Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier

Tayyab Mahmud

COLONIAL CARTOGRAPHIES, POSTCOLONIAL BORDERS, AND ENDURING FAILURES OF INTERNATIONAL LAW: THE UNENDING WARS ALONG THE AFGHANISTAN-PAKISTAN FRONTIER

Tayyab Mahmud[*]

Frontiers are indeed the razor's edge on which hang suspended the modern issues of war or peace, of life or death to nations.[1]

We have been engaged in drawing lines upon maps where no white man's foot has ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.[2]

Three degrees of latitude upset the whole of jurisprudence and one meridian determines what is true…. It is a funny sort of justice whose limits are marked by a river; true on this side of the Pyrenees, false on the other.[3]

A place on the map is also a place in history.[4]

I. INTRODUCTION

When the U.S. decided to inject another 30,000 troops into the current Afghan war, now in its ninth year, *The New York Times* emphasized that "[i]t's not about Afghanistan. It's about a people straddling a border."[5] It went on to explain:

The land is not on any map, but it's where leaders of Al Qaeda and the Taliban both hide. It straddles 1000 miles of the 1600-mile Afghan-Pakistani border. It is inhabited by the ethnic Pashtun, a fiercely independent people that number 12 million on the Afghan side and 27 million on the Pakistani side. They have a language (Pashto), an elaborate traditional code of legal and moral conduct (*Pashtunwali*), a habit of crossing the largely unmarked border at will, and a centuries-long history of foreign interventions that ended badly for the foreigners.[6]

The report adds: "[T]he Pashtun themselves have never paid the boundary much regard since it was drawn by a British diplomat, Mortimer Durand, in 1893. 'They don't recognize the border. They never have.

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1. George Nathaniel Curzon, Lord Curzon of Kedleston, as the Romanes Lecture (Nov. 2, 1907), *in* FRONTIERS 7 (Greenwood Press 2d ed. 2006) (1908).

2. Lord Salisbury, *quoted in*, J. C. ANENE, THE INTERNATIONAL BOUNDARIES OF NIGERIA 1885-1960, at 3 (1970) (quoting *The Geographical Journal*, vol. xxciii, Proceedings, Mar. 9, 1914).

3. BLAISE PASCAL, PENSÉES 46 (A. J. Krailsheimer trans., 1966).

4. ADRIENNE RICH, BLOOD, BREAD & POETRY 1979-1985, at 212 (1986).

5. Scott Shane, *The War in Pashtunistan*, N.Y. TIMES, Dec. 6, 2009, at WR 1 (subtitle of print version). *See also* Eric Schmitt, *Cables Detail Envoy's Worry on Karzai Role*, N.Y. TIMES, Jan. 26, 2010, at A1; William Dalrymple, *The Ghosts of Gandamak*, N.Y. TIMES, May 9, 2010, at WK 9.

6. Shane, *supra* note 5, at WK 1.

They never will.'"[7] An American military officer complains: "The only ones who recognized the border were us, with our G.P.S."[8] Some describe the Durand Line as one "drawn on water."[9] Perhaps, but it has been on fire for over a hundred years.
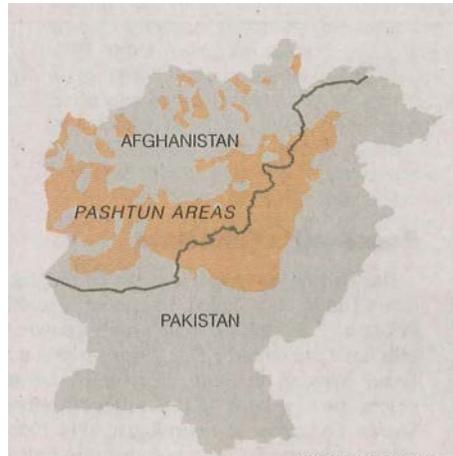
Fig. 1. The Durand Line and the Pashtun Areas[10]

For over a century, the Durand Line and the border region between Afghanistan and Pakistan has been the epicenter of political and military conflicts in the region and beyond. As the current cycle of wars in and around Afghanistan, which started with the Soviet invasion in 1979,[11] enters its thirty-first year, this line continues to both create and aggravate security challenges. The U.S. Army's official history of the war in Afghanistan, covering the period from 2001 to 2005, observes that "the single greatest obstacle to conceptualizing . . . [this war] in a holistic sense was ambivalence . . . about . . . *nation-building* . . . [in] Afghanistan

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7. *Id.*(quoting Shuja Nawaz, director of the South Asia Center at the Atlantic Council, Washington, D.C.). Pashtun, Pakhtun, Pashtoon, and Pathan are among the various designations used for this ethnic group. I will use the term Pashtun, unless quoting from or citing other materials.

8. *Id.* at WK 1.

9. Zahid Hussain, Frontline Pakistan: The Struggle With Militant Islam 210 n.12 (2007) [hereinafter Hussain, Frontline Pakistan].

10. Shane, *supra* note 5, at WK1 (map appears to the left of the article as available at www.nytimes.com).

11. *See* Shuja Nawaz, Crossed Swords: Pakistan, its Army, and the Wars Within 369–79 (2008) [hereinafter Nawaz, Crossed Swords].

[that] remained a *failed state*."[12] It bemoans that while "the need for a plan that …offered a clear vision for this transition should have been obvious," instructions were to "avoid being enmeshed in *nation building*."[13] It concludes that:

> The Afghan experience reinforces the critical point that regardless of the nature of the Army's future campaigns, U.S. soldiers will almost inevitably interact with *foreign cultures*. If these campaigns are focused on *nation building*, *cultural awareness* will become not just a necessary but perhaps a critical skill like marksmanship or land navigation.[14]

These observations raise many questions about the relationship between contested borders, nation-building, failed states, cultural difference, and foreign interventions. In particular, they put into contention the elusive search for the "nation-state," a term absent in any English language dictionary before 1950.[15] In response to these vexing questions, we are offered a "bifurcated world . . . inhabited by Hegel's and Fukuyama's Last Man . . . [and] Hobbes' First Man."[16] Binary geographies of danger and safety are deployed that see bloody boundaries between a "functioning core" and a "non-integrating gap," with the "disconnectedness" between the two designated as the "ultimate enemy." [17] An inverted map of the world is unfolded to offer prescriptions for "[g]eostrategic success," namely, "prevent collusion and maintain security dependence among the vassals . . . keep tributaries pliant and protected, and . . . keep the barbarians from coming together."[18] A "new paradigm" is enunciated for a war of "uncertain duration" against "the enemies of civilization."[19] One that "renders obsolete [and] . . . quaint"

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12. DONALD P. WRIGHT ET AL., A DIFFERENT KIND OF WAR: THE U.S. ARMY IN OPERATION ENDURING FREEDOM (OEF), OCT. 2001–SEP. 2005, at 326–27 (2009) (emphasis added), *available at* http://documents.nytimes.com/a-different-kind-of-war#p=1.

13. *Id.* at 327 (emphasis added).

14. *Id.* at 336 (emphasis added).

15. John D. Kelly & Martha Kaplan, *Legal Fictions after Empire, in* THE STATE OF SOVEREIGNTY: TERRITORIES, LAWS, POPULATIONS 169, 170 (Douglas Howland & Luise White eds., 2009).

16. ROBERT KAPLAN, THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST COLD WAR 24 (2001).

17. THOMAS P. M. BARNETT, THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY 26, 124 (2004).

18. ZBIGNEW BREZEZINSKI, THE GRAND CHESSBOARD: AMERICAN PRIMACY AND ITS GEOSTRATEGIC IMPERATIVES 32, 40, 215 (1997).

19. EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY OF THE U.S. ¶4 (2002); Stephen P. Marks, *Branding the "War on Terrorism": Is there a "New Paradigm" of International Law?*, 12 MICH. ST. J. INT'L L. 71, 89 (2006).

established rules of war.[20] This article argues that the Afghan war, like many of today's international conflicts, is rooted in contested borders that have not stood the test of time. Contested borders require that we "rethink the lazy separations between past, present, and future."[21] Conflicts that appear as new iterations of the binary-divides between civilized versus uncivilized, reason versus faith, and modernity versus fundamentalism, only confirm the "presence of the past."[22] Disruptions of the triumphal march of civilization, reason, and modernity necessitate that we shift our focus from "present futures to present pasts."[23] However, any effort to look back and bring into relief the history that animates the present confronts "a privilege of power too often unseen: the luxury of not having had to know, a parochialism and insularity that those on the margins can neither enjoy nor afford."[24] Often, contemporary ills have their roots in past policies and actions. When faced with intractable conflicts, it is useful to heed to the admonition: "Always historicize!"[25] To understand why the escalating Afghan war remains intractable it is beneficial to inquire into when, why, and how borders, nations, and states took shape in that region. It is also important to understand how modern international law, both in its incipient and mature stages, is implicated in designs that set the region into its current, unhappy course.

This article addresses questions of borders, cultures, nations, states, and foreign interventions underscored by the current war in the Afghanistan-Pakistan region by exploring the genealogy of the Durand Line, its conflict-ridden career, and the attendant role of the law. In this frame, this article interrogates modern law's subscription to a *"territorialist epistemology."*[26] Part II inventories nineteenth century constructs of in-

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20. Memorandum from White House Counsel Alberto Gonzales to President George W. Bush (Jan. 25, 2002), *available at* http://www.scribd.com/doc/8947254/Gonzales-Torture-Memo.

21. DEREK GREGORY, THE COLONIAL PRESENT 7 (2004) [hereinafter GREGORY, COLONIAL PRESENT]

22. Etienne Balibar, *Racism & Nationalism, in* RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 38, 38 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

23. Andreas Huyssen, *Present Pasts: Media, Politics, Amnesia, in* GLOBALIZATION 57 (Arjun Appadurai ed., 2001).

24. Roxanne L. Euben, *The New Manichaeans,* 5 THEORY & EVENT 1, 1 (2002).

25. FREDERICK JAMESON, THE POLITICAL UNCONSCIOUS 9 (1981).

26. WILLEM VAN SCHENDEL, THE BENGAL BORDERLAND: BEYOND STATE AND NATION IN SOUTH ASIA 5 (2005). This entails a "transposition of the historically unique territorial structure of the modern interstate system into a generalized model of sociospatial organization, whether with reference to political, societal, economic, or cultural processes." Nein Brenner, *Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies*, 28 THEORY & SOC'Y 39, 48 (1999). In this schema, "[a] nation can be imagined without a word or other symbol or color on a map, but this is impossible if

ternational law, geography, geopolitics, and borders that formed the scaffolding that made the drawing of the Durand Line possible. It shows that drawing lines, both actual and metaphoric, constitutes modern legal orders, particularly international law. Part III narrates the story of the demarcation of this line in the midst of imperial rivalries and the role it has played in colonial and postcolonial operations of power. It focuses on nation-building and security dilemmas of postcolonial states that are imprisoned in territorial straitjackets bequeathed by colonial cartographies. Part IV examines how international law preserves contested borders bequeathed by colonialism, and thereby precludes imaginative flowerings of self-determination in tune with identities and aspirations of communities located within and beyond received colonial boundaries. Part V draws conclusions about the mutually constitutive role of colonialism and international law in ordering spaces and subjects. It posits that conceptual and doctrinal frames of international law remain tangled in its colonial lineage, and thus accentuate postcolonial dilemmas and conflicts.

II. SCAFFOLDINGS OF COLONIAL CARTOGRAPHIES

> Just as none of us is outside or beyond geography, none of us is completely free from the struggle over geography. That struggle is complex and interesting because it is not only about soldiers and cannons but also about ideas, about form, about images and imaginings.[27]

Drawing boundaries is the inaugural gesture of the law, while policing boundaries is its routine function. The genesis of law signals that "[t]he primordial scene of the *nomos* opens with a drawing of a line in the soil . . . to mark the space of one's own."[28] Modern law's insistent claims of its universality notwithstanding, lines of demarcation that separate legality from illegality often create zones where bodies and spaces are placed on the other side of universality, a "moral and legal *no man's land*, where universality finds its

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boundary lines, the symbol which forms the entity of a map of a nation, are excluded." THONGCHAI WINICHAKUL, SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION 56 (1994).

27. EDWARD W. SAID, CULTURE AND IMPERIALISM 7 (1993) [hereinafter SAID, CULTURE].

28. Cornelia Vismann, *Starting from Scratch: Concepts of Order in No Man's Land*, *in* WAR, VIOLENCE AND THE MODERN CONDITION 46, 46 (Bernd Hüppauf ed., 1997).

spatial limit." [29] Material and discursive orders that enjoy hegemony in any setting, fashion and enable instruments to draw these lines and carve out such zones. The story of the Durand Line testifies to this phenomenon.

The Durand Line was drawn by a colonial power in the nineteenth century, which was a defining phase in the consolidation of modern regimes of knowledge, along with the suturing of epistemology with the state.[30] Therefore, it is critical to identify the conceptual ensemble that furnished the scaffolding for such a venture. It is the Author's position that the conceptual and discursive apparatus of international law, modern geography, geopolitics, and borders are interwoven in the enabling frame that made the drawing of this conflict-ridden dividing line possible.

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29. Denise Ferreira de Silva, *Towards a Critique of the Socio-Logos of Justice*: *The Analytics of Raciality and the Production of Universality,* 7 SOC. IDENTITIES 421, 422 (2001).

30. For the mutually constitutive roles of knowledge and power, see MICHEL FOUCAULT, POWER/KNOWLEDGE (Colin Gordon ed., trans., Leo Marshall, John Mepham, & Kate Soper trans., Pantheon Books 1980) (1972). Thomas Richards argues that

> The thread uniting the thought of . . . [leading nineteenth century intellectuals] was the idea that knowledge is inconceivable without the state: that the question of the state is a question of knowledge, especially scientific knowledge; that the classing of knowledge must be underwritten and directed by the state in its various capacities; that all epistemology became and must remain state epistemology in an economy of controlled information.

THOMAS RICHARDS, THE IMPERIAL ARCHIVE: KNOWLEDGE AND THE FANTASY OF EMPIRE 74 (1993). Here, I am also guided by the work of critical geographers regarding space and scale as actively produced through practices that are simultaneously material and meaningful. Of particular significance in this work is the mutually constitutive role of time and space. *See generally* HENRI LEFEBVRE, THE PRODUCTION OF SPACE (Donald Nicholson-Smith trans., 1991); EDWARD SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); SPACE AND SOCIAL THEORY: INTERPRETING MODERNITY AND POSTMODERNITY (Georges Benko & Ulf Strohmayer eds., 1997) (examining geography in a postmodern landscape with particular attention to representations in human and social sciences); PLACE AND POLITICS OF IDENTITY (Michael Keith & Steve Pile eds., 1993); Fernando Coronil, *Beyond Occidentalism: Towards Nonimperial Geohistorical Categories,* 11 CULTURAL ANTHROPOLOGY 51 (1996) (discussing non-cartographic ways of mapping the world); Fernando Coronil, *Towards a Critique of Globalcentrism: Speculations on Capitalism's Nature,* 12 PUBLIC CULTURE 351 (2000) (exploring the impact of globalization on reordering geohistorical units).

