larger maritime territory, Denmark raised the attachment of the people of Greenland to the sea and the people's economy being based on fishing. The Court dismissed these issues by saying that 'the attribution of maritime areas to the territory of a state, which, by its nature, is destined to be permanent, is a legal process based solely on the possession by the territory concerned of a coastline'.¹¹⁴ Thus any socio-economic factors were dismissed as being irrelevant.

In the end, territorial boundaries alone determine how resources are distributed. An attempt at an alternative international image with a utopian vision has been roughly reshaped into a realist mask. The difficulty with this reshaping is that:

[i]t is questionable how sound it is for a legal theory to accept the absolute ownership by a State of the 'natural resources' within its sphere of jurisdiction, given that territorial boundaries are

¹¹⁰ *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)*, ICJ Reports (1995) 288.

¹¹¹ *Ibid.*, Dissenting Opinion of Judge Weeramantry.

¹¹² An example of this is in the lack of any claims by states in relation to the Chernobyl nuclear accident in 1986. See Sands, 'The Environment, Community and International Law', 30 *Harvard International Law Journal* (1989) 393.

¹¹³ See Anaya, *supra* note 35, especially at 104–107.

¹¹⁴ *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Reports (1993) 38, at para. 80. Also in *Territorial Dispute (Libya v. Chad)*, ICJ Reports (1994) 6, at para. 75, the Court held that, as the treaty between Libya and France settled the boundary, any issues relating to the indigenous people were irrelevant.

not coextensive with the scope of international economic relations and so, logically, do not mark the limits of an international obligation to cooperate.¹¹⁵

6 Conclusions

Advances in military, industrial and informational technology may have made obsolete the vital role of territory or 'place' in contests of power, which have become far too complex for the comparatively primitive game of stealing land. Yet the operational guarantees of peace are still spelled out by the international legal system in the legal language of the territorial state. The current international legal system recreates and affirms the dispositions by colonial powers, it privileges certain voices and silences others, and it restricts the identities of individuals to the limits of state territorial boundaries. There is little room for the imagination of the developing states, of non-state actors, of women or of alternative concepts of the international legal system. The effect of this is to reinforce the state-based framework of the international legal system and to limit the influence of other factors. This is because this system, as traditionally conceived, 'naturalizes and legitimizes the subjugating and disciplinary effects of European, masculinist, heterosexual and capitalist regimes of power'.¹¹⁶ This is most clearly seen in the determination and reinforcement of the territorial boundaries drawn, so whimsically, over a century ago.

Peace, resource-sharing and justice have long been separate agendas in the international legal system, the first assigned primarily to the realm of politics; the second, the realm of economics; and the third, the realm of national law. Between war and peace, between displacing and merely influencing the sovereign, has been a continuum that seemed too subtle for law to regulate, which in the end is called upon merely to 'draw a line, and a precise line'. Yet territory is the most rudimentary, and the most categorical, of markers in the law regulating the use of force. Place determines access to resources and the struggle for justice is not tied down to place, but is fought and won in the hearts of people.

There are new, more subtle, ways to imagine the international legal role of territorial boundaries. Some of these ways are institutional, as seen in the multi-level sovereignties in Europe, and some are structural, such as the diminished importance of territorial boundaries due to the process of globalization. Above all, the new imaginations are conceptual. They have to be able 'to convert those borders from their prevailing postures as ramparts into a new veritable function as bridges'¹¹⁷ and to focus on relationships and not on imaginary constructs.¹¹⁸ Two notable examples show this. The first relates to the idea of territory as a resource, where the law has at

¹¹⁵ A. Carty, *The Decay of International Law* (1986) 6.

¹¹⁶ Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law', 18 *Australian Yearbook of International Law* (1998) 35.

¹¹⁷ Asiwaju, 'Borders and Borderlands as Linchpins for Regional Integration in Africa', in Schofield, *supra* note 17, at 58.

¹¹⁸ Nedelsky, *supra* note 2, at 163.

times been equal to the richness of new inter- and intra-state relationships. Vast resources are being taken beyond reach of sovereign claims and reserved for a (vaguely formulated) international community. The second relates to international human rights where, on the one hand, the sense of home is inseparable from certain group identities and, on the other, constraints of place have long impeded the prosecution of offenders and the protection of victims. Here special regimes have been crafted that erode the exclusivity of states' territorial jurisdiction. In this respect, states have yielded territorial jurisdiction but not territory itself. Hence there are some indications that the international legal system can reimagine itself, even to the point where one writer argues that:

[s]overeignty over territory will disappear as a category from the theory of international society and from its international law ... With the exclusion of the concept of sovereignty over territory, international society will find itself liberated at last to contemplate the possibility of delegating powers of governance not solely by reference to an area of the earth's surface.¹¹⁹

¹¹⁹ Allott, *supra* note 54, at 329.