A. International Law and Differentiated Sovereignty

No sooner was a new world "discovered," than a line, *patition del mar oceano*, was drawn by the Treaty of Tordesillas on June 7, 1494.[31] This line divided the world beyond Europe between Portugal and Spain, and supplemented Pope Alexander VI's edict *Inter caetera divinae* of May 4, 1494, with an agreement between sovereigns.[32] The right of two royal houses of Europe over the division of the non-European world as "lords with full, free, and every kind of power, authority and jurisdiction"[33] now stood grounded both in divine sanction and sovereign will and consent.[34] This inaugural act of the incipient global order injected colonialism into the genetic code of modern international law.[35] The "amity lines," initiated by a secret clause of the Treaty of Cateau-Cambresis of 1559, institutionalized a differentiation between the European "sphere of peace and the law of nations from an overseas sphere in which there was nei-

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31. The line ran from the North Pole to the South Pole, approximately through the middle of the Atlantic Ocean. Portugal and Spain agreed that all newly discovered territories west of the line would belong to Spain and those east of the line to Portugal. EUROPEAN TREATIES BEARING ON THE HISTORY OF THE U.S. AND ITS DEPENDENCIES TO 1648, at 85, 170–71 (Frances Gardiner Davenport ed., 1967) (1917). Subsequently, the Treaty of Saragossa (1526), drew the Molucca Line through the Pacific Ocean along the 135th meridian. *Id. See also* ANTHONY PAGDEN, SPANISH IMPERIALISM AND THE POLITICAL IMAGINATION (1990); CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM 89 (G. L. Ulmen trans., 2003) (1950).

32. SCHMITT, *supra* note 31, at 88–89; Boaventura de Souza Santos, *Beyond Abyssal Thinking*, EUROZINE 3 (June 29, 2007), http://www.eurozine.com/pdf/2007-06-29-santos-en.pdf; J. H. ELLIOTT, IMPERIAL SPAIN, 1469-1716, at 57–58 (1964); MARK COCKER, RIVERS OF BLOOD, RIVERS OF GOLD: EUROPE'S CONQUEST OF INDIGENOUS PEOPLES 14–15 (1998).

33. Tr. "*dominos cum plena libera et omnimoda potestate, auctoritate et jurisdictione*." The Papal edict besides seeking expansion of *fides catholica* and *Christiana lex*, and conversion of barbarian peoples, expressly effected *donatio* of territories, as in classic feudal law. *See* SCHMITT, *supra* note 31, at 91 n.7.

34. The treaty both "affirmed the importance of Catholicism as a rationale for empire and undermined papal authority by authorizing sovereigns to act on their own to oppose threats by infidels." LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900, at 22 n.62 (2010). For the tension between canon law and secular authority in early European colonial expansion, see JAMES MULDOON, POPES, LAWYERS, AND INFIDELS (1979).

35. Modern international law, therefore, "is a world historic result of the early colonial experience of transatlantic and eastern trade . . . it is the dialectical result of the very process of conflictual, expanding inter-polity interaction in an age of early state forms and mercantile colonialism . . . . [I]nternational law *is* colonialism." CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 168–69 (2005).

ther peace nor law."[36] These "amity lines," which mandated peaceful cooperation in the region within their bounds and gave license to unbridled conflict without, gave rise to the maxim: "Beyond the equator there are no sins."[37] In the new global order, "[e]verything that occurred 'beyond the line' remained outside the legal, moral, and political values recognized on this side of the line."[38] In this zone, "beyond the line" and "beyond the equator," doctrines of "discovery," "*terra nullius*," and "*anima nullius*" flourished.[39] The career of modern international law is the story of making, maintaining, and managing this enduring line.

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36. A. Claire Cutler, *Towards a Radical Political Economy Critique of Transnational Economic Law, in* INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 199, 205 (Susan Marks ed., 2008), (citation omitted). For details of the amity lines, see SCHMITT, *supra* note 31, at 92–99.

37. *Quoted in*, SCHMITT, *supra* note 31, at 90 n.6. *See also* Santos, *supra* note 32, at 30 n.10; Eliga Gould, *Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772,* 60 WILLIAM & MARY Q. 471 (2003) (discussing the legal justifications of colonialism). One can trace the emergence of spheres of influence in the nineteenth century to the sixteenth century amity lines. For the status of such spheres of influence, see PAUL KEAL, UNSPOKEN RULES AND SUPERPOWER DOMINANCE 179-192 (1983); SCHMITT, *supra* note 31 at 281–94.

38. SCHMITT, *supra* note 31, at 94. In 1906, it was pointed out that "[t]he color line belts the world," serving the same purpose. W. E. B. Du Bois*, The Color Line Belts the World*, *in* AMERICAN SOCIAL AND POLITICAL THOUGHT 313 (Andreas Hess ed., 2003).

39. Santos finds the idea of *anima nullius*, colonized people as empty receptacles, embedded in Pope Paul III's bull *Sublimis Deus* of 1537, that declared that indigenous people of the colonies were "truly men . . . [but] they are not capable of understanding the Catholic Faith but . . . desire exceedingly to receive it." Santos, *supra* note 32, at 30 n.12. *See also* JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004). Pope Paul III reading of these "empty receptacles" is more optimistic than that of Lord Coke, who said in the landmark *Calvin Case* of 1602, that "if a Christian King should conquer a kingdom of an infidel, and bring them under submission, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the Decalogue." 1 SIR EDWARD COKE, THE SELECTED WRITINGS & SPEECHES OF SIR EDWARD pt. 7 (Steve Sheppard ed., 2003), *available at* http://oll.libertyfund.org/title/911/106335. *See also,* Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence,* 1986 WIS. L. REV. 219, 239–45 (1986). On the doctrine of *territorium res nullious*, see PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES (2003). For British representations of empire's "empty spaces," see D. GRAHAM BURNETT, MASTERS OF ALL THEY SURVEYED: EXPLORATIONS, GEOGRAPHY, AND A BRITISH EL DORADO (2000). This zone "beyond the line" also furnished the constitutive grounds for the founding canon of liberalism, modern law, and the identity of Europe. *See* PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 45 (1993) [hereinafter FITZPATRICK, MYTHOLOGY]; PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW (2001) [hereinafter FITZPATRICK, MODERNISM]; DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000); UDEH SING MEHTA,

In the nineteenth century, colonialism animated a decisive turn in the evolution of modern international law, even though "international law consistently attempts to obscure its colonial origins, [and] its connections with the inequalities and exploitation inherent in the colonial encounter."[40] The unquestioned universality of international law "was principally a consequence of the imperial expansion."[41] The development of modern conceptions of sovereignty and the international subject, which are bedrock constructs of modern international law, has little to do with the professed foundational concern of international law, i.e., stability of the relations between sovereign states.[42] Rather, these constructs were fashioned to manage the colonial relations of domination and racial difference.[43]

Expansion of colonialism triggered a search for a legal framework that could legitimize the securing of a range of rights and privileges from colonized and dominated polities. Recognition of some measure of sovereignty of the dominated polities was warranted by the need to ensure that the terms of colonial treaties would be honored, even though the terms of these treaties betrayed a lack of sovereignty and equality.[44] This

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LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999).

40. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 117 (2004) [hereinafter ANGHIE, IMPERIALISM].

41. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1 (1999). *See also* NATSU TAYLOR SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW 35–53 (2010).

42. Eurocentric expositions treat the Treaty of Westphalia of 1648 as the inaugural moment of modern international law by bringing into alignment sovereign and territorial claims within Europe. For revisionist readings of the Treaty that question this understanding, see STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTEL AND THE MYTH OF WESTPHALIA (2004). For the argument that sovereignty within Europe differed from Europe's imperial sovereignty that rested not on frontiers but aimed at keeping rival imperial powers out of zones and spheres of control, see CHARLES MAIER, AMONG EMPIRES: AMERICAN ASCENDANCY AND ITS PREDECESSORS (2006).

43. *See* Antony Anghie, *Francisco de Votoria and the Colonial Origins of International Law*, *in* LAWS OF THE POSTCOLONIAL 89 (E. Darian-Smith & Peter Fitzpatrick eds., 1999); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE & FALL OF INTERNATIONAL LAW 98–178 (2001); Peter Fitzpatrick, *Latin Roots: The Force of International Law as Event*, *in* EVENTS: THE FORCE OF INTERNATIONAL LAW (Fleur Johns, Richard Joyce & Sundhya Pahuja eds., forthcoming) (on file with author).

44. The dilemma was that African and Asian social formations "could neither be ignored as States nor treated quite on the same footing of ordinary States." T. Baty, *Protectorates and Mandates*, 2 BRIT. Y.B. OF INT'L L. 109, 112 (1921). *See also*, ANTONY

tension raised anew the question of what entities were eligible to be regarded as proper subjects of international law.[45] In response, international law jettisoned classical natural law constructs of sovereign equality, now considered "pseudo-metaphysical notions of what the essential qualities of Statehood ought to be,"[46] and turned to positivism based on actual practice of states. Frames of *jus gentium*, or principles of law common to all peoples, yielded to positivist ontology of law and sovereignty.[47] This sharp turn yielded quick results. By the mid-nineteenth century, a new construct of differential sovereignty was entrenched in international law—sovereigns and international subjects were not alike in terms of rights, eligibilities, and competencies. Sovereignty was now to be seen as a differentially distributed bundle of rights.[48] Several classes of sovereign states were constituted—some fully sovereign, others partly so; some part of the "family of nations," some outside it; some entitled to domination, others with minimal legal competence.[49] A sliding-scale of "layers of sovereignty"[50] emerged, stretching from "Great Powers" to colonies, with suzerains, protected states, and protectorates positioned in

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CARTY, THE DECAY OF INTERNATIONAL LAW 65–78 (1986) (looking at diplomacy, and the supposedly nature of treaty obligations).

45. International lawyers were emphatic that "the public law . . . *has always been, and still is*, limited to the civilized and Christian people of Europe and to those of European origin." HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 15 (George Grafton Wilson ed., Clarendon Press 1936) (1866) (emphasis added). Furthermore, "[t]he area within which the law of nations operates is supposed to coincide with the area of civilization. To be received within it is to obtain a kind of international testimony of good conduct and respectability." T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 59 (3d ed. 1900).

46. J. L. Brierly, *The Shortcomings of International Law*, 5 BRIT. Y.B. OF INT'L L. 4, 13, 15 (1924).

47. Benton characterizes the process as one of "modified positivism," that derived "not from legislation or from agreements among [European] polities but from proliferating practices and shared expectations about legal process, stretched across the centuries of European imperial expansion and rule." BENTON, *supra* note 34, at 6.

48. David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 123 (1997).

49. Anghie argues that the project to align degrees of civilization with recognition by international law was never stable: "The ambivalent status of the non-European entity, outside the scope of law and yet within it, lacking international capacity and yet necessarily possessing it . . . was never satisfactorily denied or resolved." ANGHIE, IMPERIALISM, *supra* note 40, at 81.

50. Frederick Cooper, *Alternatives to Empire: France and Africa After World War II*, in THE STATE OF SOVEREIGNTY, *supra* note 15, at 106; SUGATA BOSE, A HUNDRED HORIZONS: THE INDIAN OCEAN IN THE AGE OF GLOBAL EMPIRE 25 (2006).

between.[51] Given that "the founding conception of late nineteenth-century international law was not sovereignty but a collective (European) conscience,"[52] it is no surprise that this sliding scale of sovereignty mirrored the Eurocentric scale of "civilization" attendant to colonialism.[53] "[P]ositivism's triumphant suppression of the non-European world"[54] rested on the premise that "of uncivilized natives international law t[ook] no account."[55] No wonder then that "[t]o characterize any conduct whatever towards a barbarous people as a violation of the laws of nations, only shows that he who so speaks has never considered the subject."[56]

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51. *See generally* SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996) (analyzing colonial and neocolonial strategies in the debate of sovereignty and self-determination within the structure and history of international order).

52. THE GENTLE CIVILIZER OF NATIONS, *supra* note 43, at 51.

53. *See* GERRIT GONG, THE STANDARD OF 'CIVILIZATION' IN INTERNATIONAL SOCIETY 44 (1986); Anghie, *Francisco de Vitoria, supra* note 43; James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 15 LEIDEN J. INT'L L. 581 (2002); SAITO, *supra* note 41, at 19–34.

54. Anghie*, Finding the Peripheries, supra* note 41, at 7.

55. John Westlake, *John Westlake on the Title to Sovereignty*, *in* IMPERIALISM 45, 47 (Philip D. Curtin ed., 1971).

56. JOHN STUART MILL, ESSAYS ON POLITICS AND CULTURE 406 (Gertrude Himmelfarb ed., 1962). Antony Anghie captures the relationship between international law's turn to positivism and a particular characterization of colonized people well:

> The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these people, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission—the discharge of the white man's burden.

Anghie, *Finding the Peripheries*, *supra* note 41, at 7. When confronted with some agreement between colonizers and the colonized, international law to this day remains at a loss to classify their nature much less their validity. For example, in *Aloeboetoe v. Suriname*, the Inter-American Court was confronted with a 1762 agreement between the Dutch and the Saramakas, a tribe that lives in Surinamese territory and was formed by African slaves fleeing from their Dutch owners, that recognized, among other things, the local authority of the Saramakas over their territory. Aloeboetoe et al. v. Suriname, Reparations, Inter-Am. Ct. H.R. 66, OAS/ser.L/V/V./III.29, doc. 4 (Sept. 10, 1993). The question was whether the obligations of the treaty are applicable, by succession, upon Suriname. The Court did "not deem it necessary to investigate whether or not that agreement is an international treaty." *Id.* ¶ 57. It simply noted that "the Commission has pointed out that it does not seek to portray the Saramakas as a community that enjoys international status. The autonomy it claims for the tribe is one governed by domestic public law." *Id.* ¶ 58. It then indulged in a hypothetical to say that even if the agreement was an international treaty, it "would be null and void because it contracts the norms of *jus cogens superveniens*," on account of providing for the capture and sale of slaves. *Id*. ¶ 57.

This muscular and positive international law at the service of states "with good breeding"[57] categorized a confluence of people and territory as "backward" and legitimated colonial acquisition of "backward territory."[58] Note that in yet another deployment of the enduring civilized/uncivilized binary, the constituent statute of the International Court of Justice ("ICJ") mandates that judges be selected with due regard to "the main forms of civilizations . . . of the world," and the Court is required to apply "the general principles of law recognized by civilized nations."[59] The ICJ has lived up to this mandate by, for example, reaching out to "geographical Hegelianism" to resolve territorial disputes in Africa.[60]

While imperatives of colonialism shaped positivist doctrines of modern international law, by the late nineteenth century they also ushered in a new global order where mutual rivalries among colonial powers gave

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57. JOHN WESTLAKE, THE COLLECTED PAPERS ON INTERNATIONAL LAW 6 (L. Oppenheim ed., 1914).

58. M. F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION (1926). This was, of course, in tune with what the courts of "civilized" states had held. For example, *Johnson v. M'Intosh*, the canonical American case about the legal import of discovery, had enunciated a positivist theory of law by holding that:

> Conquest gives a title which Courts of the conqueror cannot deny….However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Johnson v. M'Intosh, 21 U.S. 543, 587–91 (1823). Of course, Europeans had to enforce their claims to lands occupied by "fierce savages . . . by the sword." *Id.* at 590. *See also* Robert A. Williams, Jr., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (discussing the laws and legal discourses that were imposed upon the New World).

59. Statute of the International Court of Justice, arts. 9, 38 –1c. The racialized discourse of civilized/uncivilized continues to cast its shadow on technologies of global management and the ubiquitous discourse of "failed states." *See, e.g.*, Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L & POL. 243 (2000); Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate system of the League of Nations*, 34 N.Y.U. J. INT'L & POL. 513 (2002); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903 (1997).

60. *See* James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), in* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 75 (Antony Anghie et al., eds., 2003).

way when concerted action in the service of maintaining colonial domi-
nation was warranted. The first concrete step in this direction was con-
tainment of the "scramble for Africa" at the Berlin Conference on the
Congo (1884-85), which aimed "to bring the natives of Africa within the
pale of civilization by opening up the interior of the continent to com-
merce."[61] This Conference, from which Africans were completely ex-
cluded, institutionalized the "right" of "Great Powers" to colonial domi-
nion.[62] It was determined that when faced with assertions of sovereignty
over colonized territories, "it is only the recognition of such sovereignty
by the members of the international society which concerns us, [of] that
of uncivilised natives international law takes no account."[63] The logic of
nineteenth century international law could not have had it any other way:

> International law has to treat such natives as uncivilised. It regulates,
> for the mutual benefit of the civilised states, the claims which they

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61. German Chancellor Otto von Bismarck, *quoted in*, Makau Wa Mutua, *Critical
Race Theory and International Law: The View of an Outsider*, 45 VILL. L. REV. 841, 847
(2000).

62. For pertinent parts of the text of the General Act of the Conference of Berlin, see
ARCHIVES OF EMPIRE VOL. II: THE SCRAMBLE FOR AFRICA 28–47 (Barbara Harlow & Mia
Carter eds., 2003). As Bedjaoui says: "Classic international law . . . recognized and en-
forced a 'right of dominion' for the benefit of the 'civilized nations'. This was a colonial
and imperial right, institutionalized at the 1885 Berlin Conference on the Congo."
MOHAMMAD BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 49 (1979).
For the Berlin West Africa Conference and its impact, see SCHMITT, *supra* note 31, at
214–26; PROSSER GIFFORD & WM. ROGER LOUIS, FRANCE AND BRITAIN IN AFRICA:
IMPERIAL RIVALRY AND COLONIAL RULE 167–220 (1971); THOMAS PAKENHAM, THE
SCRAMBLE FOR AFRICA 239–56 (1991); Charles Henry Alexanderowicz, *The Role of
Treaties in the European-African Confrontation in the Nineteenth Century*, *in* AFRICAN
INTERNATIONAL LEGAL HISTORY 27–68 (A.K. Mensah-Brown ed., 1975). For the impact
of the Berlin conference upon the pace of colonization of Africa, see maps of Africa circa
1886, 1998, and 1921 in ARCHIVES OF EMPIRE, *supra* note 62, at 17–19.

63. JOHN WESTLAKE, INTERNATIONAL LAW 136 (1894) [hereinafter WESTLAKE,
INTERNATIONAL]. It was agreed that:

> The power which henceforth take possession of a territory upon the coast of the
> African continent situated outside of its present possession, or which, not hav-
> ing had such possessions hitherto, shall acquire them, and likewise, the Power
> which shall assume a protectorate there, shall accompany the respective act
> with a notification addressed to the other Signatory Powers of the present Act,
> in order to put them in a condition to make available, if there be occasion for it,
> their reclamations.

General Act of the Conference of Berlin, art 34, Feb. 26, 1885, *reprinted in* 3 AM J. INT'L
L. 7 (1909).

> make to sovereignty over the region and leaves the treatment of the na-
> tives to the conscience of the state to which sovereignty is awarded.[64]

Consider that the Berlin Conference took place in the midst of Europe's agrarian crisis and the Great Depression of 1873—86, which had "shaken confidence in economic self-healing" and gave colonial expansion further impetus.[65] This was also the time when a "specter of 'over-civilization'" was breeding "militarism" and a longing for "imperial adventure" in the U.S.[66] With the Great Powers' right to colonize now secure, collective military interventions to protect colonial orders were the next step in this progression. The coordinated military action in China by Western powers to put down the Boxer Uprising of 1900 was "the dramatic beginning of the contemporary phase of international history."[67] It was also in 1885, the year of the Berlin Conference, that British foreign policy and intelligence officials first developed blueprints for a "pan-Islamic alliance [between] Egypt, Turkey, Persia, and Afghanistan against czarist Russia."[68] This sowed a poison seed, the bitter fruits of which sour many a palate today. The Durand Line was drawn in this milieu.

This global framework animated instrumental deployment of the law to reorder colonized spaces and bodies.[69] Law in the colony aimed to "re-

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64. WESTLAKE, INTERNATIONAL, *supra* note 63, at 143 (1894).

65. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 223 (2001). *See also* GIOVANNI ARRIGHI, THE LONG TWENTIETH CENTURY: MONEY, POWER AND THE ORIGINS OF OUR TIMES (1994) (exploring the development of the global capitalist system).

66. JACKSON LEARS, REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA, 1877–1920, at 28–32 (2009).

67. MARTIN WRIGHT, POWER POLITICS 57 (Hedley Bull & Carsten Holdbraad ed., 1978). For the genesis, the course, and the aftermath of the Boxer Uprising, see JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 229–36 (2d ed. 1999); JOSEPH ESHERICK, THE ORIGINS OF THE BOXER UPRISING (1987); PAUL A. COHEN, HISTORY IN THREE KEYS: THE BOXERS AS EVENT, EXPERIENCE, AND MYTH (1997).

68. *See* ROBERT DREYFUSS, DEVIL'S GAME: HOW THE UNITED STATES HELPED UNLEASH FUNDAMENTALIST ISLAM 19 (2005); CHARLES C. ADAMS, ISLAM AND MODERNISM IN EGYPT 10 n.1 (1933).

69. *See* Sally Engle Merry, *From Law and Colonialism to Law and Globalization*, 28 LAW & SOC. INQUIRY 569–71 (2003); NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF 5–18 (1997); CONTESTED STATES: LAW, HEGEMONY, AND RESISTANCE (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994) (presenting case studies on people use law to contest oppression); RONEN SHAMIR, THE COLONIES OF LAW: COLONIALISM, ZIONISM, AND LAW IN EARLY MANDATE PALESTINE (2000) (analyzing the ideologies and justice system that guided the development of British colony).

duce them to civility," those who had "no skill of submission."[70] Violence was deemed a vital instrument of colonial progress,[71] with law furnishing "the cutting edge of colonialism."[72] Violence, in general, and the violence of law, in particular, played "the leading part in the creation of civilization."[73] Colonial rule deemed "[o]ur law . . . a compulsory gospel which admits of no dissent and no disobedience."[74] This overt concert of law and violence has been aptly characterized "*lawfare*[:] the effort to conquer and control indigenous peoples by the coercive use of legal means."[75] The geo-legal space of colonialism brings into sharp relief "the blood that has dried on the codes of law."[76]

In the colony, law congealed epistemic, structural, and physical violence. The colonized other, deemed an error of arrested evolution, was prescribed corrective norms of a higher rational order. This "soul making"[77] colonial project entailed entrenchment of a layered legal order. First, the colony was inserted into the global legal system of hierarchically differentiated sovereignties.[78] Second, metropolitan law was transplanted in the colony supplemented by exceptions that ensured that coercion displaced hegemony as its animating force,[79] thereby ordering a "rule of difference" that mandated performance of nonidentity between the colonizer and the colonized.[80] Third, through selective recognition, malleable norms of the colonized were truncated and reconstituted as

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70. JAMES AXTELL, THE INVASION WITHIN: THE CONTEST OF CULTURES IN COLONIAL NORTH AMERICA 131, 271 (1985) (citation omitted).

71. *See* ASHIS NANDY, THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM 69 (1983).

72. MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA 4 (1985).

73. ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA 289, 294 (1959) [hereinafter STOKES, ENGLISH UTILITARIANS].

74. James Fitzjames Stephens, *quoted in*, R. C. J. COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE 87 (J. H. Baker ed., 1988).

75. John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 LAW & SOC. INQUIRY 305, 306 (2001).

76. Michel Foucault, *quoted in*, JAMES MILLER, THE PASSION OF MICHEL FOUCAULT 289 (1993).

77. Benita Parry, *Current Theories of Colonial Discourse*, *in* THE POST-COLONIAL STUDIES READER, 39 (Bill Ashcroft et. al. eds., 1995). *See also* OLÚFÚMI TÁÍWÒ, HOW COLONIALISM PREEMPTED MODERNITY IN AFRICA (2010) (exploring the judicial and constitutional legacy of colonialism).

78. *See supra* notes 49–59 and accompanying text.

79. *See generally* RANAJIT GUHA, DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA (1997) (exploring the consequences of the social-political structure born out of British control).

80. *See* PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS 16–24 (1993).

fixed "customary law."[81] In the career of the Durand Line all these legal machinations of the colonial project came into play.

B. Modern Geography and the Colonial Encounter

Examination of the role of geography within the matrix of modern regimes of knowledge production in general, and of colonialism in particular, is sorely needed. Modern social theory, while privileging time, has tended to treat space as "dead, the fixed, the undialectical, the immobile."[82] The point of departure of this article, however, is that the spatial and the temporal are mutually constitutive, "in that each shapes and is simultaneously shaped by the other in a complex interrelationship which may vary in different social formations and at different historical conjunctures."[83] Edward Said spoke of "imaginative geograph[ies]" that fold distance into difference by multiplying partitions and enclosures that serve to demarcate "the same" from the "other" and by "designating in one's mind a familiar space which is 'ours' and an unfamiliar space beyond 'ours' which is 'theirs.'"[84] Besides, "geography legitimates, excuses, rationalizes, in its very act of origination."[85]

Modern geography is "amongst the advance-guard of a wider 'western' epistemology, deeply implicated in colonial-imperial power."[86] Not surprisingly, "geography is inescapably marked (both philosophically and institutionally) by its location and development as a western-colonial science."[87] From its very inception, modern geography formed part of the knowledge production and application attendant to colonialism that aimed to get a grasp on colonized territories and bodies by deploying an

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81. *See* FRANCIS G. SNYDER, CAPITALISM AND LEGAL CHANGE: AN AFRICAN TRANSFORMATION (1981) (looking at the transformation of legal forms under the influence of capitalism, imperialism, and classism); SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW IN KILIMANJARO, 1880–1980, 139–67 (1986).

82. Michel Foucault, *The Question on Geography, in* POWER/KNOWLEDGE 70 (Colin Gordon ed., 1980). *See also* EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY, 31–35 (1989).

83. Edward Soja, *The Socio-Spatial Dialectic,* 70 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 207, 225 (1980).

84. EDWARD SAID, ORIENTALISM 54 (1978) [hereinafter SAID, ORIENTALISM]; *see also* Derek Gregory, *Imaginative Geographies*, 19 PROGRESS IN HUM. GEOGRAPHY 447 (1995).

85. RICHARD PEET, MODERN GEOGRAPHIC THOUGHT 12 (2004).

86. James D. Sidaway, *Postcolonial Geographies: an Exploratory Essay*, 24 PROGRESS IN HUM. GEOGRAPHY 591, 593 (2000).

87. *Id.*

impulse to chart, count, and map.[88] The "discovery" of new lands was seen as enabling a "true and perfect geography."[89] As a critical component of the Enlightenment's project of knowledge production, geography helped constitute the "other" against which modernity itself was interpolated.[90] Geography adopted the confident regime of reason that "there can be nothing so remote that we cannot reach to it, nor so recondite that we cannot discover it."[91] Geography was in the vanguard of this enterprise to reach, discover, and grasp, and it underwrote Europe's "planetary consciousness."[92] Of course, what was "discovered" was unavoidably constituted by the "discovery," such that "[g]eography was not merely engaged in *discovering* the world; it was *making* it."[93] Given the spatial imperatives of an empire, modern geography developed "to serve the interests of imperialism in its various aspects including territorial acquisition, economic exploitation, militarism and the practice of class and

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88. *See* FELIX DRIVER, GEOGRAPHY MILITANT: CULTURES OF EXPLORATION AND EMPIRE (2001) (discussing the relationship between exploration and geographical knowledge).

89. *Quoting* a 1537 statement by Portuguese cosmographer Dom Joao de Castro, *in* BENTON, *supra* note 34, at 1. *See also* MARÍA M. PORTUONDO, SECRET SCIENCE: SPANISH COSMOGRAPHY AND THE NEW WORLD (2009).

90. *See generally* GEOGRAPHY AND ENLIGHTENMENT (David N. Livingstone & Charles W. J. Withers eds., 1999) (looking at the geography of the Enlightenment, ways it was practiced, and how it engaged with rationality and human nature). As Fitzpatrick articulates:

> Enlightenment creates the very monsters against which it so assiduously sets itself. These monsters of race and nature mark the outer limits, the intractable 'other' against which Enlightenment pits the vacuity of the universal and in this opposition gives its own project a palatable content. Enlightened being is what the other is not. Modern law is created in this disjunction.

FITZPATRICK, MYTHOLOGY, *supra* note 39, at 45. Modern law, then, "is imbued with this negative transcendence . . . imperiously set against certain 'others' who concentrate the qualities it opposes." *Id.* at 10.

91. RENE DESCARTES, THE PHILOSOPHICAL WORKS OF DESCARTES 92 (Elizabeth Haldane & G. R. T. Ross trans., 1955). For the association between Cartesian representations of space and European colonial expansion, see ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY (1986).

92. MARY LOUISE PRATT, IMPERIAL EYES: TRAVEL WRITING AND TRANSCULTURATION 15 (1992).

93. DAVID N. LIVINGSTONE, THE GEOGRAPHICAL TRADITION: EPISODES IN THE HISTORY OF A CONTESTED ENTERPRISE 168 (1992) [hereinafter LIVINGSTONE, GEOGRAPHICAL TRADITION]. This is in line with the mutually constitutive role of knowledge and power, whereby "[t]he Orient was Orientalized not only because it was discovered to be 'Oriental' in all those ways considered common-place by an average nineteenth-century European, but also because it could be . . . made Oriental." SAID, ORIENTALISM, *supra* note 84, at 5–6.

race domination."[94] Geographers were "among the front ranks of explorers, surveyors, technologists, and ideologues of empire"[95] and often "the most vociferous imperialists."[96]

Geography played a critical role in colonial technologies of governance that produced territorially coherent units such as "India."[97] Colonizers were "anxious to inaugurate some system for . . . correcting and revising received geography of [the newly created colony]."[98] To govern a territory, one must know it. Because, supposedly, "a single shelf of a good European library was worth the whole native literature of India and Arabia,"[99] the colonists tried "to graft the science of the West on to an Eastern stem."[100] They settled upon "a technological solution—"triangulation"—which promised to perfect geographical knowledge."[101] The survey of Bengal, initiated in 1763, and the resulting *Bengal Atlas* (1779) and the *Map of Hindoostan* (1782), were deemed works of "the first importance both for strategic and administrative purposes."[102] Theoretical debates of geographers and geologists of Britain and continental Europe during the nineteenth century drew extensively on this work.[103] The Great Trigonometrical Survey of India (1878), guided by the "flawed . . . certainty and correctness granted by the Enlightenment's epistemology" finally helped colonizers produce "their India."[104] This process furnished the grounds for the colonial production of India, which had "hardly ever been a single, integrated political entity,"[105] as a

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94. Brian Hudson, *The New Geography and the New Imperialism: 1870–1918*, 9 ANTIPODE 12, 12 (1977).

95. Neil Smith, *Geography, Empire and Social Theory*, 18 PROGRESS IN HUM. GEOGRAPHY 491, 493 (1994).

96. Neil Smith & Anne Godlewska, *Introduction: Critical Histories of Geography*, *in* GEOGRAPHY AND EMPIRE 13 (Anne Godlewska & Neil Smith eds., 1994).

97. Colonial administrators realized early that existing maps were "very inaccurate . . . only of service while India was an unknown region . . . [but these] ceased to be tolerable when that vast country became a British imperial possession, requiring to be administered." CLEMENTS MARKHAM, A MEMOIR ON INDIAN SURVEYS 58 (2d ed. 1878).

98. ZAHEER BABER, THE SCIENCE OF EMPIRE: SCIENTIFIC KNOWLEDGE, CIVILIZATION AND COLONIAL RULE IN INDIA 140 (1996) (citation omitted).

99. Thomas Babington Macaulay, *Minute on Indian Education*, *in* ARCHIVES OF EMPIRE VOL. I: FROM THE EAST INDIA COMPANY TO THE SUEZ CANAL 227, 230 (Barbara Harlow & Mia Carter eds., 2003).

100. Lord Curzon, *quoted in*, BABER, *supra* note 98, at 185.

101. MATTHEW H. EDNEY, MAPPING AN EMPIRE: THE GEOGRAPHICAL CONSTRUCTION OF BRITISH INDIA 1765–1843, at 17 (1997).

102. BABER, *supra* note 98, at 142.

103. *See id*. at 143–46.

104. EDNEY, *supra* note 101, at 2, 16.

105. B. B. MISSRA, THE UNIFICATION AND DIVISION OF INDIA, at v (1990).

bounded political unit and substantiated that "an imagined epistemology could intervene to shape the political definition of actual territory."[106]

The late nineteenth century is by most accounts a unique moment in the history of modern geography. As colonialism spread across the globe, the incipient discipline of modern geography had to contend with colonial expansion and imperial ambitions.[107] This is when geography shifted its conceptual grounds from naturalistic theology to evolutionary biology, and geographers became part of the "stratum of organic intellectuals of empire."[108] Darwin's theory of evolution through natural selection, Spencer's theory of environmental determination, and Lamarck's theory of inheritance left formative imprints on the discipline.[109] As a result, modern geography played a critical role in the modern constructions of race that enabled and sustained colonial domination.[110] These constructions of racial difference and hierarchy helped reconcile colonial domination with liberal ideals of liberty and equality.[111] Most important for this article, modern geography produced classifications of bodies and spaces that enabled colonial powers to draw "lines on a map which had little relation to underlying cultural or economic patterns. . . . These designations continue to haunt these regions to this day."[112] Also relevant to this story is the proclivity of European colonizers to "categoriz[e] mountain

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106. RICHARDS, *supra* note 30, at 16. India as a geographically bounded political unit emerged from British Acts of Parliament between 1858 and 1899. *See* Sanjay Chaturvedi, *Process of Othering in the Case of India and Pakistan,* 93 TIJDSCRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE 149, 150 (2002); THE OXFORD HISTORY OF INDIA 673–82 (Percival Spear ed., 3d ed. 1958). *See also* LAWRENCE JAMES, RAJ: THE MAKING AND UNMAKING OF BRITISH INDIA 316–21 (2000). In the 1930's Gandhi acknowledged that the "Indian nation was a creation of the empire-builders. Independent India inherited the colonial nation." Bhabani Sen Gupta, *India in the Twenty-First Century* 73 INT'L AFF. 297, 299 (1997). *See also* Sumathi Ramaswamy, *Visualising India's Geo-Body: Globes, Maps, Bodyscapes*, *in* BEYOND APPEARANCES?: VISUAL PRACTICES AND IDEOLOGIES IN MODERN INDIA 151 (Sumathi Ramaswamy ed., 2003).

107. DRIVER, *supra* note 88, at 343.

108. GEARÓID Ó. TUATHAIL, CRITICAL GEOPOLITICS: THE POLITICS OF WRITING GLOBAL SPACE 21 (1996).

109. *See* David N. Livingstone, *Natural Theology and Neo-Lamarckism: The Changing Context of Nineteenth-Century Geography in the United States and Great Britain*, 74 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 9, 22–23 (1984); David N. Livingstone, *Climate's Moral Economy: Science, Race and Place in Post-Darwinian British and American Geography*, *in* GEOGRAPHY AND EMPIRE, *supra* note 96, at 132–54.

110. *See* LIVINGSTONE, GEOGRAPHICAL TRADITION, *supra* note 93, at 216–59; Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219, 1223 (1999).

111. *See* UDAY SINGH MEHTA, LIBERALISM AND EMPIRE 1–17 (1999); Tayyab Mahmud, *Race, Reason, and Representation*, 33 U.C. DAVIS L. REV. 1581, 1591 (2000).

112. JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS 102 (1998).

and hill regions as distinctive political and cultural spaces . . . [and to] portray[] . . . highlanders as belligerents . . . [and] hill regions as tending towards violence."[113] Modern geography facilitated such an image and colonial designs were devised to subdue and control mountain and hill regions.

C. Geopolitics and Imperial Designs

The late nineteenth century also saw the rise of the discipline of geopolitics—knowledge claims about the relationship between space and power, and particularly about the impact of geography on the conduct of foreign policy. A geopolitical vision is "any idea concerning the relation between one's own and other places, involving feelings of (in)security or (dis)advantage (and/or) invoking ideas about a collective mission or foreign policy . . . . [which] requires at least *a Them-and-Us distinction*."[114] From its birth, this discipline bore the marks of the temporal and spatial context of its emergence, i.e., the age of empire and "race sciences."[115] The discipline's professed claims to objectivity and neutrality notwithstanding, geopolitics "was always a highly ideological and deeply politicized form of analysis"[116] that furnished "pseudo-scientific justifications for colonial expansionism . . . ."[117] Incipient geopolitics sutured colonialism with theories of biological and social evolution to predict the decline

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113. BENTON, *supra* note 34, at 224–25.

114. GERTJAN DIJKINK, NATIONAL IDENTITY & GEOPOLITICAL VISION: MAPS OF PRIDE & PAIN 11 (1996) (emphasis added).

115*. See* John S. Dryzek & David Schlosberg, *Disciplining Darwin: Biology in the History of Political Science*, *in* POLITICAL SCIENCE IN HISTORY: RESEARCH PROGRAMS AND POLITICAL TRADITIONS 123 (James Farr et al. eds., 1995). Halford Mackinder, a pioneer of geo-politics, theorized that natural regions have differentiated flows of sap and blood running through their populations giving them different characteristics of physique and character. Halford John Mackinder, *The Human Habitat*, 47 SCOT. GEOGRAPHICAL MAG. 321, 324–28, 331–35 (1931). Ellen Semple theorized how the sturdy energy of the Anglo-Saxon race was reinvigorated by settlement of North America and formulated "scientific" justifications for the ideology of manifest destiny. ELLEN CHURCHILL SEMPLE, AMERICAN HISTORY AND ITS GEOGRAPHIC CONDITIONS (1903). *See also* THOMAS R. HIETALA, MANIFEST DESTINY: AMERICAN EXCEPTIONALISM AND EMPIRE 261–62 (rev. ed. 2003).

116. Gearóid Ó. Tuathail & John Agnew, *Geopolitics and Discourse: Practical Geopolitical Reasoning in American Foreign Policy*, *in* EXPLORING HUMAN GEOGRAPHY 361 (Stephen Daniels & Roger Lee eds., 1996).

117. Sanjay Chaturvedi, *Can There be an Asian Geopolitics?*, *in* SPACE, TERRITORY AND THE STATE: NEW READINGS IN INTERNATIONAL POLITICS 1, 5 (Ranabir Samaddar ed., 2002). *See also*, Halford J. Mackinder, *The Teaching of Geography from an Imperial Point of View*, 6 GEOGRAPHICAL TCHR. 79 (1911).

and even the demise of "inferior" races.[118] In 1899, a military surveyor and future President of the Royal Geographical society made an evocative statement:

> Truly, this period in our history has been well defined as the boundary-making era . . . such an endless vista of political geography arises before us . . . such a vision of great burdens for the white man to take up in far-off regions, dim and indefinite as yet.[119]

The founding canon of geopolitics is directly relevant to the story of the Durand Line. Halford John Mackinder's "Heartland" thesis foresaw a reassertion of Central Asia as swinging the global balance of power to the Asian heartland, which could become the base of a global empire.[120] Alfred Mahan saw the territorial arc running from Turkey to China as a geopolitical "no man's land," one "'destined' to be a disputed area between Russia and maritime powers."[121] Nicholas John Spykman gathered these conceptual threads to weave the "Rimland" thesis which posits that the real power potential of Eurasia lay not in its heartland but in its littoral rim which was thickly populated, rich with resources, and strategically located.[122] Consequently, "[w]ho controls the rimland rules Eurasia; who rules Eurasia controls the destinies of the world."[123] Mackinder had

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118. *See, e.g.*, WALTER FITZGERALD, AFRICA: A SOCIAL, ECONOMIC AND POLITICAL GEOGRAPHY OF ITS MAJOR REGIONS 137 (1934) ("It is *agreed* that Negro and European civilizations cannot remain mutually exclusive while existing side by side in the same continent . . . . [I]t seems *inevitable* that the infinitely weaker civilization of the Negro should ultimately pass away.") (emphasis added).

119. Thomas Holdich, *The Use of Practical Geography Illustrated by Recent Frontier Operations*, 13 GEOGRAPHICAL J. 465, 466–67 (1899).

120. *See* Chaturvedi, *supra* note 117, at 7–8; Halford Mackinder, *The Physical Basis of Political Geography*, 6 SCOT. GEOGRAPHICAL MAG. 78, 79–83 (1890); ANITA SENGUPTA, HEARTLANDS OF EURASIA: THE GEOPOLITICS OF POLITICAL SPACE (2009). Mackinder was quite alert to the imperatives of financial capital to expand globally. He pointed out at the turn of the century in a speech delivered to a group of London bankers that power "will always be where there is the greatest ownership of capital . . . we are essentially the people who have capital, and those who have capital always share in the activity of brains and muscles of other countries." *Quoted in*, PETER J. Hugill, WORLD TRADE SINCE 1431: GEOGRAPHY, TECHNOLOGY, AND CAPITALISM 305 (1993).

121. Chaturvedi, *supra* note 117, at 7–9. *See generally* ALFRED THAYER MAHAN, THE PROBLEM OF ASIA & ITS EFFECT ON INTERNATIONAL POLICIES (1900) (investigating the features, relations, and influences of China on world politics at the turn of the 20th century).

122. *See* NICHOLAS JOHN SPYKMAN, AMERICA'S STRATEGY IN WORLD POLITICS: THE UNITED STATES AND THE BALANCE OF POWER 178–87 (1942); Chaturvedi, *supra* note 117, at 8–9.

123. Nicholas Spykman, *quoted in*, MARTIN I. GLASSNER, POLITICAL GEOGRAPHY 327 (2d ed. 1996).

a specific recipe particularly relevant to the Durand Line: "In all the British Empire there is but one land frontier on which war-like preparation must ever be ready. It is the north-west frontier of India."[124] Later geopolitical enunciations about the region remain little more than worked-up permutations of the Makinder-Mahan-Spykman combine.[125]

D. Frontiers, Boundaries, and Borders

Borders are human constructs built through an amalgamation of geography, cartography, theories of sovereignty, and prevailing constellations of power. In the process of being drawn "maps *make* reality as much as they represent it."[126] Any examination of borders often confronts an official politics of forgetting, an elaborate attempt to obliterate the contested origins and nature of the border.[127] Borders take different forms in different historical and political circumstances. Usually traced back to the Roman Empire that marked out discrete territories to distinguish centers of population density and uninhabited surroundings, the history of borders and frontiers is ancient and varied.[128] Romans ex-

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124. Halford J. Mackinder, *The Sub-Continent of India*, *in* 1 THE CAMBRIDGE HISTORY OF INDIA: ANCIENT INDIA 23 (E. J. Rapson ed., 3d rpt. 1968).

125. *See, e.g.,* BREZEZINKSI, supra note 18; BARNETT, supra note 17; RALPH PETERS, WARS OF BLOOD AND FAITH: THE CONFLICTS THAT WILL SHAPE THE TWENTY-FIRST CENTURY 132–34, 139–41 (2009); *See also* EMPIRE'S LAW: THE AMERICAN IMPERIAL PROJECT AND THE 'WAR TO REMAKE THE WORLD' (Amy Bartholomew ed., 2006) (a collection of essays looking at modern day imperialism). The genesis of these related and lasting geopolitical enunciations is captured well by P. J. Taylor:

> Throughout the second half of the nineteenth century Britain and Russia had been rivals in much of Asia. While Britain was consolidating its hold on India and the route to India, Russia had been expanding eastwards and southwards producing many zones of potential conflict from Turkey through Persia and Afghanistan to Tibet. But instead of war, this became an arena of intrigue, of bluff and counter-bluff, know as the 'Great Game' . . . . Put simply, the heartland model is a codification and globalization of the Great Game; it brings a relatively obscure imperial contest on to the center stage.

Quoted in, Sanjay Chaturvedi, *Can There be an Asian Geopolitics?*, *supra* note 117, at 8.

126. Jeremy W. Crampton & John Krygier, *An Introduction to Critical Geography*, 4 ACME: AN INT'L E-JOURNAL FOR CRITICAL GEOGRAPHIES 11, 15 (2006).

127. *See* James Anderson & Liam O'Dowd, *Borders, Border Regions and Territoriality: Contradictory Meanings, Changing Significance,* 33 REGIONAL STUD. 593, 596 (1999).

128*. See generally* MALCOLM ANDERSON, FRONTIERS: TERRITORY AND STATE FORMATION IN THE MODERN WORLD (1996) (examining the impact and nature of frontiers); PETER SAHLINS, BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES (1989) (discussing the formulation of nations along an imaginary boundary); ALISTAIR

tended this practice to Gaul and Britain. In the Middle Ages, newly dis-
covered long-distance trade routes were loosely divided into zones as
clear assertions of political control to allocate responsibility for protec-
tion of trade caravans and the right to levy transit charges. Consolidation
of centralized monarchies in Europe in the twelfth and thirteenth centu-
ries ushered in the phase of defined political borders. The Renaissance
made cartography popular; maps became an instrument of centralizing
control.[129] With colonialism, maps became a weapon of statecraft when
imperial powers used topographical features on maps as bargaining chips
among themselves. Boundaries were drawn to manipulate distribution of
power among colonial powers, thereby creating a direct connection be-
tween colonialism and borders later inherited by postcolonial states. In
this progression, a European practice of demarcated borders was imposed
upon, and subsequently internalized by, postcolonial formations.

  Borders just as often join what is different as divide what is similar.[130]
Here, it is important to distinguish *frontiers* from *boundaries*.[131] A boun-
dary denotes a line while a frontier is a zone. In effect, a boundary girds
a frontier. Frontiers— zones at the periphery of political orders—have
over the last few centuries been replaced by defined lines of political
control, the borders of the state.[132] The idea of the frontier had a particu-
lar purchase in the colonial imagination. Discourses of "discovery," "*ter-
ra nullius,*" and the "frontier" commingled to furnish license to occupy
and subjugate coveted spaces that were represented as being "empty."[133]

HENNESSY, THE FRONTIER IN LATIN AMERICAN HISTORY (1978) (comparing the role of
boundaries and frontiers in the development of North and South America).

  129. *See* Paula Banerjee, *Frontiers and Borders: Spaces of Sharing, Spaces of Con-
flict*, *in* SPACE, TERRITORY AND THE STATE, *supra* note 117, at 28.

  130. Tobias Wendl & Michael Rösler, *Introduction: Frontiers and Borderlands—The
Rise and Relevance of an Anthropological Research Genre*, *in* FRONTIERS AND
BORDERLAND: ANTHROPOLOGICAL PERSPECTIVES 1, 2 (Michael Rösler & Tobias Wendl
eds., 1999).

  131. *See* A. O. CUKWURAH, THE SETTLEMENT OF BOUNDARY DISPUTES IN
INTERNATIONAL LAW 11–16 (1967). By one account, "frontiers are areal, boundaries are
linear . . . . The former may be correctly described as 'natural' . . . . The latter are artifi-
cial." A. E. MOODIE, GEOGRAPHY BEHIND POLITICS 73–74 (5th ed. 1963).

  132. J. R. V. PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES 1 (1987). For the rela-
tionship between borderlands and formation of borders, see Jeremy Adelman & Stephen
Aron, *From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between
in North American History*, 104:3 AM. HIST. REV. 814 (1999); Michiel Baud & Willem
van Schendel, T*owards a Comparative History of Borderlands*, 8 J. WORLD HIST. 211
(1997).

  133. *See* J. M. BLAUT, THE COLONIZER'S MODEL OF THE WORLD: GEOGRAPHICAL
DIFFUSIONISM AND EUROCENTRIC HISTORY 25 (1993); ANTHONY PAGDEN, EUROPEAN
ENCOUNTERS WITH THE NEW WORLD: FROM RENAISSANCE TO ROMANTICISM (1993) (look-

Indeed, for colonial settler-states, territorial expansion into and settlement of "empty" areas furnished the constitutive grounds of their identity.[134]

During the phase of decolonization, borders became a crucial issue for postcolonial states. In most cases, the inherited borders were in large measure determined by geopolitical, economic, and administrative policies of colonial powers that had occupied these territories. Colonial claims were often carved up with little regard to the coherence of historic, cultural, and ethnic zones. As a result, historical and cultural units were split, and different cultures, religions, languages, identities, and affiliations were enclosed in demarcated territorial units. The connection between a people and their territory, assumed and prescribed by Eurocentric theories of the "nation-state," found no room in these configurations. These inherited colonial demarcations, reinforced by postcolonial states, often provoke challenge and resistance from below by assertions of identity and difference. Power-blocs of postcolonial formations, in an effort to legitimize their new-found hegemony, impose a firm control over the inherited borders to draw "sharper lines between citizens, invested with certain rights and duties, and 'aliens' or 'foreigners.'"[135] The

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ing at how encounters with the America was interpreted by European scholars); JOHN K. NOYES, COLONIAL SPACE: SPATIALITY IN THE DISCOURSE OF GERMAN SOUTH WEST AFRICA 1884–1915 (1992) (examining the social context, representation and experience of colonial literature and how it produces space).

134. *See, e.g.*, Frederick Jackson Turner, *The Significance of the Frontier in American History*, *in* FRONTIER AND SECTION 37–62 (Ray Allen Billington ed., 1961); DONALD W. TREADGOLD, THE GREAT SIBERIAN MIGRATION: GOVERNMENT AND PEASANTS IN RESETTLEMENT FROM EMANCIPATION TO THE FIRST WORLD WAR (1957); HENNESSY, *supra* note 128; Paul. F. Sharp, *Three Frontiers: Some Comparative Studies of Canadian, American and Australian Settlements*, 24 PAC. HIST. REV. 369 (1955); THE FRONTIER IN PERSPECTIVE (Walker D. Wyman & Clifton B. Kroeber eds., 1957) (illustrating the various perspectives driving colonial conquest and discovery of new frontiers); Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the 17th Century*, 26 LAW AND SOCIAL INQUIRY 315, 324 (2001).

135. Baud, *supra* note 132, at 214. *See also* William F.S. Miles & David A. Rochefort, *Nationalism Versus Ethnic Identity in Sub-Saharan Africa*, 85 AM. POL. SCI. REV. 393, 401–02 (1991). In order to preserve their converging interests and to ensure a stable order whereby their conflicting interests can be mediated, different dominant classes structurally form a "joint front" to articulate their interests in the states apparatuses. This "joint front" is the power bloc of a social formation. *See* NICOS POULANTZAS, POLITICAL POWER AND SOCIAL CLASSES 229–52 (Timothy O'Hagan trans., Verso, 1973) (1968). *But see* A.I. ASIWAJU, PARTITIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES 1884–1984 (1985) (emphasizing the social relations that take place as part of normal activity virtually disregarding dividing lines and divisive administrative influences).

result is territorial disputes with adjacent polities and/or suppression of difference within, two intractable issues that quickly become the primary preoccupations of the postcolonial states. The career of the Durand Line is an evocative story of these intractable conflicts and the inability of existing legal regimes to resolve them.

III. IMPERIAL GREAT GAMES AND DRAWING OF LINES

What the map cuts up, the story cuts across.[136]

A. Great Game I: The Genesis of the "Buffer to a Buffer"

The Durand Line emerged as an instrumentality in the so-called Great Game,[137] the contest between British colonial expansion in India and eastward colonial expansion of Czarist Russia, one that turned the intermediate region into "a cockpit of international rivalry."[138] During the nineteenth century, issues of frontiers, boundaries, and borders within the Persian Plateau as a geographical unit were contentious.[139] Imperial efforts to fix boundaries of control that conflicted with the practices and experience of native populations for whom frontiers were essentially mobile and porous, compounded these contentions. This mobility and porosity stemmed from the region's location at the junction of historic trade routes between China, India, Central Asia, Persia, and the Arab

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136. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 129 (Steven Rendall trans., 1988).

137. The term "Great Game" was coined by Lieutenant Arthur Connolly of the 6th Bengal Native Light Cavalry, the British agent sent to reconnoiter the region between colonial India and the Caucasus in 1829. PETER HOPKIRK, THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA 123–24 (Kodansha, 1992). The term was later popularized by Kipling. *See* RUDYARD KIPLING, KIM (Máire ní Fhlathúin ed., 1901). Edward Said notes that Kipling treats the Great Game "less like a story—linear, continuous, temporal—and more like a playing field—many-dimensional, discontinuous, spatial." SAID, CULTURE , *supra* note 27, at 138. The term is in tune with the triumphalist "guts and glory" tenor of imperial military historiography of Britain. *See, e.g.*, T. A. HEATHCOTE, THE INDIAN ARMY: THE GARRISON OF BRITISH IMPERIAL INDIA 1822–1922, at 171–72 (1974); CHARLES CHENEVIX-TRENCH, THE INDIAN ARMY AND THE KING'S ENEMIES 1900-1947 (1988) (describing the composition and courage of the British Indian Army).

138. J.G. ELLIOTT, THE FRONTIER 1839–1947: THE STORY OF THE NORTH-WEST FRONTIER OF INDIA 3 (1968) [hereinafter ELLIOTT, THE FRONTIER].

139. The term "Persian plateau" denotes the physical geography of a single plateau that today includes Afghanistan, Baluchistan, and Iran. *See* GRAHAM P. CHAPMAN, THE GEOPOLITICS OF SOUTH ASIA: FROM EARLY EMPIRES TO THE NUCLEAR AGE 89 (3d ed. 2009).

world. [140] The Great Game was a contest, both overt and shadowy, over territory where different imperial orders came into volatile proximity. The conflicts turned on questions of territory, zones of influence, and spatial buffers.

The British were unequivocal about their empire's need to have "*scientific frontiers*" that had to be demarcated under "European pressure and by the intervention of European agents."[141] Lord Curzon, the arch-imperialist and Viceroy of India, proposed a specific recipe for colonial India—a "threefold Frontier."[142] British imperial strategists were mindful of the simultaneous expansion of British and Russian empires in the heartland of Asia. A "frontier of separation" rather than a "frontier of contact" was to be the solution which led to the creation of protectorates, neutral zones, and buffers in between.[143] This policy of a "three-fold frontier" was choreographed and implemented in the northwest of colonial India. The first frontier, at the edge of directly controlled territory, enabled the colonial regime to exercise full authority and impose its legal and political order. The second frontier, just beyond the first, was a zone of indirect rule where colonial domination proceeded through existing institutions of social control. The third frontier was a string of buffer states which, while maintaining formal political autonomy and trappings of statehood, aligned foreign relations with the interests of the British.

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140. *See* ALASTAIR LAMB, ASIAN FRONTIERS: STUDIES IN A CONTINUING PROBLEM 44–53 (1968); David Ludden, *Presidential Address: Maps in the Mind and the Mobility of Asia*, 62 J. OF ASIAN STUD. 1057, 1060–64 (2003).

141. Curzon, *supra* note 1, at 19, 49 (emphasis added).

142. *Id.* at 41.

143. Ainslie T. Embree, *Pakistan's Imperial Legacy*, *in* PAKISTAN'S WESTERN BORDERLANDS 24, 25–26 (Ainslie T. Embree ed., 1977).
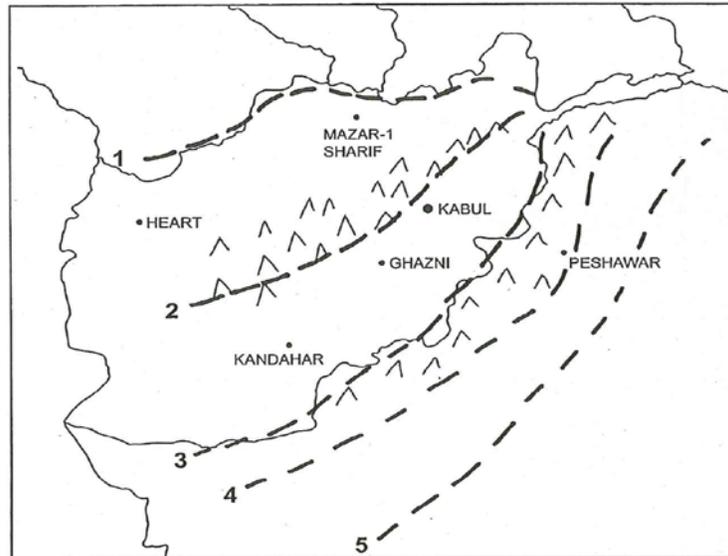
Fig. 2: Contemplated Northwest Frontier of Colonial India[144]
        1- River Oxus
        2- Hindu Kush
        3- Current Frontier, Suliman Mountains
        4- Suliman Mountain Foothills (Selected Territories)
        5- Indus River

   The story of the Durand Line shows that colonial map-making simultaneously exhibits "both delusions of grandeur and delusions of engulfment."[145] Historically, the river Indus was seen as the western boundary of India.[146] The region west of the Indus and south of the Oxus river, was home to the dominant ethnic group of the region, the Pashtun, who have a recorded history going well before 500 B.C.[147] Located at the southern

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   144. Bijan Omrani, *The Durand Line: History and Problems of the Afghan-Pakistan Border*, 40 ASIAN AFF. 177, 179 (2009).

   145. Anne McClintock, *Maidens, Maps and Mines*, *in* WOMEN AND GENDER IN SOUTHERN AFRICA TO 1945, 97, 114 (Cherryl Walker ed., 1990).

   146. EDNEY, *supra* note 101, at 3–9.

   147. *See* OLAF CAROE, THE PATHANS: 550 B.C.–A.D. 1957, at xvii–xxii, 56–57 (1965); JAMES W. SPAIN, THE PEOPLE OF THE KHYBER: THE PATHANS OF PAKISTAN 27–30 (1963) [hereinafter SPAIN, PEOPLE OF THE KHYBER]. With nearly 40 million members, the Pashtun are one of the largest tribal groups in the world. They have about 350 sub-tribes and five major groupings: the Durrani, the Ghurghusht, the Ghilzai, the Sarbani, and the Karlani. Perhaps the most highly segmented ethnic group in the world, the approximately 350 sub-tribes have a large number of clans that are, in turn, divided into large extended family groups. Relations amongst the groups dating back to more than a millennium are

edge of Central Asia and flanking the Chinese, Persian, and Indian empires, the Pashtun saw different phases of unity and fragmentation, along with Hindu, Buddhist, and Muslim cultural influences. Regional geopolitical maneuverings shaped the formation of the modern state of Afghanistan out of shards of rival tribal fiefdoms, ethnic loyalties, and shifting alliances and allegiances.[148] In 1747, as the Mughal and Persian empires were imploding, Ahmad Khan Durrani, a Pashtun military commander, took control of the region and created an Afghan tribal confederacy dominated by the Pashtuns, as a distinct political entity in the region—giving birth to what came to be called Afghanistan.[149] Given the circumstances of its emergence, Lord Curzon was to call the state "purely accidental."[150] The Durrani dynasty came to an end only in 1974, when Afghanistan became a republic.

Just as Afghanistan was emerging as a unified political entity, the British East India Company established political control over the fertile delta

complex and marked by feuds, alliances, and compromises. Among these fault lines is the 300-year-old conflict between the Ghilzai and Durrani tribes; one that animates the struggle between the Taliban and the Karzai government in Afghanistan. Thomas H. Johnson & M. Chris Mason, *Understanding the Taliban Insurgency in Afghanistan*, 51 ORBIS 71–89 (2007) [hereinafter Johnson & Mason, *Understanding*]. A Pathan's identity is constituted through concentric rings consisting of family, extended family, clan, tribe, confederacy, and linguistic group. The hierarchy of personal loyalties tracks these circles and become accentuated as the circle gets smaller. This segmentation and locus of loyalties are the primary reasons that no foreign entity—whether Alexander, the British, the Pakistanis, the Soviets, or the Americans—has been able to reconcile the Pathans to external rule. As British colonial rule in India moved westward from Bengal, the East India Company officials began to probe the region in the late eighteenth century. There followed generations of explorers, administrators, and soldiers who remained unable to penetrate and subdue it. This gave rise to the weaving of a complex mythology around the Pathans, portraying them as warlike, brave, savage, and stoic. One elderly Pashtun tribesman told a visiting British official in 1809: "We are content with discord, we are content with alarms, we are content with blood . . . [but] we will never be content with a master." *Quoted in*, STEPHEN TANNER, AFGHANISTAN: A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE FALL OF THE TALIBAN 134 (2002). The Pashtuns "accept no law but their own." JAMES W. SPAIN, THE PATHAN BORDERLAND 68 (1963) [hereinafter SPAIN, BORDERLAND]. The absence of modern structures of governance should not be conflated with the absence of governance. Complex and sophisticated dispute-resolution mechanisms, legal codes, and alternative systems of social control have developed in the region over a millennia. *Pashtunwali* (the way of the Pastun) is the keystone of Pashtun identity, social structure, and behavior. Many stereotypes of the Pashtun flourished during colonialism. *See, e.g.*, Paul Titus, *Honor the Baloch, Buy the Pushtun: Stereotypes, Social Organization and History in Western Pakistan*, 32 MOD. ASIAN STUD. 657 (1998).

148. *See* KARL E. MEYER & SHAREEN BLAIR BRYSAC, TOURNAMENT OF SHADOWS: THE GREAT GAME AND THE RACE FOR EMPIRE IN CENTRAL ASIA 65 (1999).

149. CHAPMAN, *supra* note 139, at 90–91.

150. Curzon, *quoted in*, GREGORY, COLONIAL PRESENT, *supra* note 21, at 31.

of Bengal in 1757, and began the process of colonizing India.[151] Over the next century, British colonial rule in India expanded westward. At the time, Russia's sense of its eastern border was "vague and protean, shaped by the constellation of power on its frontiers at any given moment."[152] Imperial Russia started to expand southwards and eastwards through the Caucasus, just when British colonial rule was expanding westward and northward in India.[153] Unavoidably, Central Asia, the zone of confluence of two expanding imperial empires, became the terrain of the Great Game. As the frontlines of two empires approached each other, the Great Game intensified.[154] To check Russia's growing presence in Central Asia in the early nineteenth century, the British aimed to turn Afghanistan into a "buffer state" governed by a compliant ruler. The "three fold frontier," that Curzon was later to articulate,[155] came into play.

An internal struggle for the throne of Kabul in the 1830's gave the British their first opening to play kingmakers in Afghanistan. In June 1838, the British signed a secret agreement with Ranjit Singh, the Sikh ruler of Punjab, and Shah Shujah, a claimant to the Kabul throne.[156] In return for their help in putting him in power, Shujah renounced Afghan claims to Kashmir and substantial areas between the Indus river and the Khyber Pass in favor of Ranjit Singh and agreed to become an ally of the British in their struggle with Russia. This agreement triggered what mainstream history styles the First Afghan War, when a 21,000-strong British "Army of the Indus" invaded Afghanistan in 1839 and installed Shujah as the Amir.[157] The license to colonize and dominate granted by contemporaneous international law to the "Great Powers" of the day

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151. For the chronology and pattern of spatial expansion of British colonial rule in India, see CHAPMAN, *supra* note 139, at fig. 4.1, fig. 4.2.

152. GEOFFREY HOSKING, RUSSIA, PEOPLE AND EMPIRE 1552–1917, at 14 (1998). *See also* Alfred J. Reiber, *Persistent Factors in Russian Foreign Policy*, *in* IMPERIAL RUSSIAN FOREIGN POLICY 315, 329–30 (Hugh Ragsdale ed., 1993); RUSSIAN COLONIAL EXPANSION TO 1917 (Michael Rwykin ed., 1988) (providing some perspective on the preservation of Russia's territorial conquests).

153. By the Treaty of Turkmenchay in 1828, Russia forced Persia to cede Transcaucasia, thus eliminating a barrier to Russian expansion into Turkistan. CAROE, *supra* note 147, at 317. *See also* DEMETRIUS CHARLES BOULGER, II ENGLAND AND RUSSIA IN CENTRAL ASIA 338–39, 382–93 (1879).

154. For a detailed account, see MEYER & BRYSAC, *supra* note 148, at 111–36.

155. *See supra* note 1 and accompanying text.

156. *See* HOPKIRK, *supra* note 137, at 188–201; CAROE, *supra* note 147, at 319–21.

157. *See* J. A. NORRIS, THE FIRST AFGHAN WAR 1838–1842, at 231–302 (1967). To facilitate the march of the invading army through the historic Bolan Pass in Baluchistan, the British set in place a process that later incorporated Punjab, Sind, and Baluchistan into colonial India. *See* VINCENT A. SMITH, THE OXFORD HISTORY OF INDIA 599–619 (3d ed. Percival Spear ed., 1958).

proved useful. However, the initial British success proved short-lived—resistance against the occupation force and their puppet leader broke out, and in 1842 the deposed Amir, Dost Mohammad Kahn, was returned to power, and the British invasion force was decimated.[158]

During the subsequent twenty years, the British started to bring the region west of the Indus river under colonial rule. Occupation of the Punjab in 1849, until then an independent state, brought under British control traditionally Afghan areas up to the eastern end of the legendary Khyber Pass that Punjab had annexed before the First Afghan War.[159] In 1857, India erupted in an anti-colonial revolt ignited by a mutiny of the Bengal Army. The revolt proved to be a watershed moment in the history of colonial rule, and led to a reordering of the Punjab as the "sword arm of the Raj."[160] British forces finally suppressed the revolt, and the governance of colonial India passed from the East India Company to the Crown, but "British fears of rebellion, conspiracies, holy wars, and possible foreign provocation" heightened.[161] Through innovative colonial legal regimes, a "military-fiscal state" was turned into a "military state," the Bengal Army was disbanded, and a reconstituted Punjab began to serve as "the military bulwark of the Raj."[162] The British deployed a racist recruiting doctrine known as the "martial race theory," to raise a new "Indian Army," with over half of it recruited from the Punjab, to serve as the "Empire's 'fire brigade.'"[163] This army was to be "the iron fist in the velvet glove of

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158. HOPKIRK, *supra* note 137, at 236–77.

159. Upon incorporation into colonial India, the Punjab was declared a "non-regulation" province, combining executive, legislative, and judicial functions, in a form of government that "emphasized dynamic administrative flexibility over 'rigid adherence to legislative regulations.'" This became the basis of "a paternalistic despotism that was to characterize the famed Punjab school of administration." TAN TAI YONG, THE GARRISON STATE: THE MILITARY GOVERNMENT & SOCIETY IN COLONIAL PUNJAB 1849–1947, at 17 (2005).

160. YONG, *supra* note 159, at 27. For the 1857 revolt, see ERIC STOKES, THE PEASANT ARMED: THE INDIAN REBELLION OF 1857 (C. A. Bayly ed., 1986); THE PENGUIN 1857 READER 1–2 (Pramod K. Nayar ed., 2007).

161. MEYER & BRYSAC, *supra* note 148, at 152.

162. YONG, *supra* note 159, at 24, 27, 138 (citation omitted). *See also* STOKES, ENGLISH UTILITARIANS, *supra* note 73, at 243.

163. YONG, *supra* note 159, at 100. *See also* BYRON FARWELL, ARMIES OF THE RAJ: FROM THE MUTINY TO INDEPENDENCE, 1858–1947, at 179–90 (1986); DAVID OMISSI, THE SEPOY AND THE RAJ: THE INDIAN ARMY, 1860–1940, at 10–43 (1994). Over time, the British used the "Indian Army" in Africa, China, Europe, Middle East, the Indian Ocean, and South East Asia. THOMAS R. METCALF, IMPERIAL CONNECTIONS: INDIA IN THE INDIAN OCEAN ARENA 1860–1920, at 78–101 (2007). "In Lord Salisbury's words, 'India was an English barrack in the Oriental Seas from which we may draw any number of troops without paying for them.'" *Quoted in*, B. R. Tomlinson, *India and the British Empire,*

Victorian expansionism . . . the major coercive force behind the internationalization of industrial capitalism."[164]

As the pace of Russian eastward expansion picked up after the Crimean War (1854-56), the British "became obsessed with the Great Game," and the Punjab as "the garrison province of the Raj . . . [was] reoriented . . . to meet[] the challenge of an external danger."[165] The rapid transformation of the Punjab into a "garrison state" involved novel colonial legal orders of land tenure, revenue extraction, military recruitment, resettlement of indigenous communities, rural social control, and political governance.[166] Colonial social engineering included refashioning of religious affiliations, identities, and practices.[167] To orchestrate this enterprise, a suitable administrative system was fashioned for the Punjab that "in both form and spirit . . . had a strong military flavor."[168] A century later, this reconstruction of the Punjab became the grounds for "Punjabisation of the state"[169] of Pakistan, its praetorian tenor, and the source of its "post-independence propensity towards a military-dominated state."[170]

1880-1935, 12 INDIAN ECO. & SOC. HIST. REV. 337, 341 (1975). The infamous "home charges" and Indian monetary reserves ensured that Britain did not have to pay for this service. *See* MARCELLO DE CECCO, THE INTERNATIONAL GOLD STANDARD: MONEY AND EMPIRE 62–63 (2d ed. 1984).

164. David Washbrook, *South Asia, the World System, and World Capitalism*, 49 J. ASIAN STUD. 479, 481 (1990). Between 1803 and 1901, Britain fought fifty major colonial wars. ANTHONY GIDDENS, THE NATION-STATE AND VIOLENCE 223 (1987).

165. YONG, *supra* note 159, at 20, 57, 58.

166*. See id.* at 17–30; MUSTAPHA KAMAL PASHA, COLONIAL POLITICAL ECONOMY: RECRUITMENT AND UNDERDEVELOPMENT IN THE PUNJAB 121–29 (1998); Richard G. Fox, *British Colonialism and Punjabi labor, in* 7 LABOR IN THE CAPITALIST WORLD ECONOMY 107, 114–15 (Charles Bergquist ed., 1984); PAUL PAUSTIAN, CANAL IRRIGATION IN THE PUNJAB 103 (1930).

167*. See* RICHARD G. FOX, LIONS OF THE PUNJAB: CULTURE IN THE MAKING 140–41 (1985); MOHINDER SINGH, THE AKALI MOVEMENT 144 (1978); KENNETH W. JONES, ARYA DHARAM: HINDU CONSCIOUSNESS IN 19TH-CENTURY PUNJAB 24–25(1976); DAVID GILMARTIN, EMPIRE AND ISLAM: PUNJAB AND THE MAKING OF PAKISTAN 29–31 (1988); Gerald Barrier, *The Punjab Government and Communal Politics 1870-1908*, 27 J. OF ASIAN STUD. 523, 529–31 (1968).

168. ANDREW J. MAJOR, RETURN TO EMPIRE: PUNJAB UNDER THE SIKHS AND BRITISH IN THE MID-NINETEENTH CENTURY 127 (1996).

169. Sanjay Chaturvedi, *Process of Othering in the Case of India and Pakistan* 93 TIJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE (SPECIAL ISSUE: THE NEW GEOGRAPHY OF RETAILING) 149, 153 (2002) (internal quotations omitted).

170*. See* Clive Dewey, *The Rural Roots of Pakistani Militarism, in* THE POLITICAL INHERITANCE OF PAKISTAN 255, 261–66 (David A. Low ed., 1991); AYESHA JALAL, DEMOCRACY AND AUTHORITARIANISM IN SOUTH ASIA: A COMPARATIVE AND HISTORICAL PERSPECTIVE 48–54 (1995).

British occupation and reordering of the Punjab in the middle of the nineteenth century produced the northwest border problem in the territories to the west of the river Indus that remains a source of conflict to this day. The northwest edge of this region, a great belt of mountains stretching over 1200 miles from Pamir to Persia, was home of scores of Pashtun tribes that had a long history of effective armed resistance against encroachers and of retaining their autonomy from the political orders around them.[171] Fierce resistance by these tribes started as soon as colonial rule came to their vicinity.[172] It was then that the British policy of creating a frontier zone between Afghanistan and colonial directly-administered areas came into force.[173] This so-called "close border" policy, also known as "masterly inactivity," provided that no further westward expansion of direct colonial rule was possible or warranted, and therefore British sovereignty should not be extended to areas and tribes that could not be subdued and governed effectively.[174] First implemented in Baluchistan and later further north,[175] the close border policy created a peculiar frontier zone—a narrow stretch of territory inhabited by Pashtun tribes maintaining their modes of self-governance, dotted with colonial military outposts, absent direct colonial administration, but discouraged from maintaining their traditional political relations with Afghanistan. Foothills at the edge of directly-administered "settled" areas were fortified to keep out the tribes, who, in exchange for monetary subsidies, were to keep access to military outposts open, and, in contravention to their tribal code, were to deny sanctuary to fugitives from the settled areas.[176] The system did not work well. The Pashtun tribes of the frontier zone remained restive, resulting in twenty-three British military operations between 1857 and 1881 to subdue them.[177]

A new British policy, initiated by the Disraeli government to build a new strategic line of defense against Russian pressure in Central Asia, led in 1876 to the abandonment of the "close border" policy in favor of the so-called "forward policy." [178] The new policy called for aggressive

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171. *See supra* note 147 and accompanying text.

172. *See* H. T. LAMBRICK, SIR CHARLES NAPIER AND SIND 275–98 (1952).

173. *See* Embree, *supra* note 143, at 33–37.

174. *See* CAROE, *supra* note 147, at 346–59.

175. *See id*. at 370–73.

176. *Melmastia* (hospitality and protection), and *Nanawati* (asylum and sanctuary) are central to *Pashtunwali* (the way of the Pashtun), the tribal code. *See id*. at 349–52.

177. *See* CAROE, *supra* note 147, at 348. For a table of record of "pacification" expeditions against the frontier tribes, see CHAPMAN, *supra* note 139, at 104–07.

178. *See* CAROE, *supra* note 147, at 370–89; HOPKIRK, *supra* note 137, at 359–64. The "forward policy" aimed at "pushing the international boundary as far westward and northward as physically possible and by dint of changing existing conditions in the ex-

expansion into and control over the frontier regions. Strong points in the tribal belt were to be captured, fortified, garrisoned, and connected with protected roads. This "forward policy," in its extreme, envisaged pushing the boundary as far west as the Hindu Kush mountain range in the middle of Afghanistan, with the Kabul-Ghazni-Kandahar arc forming the first line of defense for colonial India.[179] As the new policy unfolded, British meddling in Afghan and Persian affairs increased.[180] Decisions of a British Commission demarcating the disputed border between Afghanistan and Persia and permanent stationing of British garrisons nearby, heightened Afghan concerns about hostile encirclement.[181] The Afghans made overtures towards the Russians to counter-balance the growing British influence.[182] The result was the Second Afghan War, when, in November 1878, the British launched a three-pronged attack on Afghan territory.[183] The Amir abdicated in favor of his son.[184] The son then ceded control over the Khyber Pass and agreed to become a vassal of the British, who were to control the external relations of his country.[185] After some pacification campaigns around the country, the British troops withdrew from Afghanistan in 1880.[186] One result of the Second Afghan War was the institution of a joint Russo-British commission to determine the border between Russia and Afghanistan, with the latter to serve as a buffer between the two imperial empires.[187]

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tended area through both education and force of arms exercising full sovereignty over the whole." James W. Spain, *Political Problems of A Borderland, in* PAKISTAN'S WESTERN BORDERLANDS, *supra* note 143, at 13.

179. Omrani, *supra* note 144, at 183. The policy was first implemented in Baluchistan known as the "Sandeman system." CAROE, *supra* note 147, at 376; *see also* SIMANTI DUTTA, IMPERIAL MAPPINGS IN SAVAGE SPACES: BALUCHISTAN AND BRITISH INDIA 107 (2002).

180*. See* CAROE, *supra* note 147, at 370–89.

181. To counter Russia's growing influence in Persia, and the latter's renewed designs to retake Afghanistan's western province of Herat, Britain went to war with Persia in 1856. A year later the two signed a peace treaty and Afghan-Persian border was determined as part of this treaty. Amin Saikal, *The Afghanistan-Pakistan Border and Afghanistan's Long-Term Stability*, *in* BUILDING STATE AND SECURITY IN AFGHANISTAN 216 (Wolfgang Danspeckgruber & Robert P. Finn eds., 2007).

182*. See* ELLIOT, THE FRONTIER, *supra* note 138, at 29–33.

183*. See id.* at 33.

184. HOPKIRK, *supra* note 137, at 392.

185. ELLIOTT, THE FRONTIER, *supra* note 138, at 34–35; HOPKIRK, *supra* note 137, at 384–401. Some scholars date the emergence of Afghanistan as a modern state with the 1880 installation of the new Amir orchestrated by imperial forces. *See* OLIVIER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN 13–16 (2d ed., 1990).

186. HOPKIRK, *supra* note 137, at 397–401.

187. After many disputes and disagreements, a commission completed its work to demarcate the boundary in 1895. *See* ELLIOT, THE FRONTIER, *supra* note 138, at 46–47;

Confronted with increasing demands for more concessions by the colonial government of India, in 1892, the Afghan Amir sought to visit Britain to negotiate directly with the British government.[188] The algebra of differentiated sovereignties came into play—British authorities refused his request, forcing him to negotiate with British colonial authorities in India.[189] The Amir yielded to British pressure to delineate Afghanistan's eastern boundary.[190] The British proceeded to "dictate a boundary settlement,"[191] signed by the Amir and Henry Mortimer Durand, foreign secretary of British India, on 12 November 1893.[192] This agreement adjusted the "the eastern and southern *frontier* of His Highness's [the Amir's] dominions, from Wakhan to the Persian border." [193] The result was the Durand Line, which pushed colonial India's border with Afghanistan from the eastern foot of the frontier hills to their crest.[194] Curzon's dream of "*scientific frontiers*" demarcated under "European pressure and by the intervention of European agents," appeared to be coming true.[195]

The Durand Line proved more difficult to delineate on the ground than to draw on paper.[196] Initially surveyed in 1894-5, most of the demarcation was completed by 1896, though the section around the Khyber Pass

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HOPKIRK, *supra* note 137, at 430–38. The border was demarcated along the Oxus River from Pamir to today's Turkmenistan, and the Oxus Line was linked westward to Persia's northern boundary. Some adjustments were made soon after, and the demarcation was finalized in an Afghan-Soviet agreement in 1946 with further adjustments to compensate for changes in the flow of the Oxus River. ALASTAIR LAMB, ASIAN FRONTIERS: STUDIES IN A CONTINUING PROBLEM 86–89 (1968).

188. ELLIOT, THE FRONTIER, *supra* note 138, at 47.

189. *Id.*

190. *Id.* at 45–46.

191. *Id*. at 46.

192. *See* CAROE, *supra* note 147, at 381–82, app. B at 463.

193. For pertinent text of the treaty, see *id.* app. B at 463–66 (emphasis added). For an account of the negotiations leading to the agreement, see PERCY SYKES, THE RIGHT HONOURABLE MORTIMER DURAND 205–24 (2006).

194. *See* Embree, *supra* note 143, at 36.

195. *See supra* notes 141–142 and accompanying text.

196. Particular care was taken to create and allocate to Afghanistan the narrow Wakhan strip to avoid any territorial contiguity between Russia and colonial India. *See* Omrani, *supra* note 144, at 185. Some call it "one of the best defined and most clearly recognized frontiers in the world." MUJTABA RAZVI, THE FRONTIERS OF PAKISTAN 143 (1971). Others state that some sectors were never demarcated. Difficulties cited are that in some sectors "the fact that geographical watersheds and tribal boundaries do not coincide," in others "the failure to demarcate is of no consequence, for the range summit is unmistakable," in yet others tribal resistance. CAROE, *supra* note 147, at 382.

was only demarcated after the Third Afghan War in 1921.[197] While some inaccessible sections remained unmarked, the line created a strategic frontier that "did not correspond to any ethnic or historical boundary."[198] Slicing through tribes, villages, and clans, it "cut the Pukhtoon people in two."[199] The Pashtun tribes resisted attempts at demarcation, including, in some cases, burning down camps of the Boundary Commission. The British response was to station substantial permanent garrisons.[200] The Pashtuns remained restive, with religious leaders often playing leading roles in the insurgencies.[201]

In tune with the colonial project of reordering colonized bodies and spaces, in 1901, British authorities severed the "settled areas" of the northwest region under British control from the Punjab to form an evocatively named North-West Frontier Province ("NWFP"), though with a status not on par with other provinces.[202] Control over the tribal belt between the "settled areas" of NWFP and the Durand Line remained with the central government. The belt, now designated Federally Administered Tribal Area ("FATA"), was to serve as a "*buffer to a buffer*."[203] The legal order of colonial India did not extend to this zone and the tribes on the grounds that "[r]igour is inseparable from the government of *such a people*. We cannot rein *wild horses* with silken braids."[204] Tribes were to conduct their internal affairs under their customary norms. However, to supervise matters that touched the security interests of the British, a unique set of rules and procedures, draconian even by colonial standards, were enforced under the Frontier Crimes Regulation.[205] This created yet another "anomalous legal zones"[206] like others that came into existence

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197. Paula Banerjee, *Borders as Unsettled Markers in South Asia: A Case Study of the Sino-Indian Border*, 35 INT'L STUD. 179, 180 (1998).

198. ROY, *supra* note 185, at 17. The Durand Line has been characterized "illogical from the point of view of ethnography, of strategy and of geography." W. K. FRASER-TYTLER, AFGHANISTAN: A STUDY OF POLITICAL DEVELOPMENTS IN CENTRAL AND SOUTHERN ASIA 188 (1953). Others call it "a classic example of an artificial political boundary cutting through a culture area." LOUIS DUPREE, AFGHANISTAN 425 (1980).

199. OWEN BENNETT JONES, PAKISTAN: EYE OF THE STORM 23 (3d ed. 2009) [hereinafter JONES, PAKISTAN].

200. *See* Omrani, *supra* note 144, at 187.

201. *See* DAVID B. EDWARDS, HEROES OF THE AGE: MORAL FAULT LINES ON THE AFGHAN FRONTIER 143–44, 169–71 (1996).

202. *See* CAROE, *supra* note 147, at 413–20.

203. ELLIOT, THE FRONTIER, *supra* note 138, at 53 (emphasis added).

204. JOHN W. KAYE, THE WAR IN AFGHANISTAN 123–24 (1851) (emphasis added).

205. The FCR was first designed in 1858, and amended in 1872 and 1901. For a detailed discussion of FCR, *see infra* notes 342–345 and accompanying text.

206. For a discussion of anomalous zones, see Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996); BENTON, *supra* note 34, at 165.

in many European colonies. In the case of FATA, Pashtun tribes, "though not [] fully-fledged British subject[s] in the legal sense of the term, lived within the territorial boundaries of India."[207] To facilitate such territorial arrangements within British colonies, the Parliament had established a process for outlying districts intended "to remove those districts from beyond the pale of the law."[208] Tribes on both sides of the Durand Line continued to disregard it, and incessant tribal resistance prompted successive punitive expeditions. Even the semblance of order broke down with the Third Afghan War of 1919, when Afghanistan declared war, an effort joined by FATA tribes and Pashtun troops who deserted the colonial forces.[209] This short war resulted in Afghanistan regaining control over its foreign affairs.[210] However, the FATA tribes remained restive, and colonial efforts to quell incessant revolts included the first use of aerial bombardment in the history of India, laying waste to the country where local tribes had supported the invasion.[211] The tribes maintained their traditional connections with Afghanistan while negotiating the new FATA dispensation.

When the Indian struggle for decolonization gained momentum in the early 20th century, Pashtuns of "settled areas" quickly gravitated towards the movement.[212] The struggle forced the British to take initial steps towards allowing natives to participate in political governance in 1920 under the Montagu-Chelmsford "reforms," which envisaged an "advance towards self-government in stages."[213] The NWFP and FATA, however, were left out of the scheme on the grounds that, as the chief colonial administrator of the region put it, the Pashtuns "w[ere] not ready for . . . 'responsible government.'"[214] In response, Pashtuns gave their anti-

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207. ELLIOT, THE FRONTIER, *supra* note 138, at 113.

208. BENTON, *supra* note 34, at 262. Legislation, together with policy and practice "created five kinds of legal territory: three kinds of territory in British India and two kinds of territory in native states, depending on the statutes and agreements determining exemptions from British enactments and jurisdiction." *Id.* at 263.

209. *See* CHAPMAN, *supra* note 139, at 108; SPAIN, BORDERLAND, *supra* note 147, at 115–19; CAROE, *supra* note 147, at 397.

210. ELLIOT, THE FRONTIER, *supra* note 138, at 50.

211. *Id.* at 50–51. *See also*, CAROE, *supra* note 147, at 405–08. The first aerial bombardment of the area took place in 1915. SVEN LINDQVIST, THE HISTORY OF BOMBING 42 (Linda Haverty Rugg trans., New Press 2003) (2000). It is noted that "unlike other wars, Afghan wars become serious only when they are over; in the British times at least they were apt to produce an after-crop of tribal unrest." CAROE, *supra* note 147, at 397.

212. *See* Stephen Rittenberg, *Continuities in Borderland Politics*, *in* PAKISTAN'S WESTERN BORDERLANDS, *supra* note 143, at 67.

213. REPORT ON INDIAN CONSTITUTIONAL REFORM, *quoted in*, YONG, *supra* note 159, at 243.

214. Lionel Curtis, *quoted in*, CAROE, *supra* note 147, at 425.

colonial movement an organized form aimed at braiding "factors of history, geography, culture, and language to transform the relatively backward, divided, and disorganized Pukhtuns into a national community."[215] This movement, which came to be known as *Surkhposh* (Red-shirts), expressly adopted non-violence as a foundational principle of social and political action and became politically allied with the Indian National Congress, the spearhead of India's independence movement.[216]

   When India's anti-colonial struggle escalated into a civil-disobedience movement in the early 1930s, it had "only a marginal effect on the Punjab" thanks to the entrenched administrative, political, and social order in that "garrison province."[217] NWFP, on the other hand, proved receptive to the call, and in 1930 colonial authorities declared martial law in order to quell the civil-disobedience movement and to prevent armed tribes of FATA from making common cause with residents of the settled areas.[218] In 1935, the British enacted the Government of India Act in response to the ascending independence movement in India.[219] This Act provided for increased political participation through an enlarged franchise to elect provincial legislative assemblies with broadened powers.[220] When the first-ever elections took place in NWFP in 1937, the Indian National Congress, the secular nationalist party, won handily and formed the provincial government.[221] Because the 1935 Act was applicable only to provinces, FATA, the "buffer to a buffer," remained outside the ambit of constitutional reforms and the right to vote and representation.[222] The

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   215. KHALID B. SAYEED, POLITICS IN PAKISTAN: THE NATURE AND DIRECTION OF CHANGE 19 (1980).

   216. The members of the movement called themselves *Khudai Khidmargar* (servants of God). They wore red brick-dyed attire and acquired the designation *Surkhposh* (Red-shirts). The leader of the movement, Abdul Ghafar Khan, is also know as the "Frontier Gandhi" due to his philosophy of non-violence and his personal and political association with India's nationalist leader M. K. Gandhi. *See* CAROE, *supra* note 147, at 431–43. For a detailed account of politics in NWFP during this period, see ERLAND JANSSON, INDIA, PAKISTAN OR PAKHTUNISTAN: THE NATIONALIST MOVEMENTS IN THE NORTH-WEST FRONTIER PROVINCE 1937–47 (1981); MUKULIKA BANERJEE, THE PATHAN UNARMED: OPPOSITION AND MEMORY IN THE NORTH WEST FRONTIER (2000).

   217. YONG, *supra* note 159, at 20, 171–73. *See also* JUDITH M. BROWN, GANDHI AND CIVIL DISOBEDIENCE 145–46 (1977). *See generally* D. R. GROVER, CIVIL DISOBEDIENCE IN THE PUNJAB (1987).

   218. YONG, *supra* note 159, at 183–86.

   219. *See* AYESHA JALAL, THE SOLE SPOKESMAN: JINNAH, THE MUSLIM LEAGUE AND THE DEMAND FOR PAKISTAN 15–16 (1985) [hereinafter JALAL, THE SOLE SPOKESMAN].

   220. *See* JALAL, THE SOLE SPOKESMAN, *supra* note 219, at 15–16.

   221. *See* CAROE, *supra* note 147, at 433.

   222. *See supra* note 202–203 and accompanying text.

result was a spike in armed resistance in FATA, triggering more campaigns of "'pacification' by British and Indian troops."[223]

In 1947, "the tectonic plates of South Asian politics shifted abruptly."[224] The British partitioned colonial India into two independent states—India and Pakistan—surgically dividing "Hindi majority" areas from "Muslim majority" ones, substantiating once again the wonderful artificiality of states,[225] and triggering "one of the great human convulsions of history."[226] That Pashtuns, while overwhelmingly Muslim, had consistently voted for the secular Indian National Congress and helped it form the provincial government in NWFP, struck the colonial Viceroy's office, which presided over the religion-based partition, as "a bastard situation."[227] To bring NWFP in line with the designed partition, the colonial authorities bypassed the generally prescribed process of allowing elected representatives of provinces in their respective legislative assemblies to determine the future of the province. A referendum to choose between India and Pakistan was offered instead.[228] Most Pashtuns, including both the "Red Shirts" and the governing political party of the province, boycotted the referendum in protest against NWFP having been made an exception to the prescribed process, and because the substitute process of referendum did not offer a third option, namely, separate independent statehood.[229] This demand for a separate state for the Pash-

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223. CHAPMAN, *supra* note 139, at 109.

224. WILLEM VAN SCHENDEL, *supra* note 26, at 2.

225. Martti Koskenniemi, *National Self-determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L. Q. 241, 258 (1994). For detailed accounts of the partition, see ANITA INDER SINGH, THE ORIGINS OF THE PARTITION OF INDIA 1936–1947 (1987); H.V. HODSON, THE GREAT DIVIDE: BRITAIN-INDIA-PAKISTAN (1985); YASMIN KHAN, THE GREAT PARTITION: THE MAKING OF INDIA AND PAKISTAN (2008).

226. URVASHI BUTALIA, THE OTHER SIDE OF SILENCE: VOICES FROM THE PARTITION OF INDIA 3 (1998). The partition resulted in the migration of over 17 million people. O. H. K. SPATE, INDIA AND PAKISTAN: A GENERAL AND REGIONAL GEOGRAPHY 119 (1954). For incisive analyses of partition deploying a comparative perspective and engaging wider questions of the cases and long-term effects of state fragmentation, see Radha Kumar, *The Troubled History of Partition*, 76 FOREIGN AFF. 22, 26 (1997); Radha Kumar, *Settling Partition Hostilities: Lessons Learnt, the Options Ahead, in* DIVIDED COUNTRIES, SEPARATED CITIES: THE MODERN LEGACY OF PARTITION 3 (Ghislaine Glasson Deschaumes & Rada Iveković eds., 2003); Rada Iveković, *From the Nation to Partition, Through Partition to the Nation: Readings, in* DIVIDED COUNTRIES, *supra* note 226, at 150; Gurharpal Singh, *The Partition of India in a Comparative Perspective: A Long-term View, in* REGION AND PARTITION: BENGAL, PUNJAB AND THE PARTITION OF THE SUBCONTINENT 95, 95–115 (Ian Talbot & Gurharpal Singh eds., 1999).

227. ALAN CAMPBELL-JOHNSON, MISSION WITH MOUNTBATTEN 54 (1953).

228. JALAL, THE SOLE SPOKESMAN, *supra* note 219, at 290 n.162 (1985).

229. For details, see NARENDRA SINGH SARILA, THE SHADOW OF THE GREAT GAME: THE UNTOLD STORY OF INDIA'S PARTITION 280–82, 299–306 (2006).

tuns, styled Pashtunistan, emerged as the partition of India became in-
evitable.[230] In the end, NWFP was awarded to Pakistan following a con-
troversial referendum.[231] For FATA tribes, yet another mode to deter-
mine their fate was devised. In special tribal *jirgas* (tribal assemblies)
orchestrated by the colonial administrators, hand-picked leaders of the
FATA tribes were asked to signify their allegiance to Pakistan and re-
ceived the assurance that monetary allowances and autonomous status of
the tribes would continue undisturbed.[232]

Decolonization and the partition of India drew into sharp relief the
contested status of the Durand Line, which now became a disputed mat-
ter between Afghanistan and Pakistan.[233] As soon as India was parti-
tioned, Afghanistan renewed claims to the area between the Durand Line
and the Indus.[234] In 1947, Afghanistan joined the demand for Pashtunis-
tan, opposed Pakistan's admission to the United Nations, and later condi-
tioned its recognition upon granting the right of self determination to the
people of NWFP and FATA, who were caught in between.[235] "In 1949,
an Afghan *loya jirga* [(grand tribal assembly) formally] declared the Du-
rand Line invalid."[236] Thus, Pakistan started its postcolonial career as
successor to a territorial dispute and with an ambivalent relationship with
a section of the population located within its designated territorial
bounds.

B. Great Game II: The Cold War and the Frontline State

The partition of India and inclusion of NWFP and FATA in Pakistan
was, in no small measure, connected with the next phase of the Great
Game—the Cold War. The British colonial authorities saw the partition

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230. JALAL, THE SOLE SPOKESMAN, *supra* note 219, at 282. As partition loomed large,
the British also flirted with the idea of a separate "Pathanistan" in the northwest. SARILA,
supra note 229, at 304.

231. Out of a total of 292,118 votes cast, 289,244 went for Pakistan and 2,874 for Hin-
dustan. JALAL, THE SOLE SPOKESMAN, *supra* note 219, at 290. Before the referendum the
Muslim League leadership contemplated creating unrest among the Pashtun tribes against
the Congress ministry in the NWFP. HUMAYUN MIRZA, FROM PLASSEY TO PAKISTAN: THE
FAMILY HISTORY OF ISKANDER MIRZA, THE FIRST PRESIDENT OF PAKISTAN 150–52 (1999).

232. *See* CAROE, *supra* note 147, at 435. The status of the tribes at the time of partition
of India has been termed a "legal curiosity." Omrani, *supra* note 144, at 188.

233. *See infra* notes 245, 257–262 and accompanying text.

234. IAN STEPHENS, PAKISTAN: OLD COUNTRY/NEW NATION 265 (1964).

235. S. M. BURKE, PAKISTAN'S FOREIGN POLICY; AN HISTORICAL ANALYSIS 72–73
(1973).

236. Thomas H. Johnson & M. Chris Mason, *No Sign until the Burst of Fire: Under-
standing the Pakistan-Afghanistan Frontier*, 32 INT'L SECURITY 41, 68 (2008) [hereinaf-
ter Johnson & Mason, *No Sign*].

of colonial India as offering the possibility to remain in the northwest region "for an indefinite period . . . [with] British control of the vulnerable North-Western . . . frontiers."[237] The northwest region was envisaged as "the most suitable area from which to conduct the defense" of oil supplies of the Middle East, and "the keystone of the strategic arc of the wide and vulnerable waters of the Indian Ocean."[238] As the importance of oil from the Persian Gulf increased, Western powers called for a "close accord between the States which surround this *Muslim lake*, an accord underwritten by the Great powers whose interests are engaged."[239] The Western world "went east in search of oil—and found Islam."[240] Pakistan, the only state in the modern world created in the name of Islam, was to now be turned into a *frontline state* of the Cold War, with the Durand Line to serve as the frontline.

After cultivating close military ties with Britain and the U.S., Pakistan formally entered a Mutual Defense Agreement with the US and joined the Central Treaty Organization ("CENTO") in 1954 and the Southeast Asia Treaty Organization ("SEATO") a year later.[241] It is important to note that British military officers retained control of Pakistan's military, now seen as "the kingpin of U.S. interests,"[242] for many years after decolonization.[243] Pakistan provided the U.S. with military bases in the NWFP.[244] All this helped Pakistan secure recognition by Britain[245] and

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237. Field Marshal Wavell, Viceroy of India, *quoted in*, SARILA, *supra* note 229, at 220, 235.

238*. Id*. at 29, *quoting* an unsigned memorandum, The Strategic & Political Importance of Pakistan in the Event of War with the U.S.S.R. (May 19, 1948).

239. SARILA, *supra* note 229, at 21.

240. DREYFUSS, *supra* note 68, at 7.

241. As early as 1947, Pakistan raised the specter of "Soviet threat on its Western frontier" to seek financial assistance from the U.S. TARIQ ALI, THE DUEL: PAKISTAN ON THE FLIGHT PATH OF AMERICAN POWER 195 (2008). In 1949, when the Iranian nationalist government contemplated nationalizing Iran's oil production, an effort was made to move Pakistani troops into Iranian oil fields to "lend a hand in case the British or Americans needed it." AYESHA JALAL, THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE 122 (1990) [hereinafter JALAL, THE STATE OF MARTIAL RULE] (quoting General Gracey, British commander-in-chief of the Pakistan Army). For details of the consolidation of the military alliance between Pakistan and the US, see NAWAZ, CROSSED SWORDS, *supra* note 11, at 92–138.

242. JALAL, THE STATE OF MARTIAL RULE, *supra* note 241, at 127.

243. CHRISTOPHE JAFFRELOT, A HISTORY OF PAKISTAN AND ITS ORIGINS 100 (Gillian Beaumont trans., 2002). The command of the army, navy, and air force was transferred in 1951, 1953, and 1957, respectively. MOHAMMAD WASEEM, POLITICS AND THE STATE IN PAKISTAN 98 (1989).

244. NAWAZ, CROSSED SWORDS, *supra* note 11, at 130, 185–86.

245. In June 1950, Britain declared that "Pakistan is in international law the inheritor of the rights and duties of [British colonial India] . . . and that the Durand Line is the

the U.S.[246] of the Durand Line as a legitimate international border. As Pakistan consolidated its role in the anti-Communist military alliances of the Cold War, Afghanistan drew closer to the Soviet Union, hardened its position about the Durand Line, and again raised the issues of self-determination for the Pashtuns in Pakistan and the formation of Pashtunistan.[247] In December, 1955, the Soviet Union declared support for the Afghan position regarding the Durand Line and Pashtunistan.[248]

Pakistan's assumption of the role as a frontline state in the Cold War had a profound impact on the political order within the country. This included ascendency of the military as a political force, derailment of constitutional governance, and centralization of political power in defiance of the federal architecture of the state. This turn to praetorianism had a direct impact on the NWFP and FATA. In 1954, the same year that Pakistan formalized its partisan role in the Cold War, a "gang of four"[249] representing the military-bureaucracy combine overturned the constitutional order in Pakistan, a step validated by a docile judiciary under the doctrine of state necessity.[250] The new order then moved to erase the separate existence of NWFP in 1955, when the bureaucratic-military combine ruling Pakistan amalgamated all four provinces of the western wing of the country into the so-called "One Unit."[251] FATA, however, retained its status as a distinct federally administered zone. Afghanistan reacted sharply to the dissolution of NWFP and accelerated its demand for Pashtunistan, leading to a break in diplomatic relations.[252] Trade

international frontier." In March 1956, the British again stated that it "fully support[s]" Pakistan's "sovereignty over the areas east of the Durand Line" and regards "this Line as the international frontier." CAROE, *supra* note 147, app. B at 465–66.

246. In March 1956, the SEATO Ministerial Council declared that "their governments recognized that the sovereignty of Pakistan extends up to the Durant Line" and that the SEATO Treaty "includes the area up to that Line." Tariq Mahmood, The Durant Line: South Asia's Next Trouble Spot, 24–25 (June 2005) (unpublished M.A. thesis, Naval Postgraduate School) (on file with author).

247. For the Afghan position, see RAHMAN PAZHWAK, PAKHTUNISTAN: A NEW STATE IN CENTRAL ASIA (1960). For Afghan balancing between neutrality and closer ties with Soviet Union during this period, see AMIN SAIKAL, MODERN AFGHANISTAN: A HISTORY OF STRUGGLE AND SURVIVAL 117–132 (2004).

248. *See* LARRY P. GOODSON, AFGHANISTAN'S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN 49 (2001).

249. WASEEM, *supra* note 243, at 145.

250. For details, see LESLIE WOLF-PHILLIPS, CONSTITUTIONAL LEGITIMACY: A STUDY OF THE DOCTRINE OF NECESSITY (1980); Mark M. Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT'L L.J. 341, 363–93 (1983).

251. HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 96–98 (2005).

252. ASLAM SIDDIQI, PAKISTAN SEEKS SECURITY 25–30 (1960).

blockades and border skirmishes followed. Relations remained seriously strained until 1963, when the King of Afghanistan removed his prime minister, Sardar Daud, a Pastun and an ardent advocate of Pashtunistan.[253] In the meantime, strengthened and emboldened by its Cold War alliances, Pakistan's military formally usurped political power by declaring martial law in 1958, a move validated by the courts through a misapplication of Kelsen's theory of revolutionary legality.[254] In 1969, a mass-protest movement forced the removal of Pakistan's military dictator. The new government dissolved the "One Unit" and restored NWFP as a separate province.[255] FATA, however, retained its distinct dispensation.

A serious downturn in relations between Afghanistan and Pakistan came in 1973, when Afghanistan declared itself a republic, and Sardar Daud, now its new president, revived the issue of Pashtunistan.[256] Pakistan immediately responded by giving sanctuary to Afghan dissidents and began training and arming disaffected Afghans to destabilize the new Afghan regime.[257] From 1973-77, Pakistan trained an estimated 5,000 Afghan militants and channeled material support to groups inside Afghanistan.[258] This was the beginning of Pakistan's prolonged engagement in training and arming Afghan militants professing the establishment of an "Islamic order."[259] This also ushered in an era when the FATA, the "*buffer to a buffer*," became the staging ground for Pakistani military's involvement in Afghan militants' operation across the Durand Line with its intelligence agency Inter Services Intelligence ("ISI") taking the lead.[260] It is important to note that this engagement was choreographed by Pakis-

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253. *See* NAWAZ, CROSSED SWORDS, *supra* note 11, at 333, 367; Atta Rasool Malik, *The Lesser Known Story of Proud Pashtun*, NEWSVINE.COM (July 31, 2010), http://attajee.new.newsvine.com/_news/2010/07/31/4789814-the-lesser-known-story-of-proud-pashtun-.

254. *See* Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat and Common Law,* 27 CORNELL INT'L L. J. 49, 54–57, 106–16 (1994).

255. NAWAZ, CROSSED SWORDS, *supra* note 11, at 127.

256. NAWAZ, CROSSED SWORDS, *supra* note 11, at 367.

257. JAFFRELOT, *supra* note 243, at 139. *See also* WILLIAM MALEY, THE AFGHANISTAN WARS 66–76 (2002).

258. *See* EDWARD GIRARDET, AFGHANISTAN: THE SOVIET WAR 166 (1985); ROBERT G. WIRSING, PAKISTAN'S SECURITY UNDER ZIA 1977–1988 at 30 (1991).

259. *See* AHMAD RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 13, 77–79 (Yale Univ. Press 2001) [hereinafter RASHID, TALIBAN].

260. For details of the involvement of Pakistan's military, including raids into Soviet territory, see MOHAMMAD YUSUF & MARK ADKIN, THE BEAR TRAP: AFGHANISTAN'S UNTOLD STORY (1992) (giving an account of the Afghan war from the perspective of the director of the the Afgan Bureau of the ISI, whose role it was to train, arm, and plan Mujahideen's operations). *See also* SETH G. JONES, IN THE GRAVEYARD OF EMPIRES: AMERICA'S WAR IN AFGHANISTAN 23–40 (2009).

tan's Prime Minister Z. A. Bhutto, a self-professed master of geopolitics, who held that "geography continues to remain the most important single factor in the formation of a country's foreign policy. . . . Territorial disputes . . . are the most important of all disputes."[261] This was by no means the first instance of the use of FATA by Pakistan in its military strategies. As early as 1948, Pakistan had used sections of the FATA tribes in its campaigns in Kashmir.[262]

The Soviet invasion of Afghanistan in 1979 dramatically accelerated the decline of Afghan-Pakistan relations. During the 1979–84 Afghan "*jihad*," FATA served as a "launching pad for the *mujahidin*" and as a "base for their covert operation[s]."[263] The U.S. and Saudi Arabia poured in $7.2 billion in covert aid for the *jihad*, channeled through the ISI, and given primarily to the most radical religious groupings, thus bypassing the moderate Afghan nationalists.[264] The Afghan *jihad* furnished a justification for the tacit support by Western powers for the consolidation of military dictatorship in Pakistan under General Zia ul-Haq, a development that initiated and entrenched the process of "Islamization" of Pakistan.[265] After the Geneva Accord of 1984 to end the Afghan conflict, and subsequent withdrawal of Soviet forces, Afghanistan plunged into a civil war, with Pakistan and other regional powers supporting different factions.[266] The relative disengagement of the U.S. during this period is now seen by the American policy makers as a "strategic mistake."[267]

FATA continued to be used by the ISI and Afghan Islamist groups for their engagements in the Afghan civil war. By now, Pakistan's military had developed the so-called doctrine of "strategic depth" with regards to Afghanistan, because it regarded India to the east as the primary military

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261. Zulfikar Ali Bhutto, The Myth of Independence 28 (1969).

262. *Se*e Nawaz, Crossed Swords, *supra* note 11, at 48–53.

263. Hussain, Frontline Pakistan, *supra* note 9, at 143.

264. Johnson & Mason, *Understanding*, supra note 147, at 71; Steve Coll, Ghost Wars: The Secret History of the CIA, Afghanistan and Bin Laden from the Soviet Invasion to September 10, 2001, at 59, 161–67 (2004); Thomas H. Johnson, *Financing Afghan Terrorism: Thugs, Drugs, and Creative Movements of Money*, *in* Terrorism Financing and State Responses 93–114 (Jeanne K. Giraldo and Harold A. Trinkunas eds., 2007).

265. *See* Khan, *supra* note 251, at 647–67; Rashida Patel, Islamisation of Laws in Pakistan? (1986); *see also* Ayesha Jalal, Partisans of Allah: Jihad in South Asia 278–301 (2008).

266. For details of the Geneva Accord, see Maley, *supra* note 257, at 134–42. For the ethnic divides and post-1984 civil war in Afghanistan, see Rasul Bakhsh Rais, Recovering the Frontier State: War, Ethnicity, and State in Afghanistan 27–86 (2008).

267. Bob Gates, *quoted in*, Maureen Dowd, *Doubts About Certitude*, N.Y. Times, Dec. 16, 2009, at A43.

threat to Pakistan's interests. [268] In order to counter India, Pakistan, given its significantly smaller territorial size, sought a compliant Afghanistan on its western border. It was against this backdrop that Pakistan in effect created the Taliban in the early 1990s, a development that dramatically affected the Afghan civil war and, later on, the whole region.[269] Pakistan's military saw continued support for the Taliban as a strategic imperative.[270] Pakistan's desire to open trade routes to former Soviet Central Asian republics contributed to its patronage of the Taliban in Afghanistan.[271] Having helped the Taliban capture power in Afghanistan in 1996, Pakistan was among the handful of states that quickly recognized the new regime, and for some time even paid the salaries of the Taliban administration in Kabul.[272] Pakistan's search for "strategic depth," however, remained elusive. While Afghanistan is a multi-ethnic country, the Taliban were exclusively Pashtuns, who make up over 50% of the country's population.[273] Consequently, Pakistan's patronage notwithstanding, the radical Islamic regime of the Taliban refused to accept the Durand Line as a legitimate international border or to drop Afghan claims over FATA and areas of NWFP east of the Line.[274]

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268. *See* NAWAZ, CROSSED SWORDS, *supra* note 11, at 439; Eqbal Ahmad, *What After 'Strategic Depth'?, in* SELECTED WRITINGS OF EQBAL Ahmad 509–13 (Carollee Bengelsdorf, et al., eds., 2006); Johnson & Mason, *No Sign*, *supra* note 236, at 68; Raman Commodore Uday Bhaskar, director of the National Maritime Foundation, *quoted in* Ishaan Tharoor, *India*, *Pakistan and the Battle for Afghanistan*, TIME (Dec. 5, 2009), http://www.time.com/time/world/article/0,8599,1945666,00.html.

269. *See* HUSSAIN, FRONTLINE PAKISTAN, *supra* note 9, at 28–30; NAWAZ, CROSSED SWORDS, *supra* note 11, at 478–80, 534–37, 542–44; MALEY, *supra* note 257, at 219–26; RASHID, TALIBAN, *supra* note 259, at 17–40.

270. *See* AMIN SAIKAL, ISLAM AND THE WEST: CONFLICT OR COOPERATION? 104–06 (2003).

271. *See* NAWAZ, CROSSED SWORDS, *supra* note 11, at 479. During the Taliban regime from 1996–2001, Pakistan refurbished Afghan telephone systems and linked them with Pakistan's domestic phone system. *Id*. at 480. For Pakistan's involvement in Central Asia via Afghanistan, see JAFFRELOT, *supra* note 243, at 141–45.

272. For planning, logistics, and military support of the Taliban by Pakistan including the use of air force, see GOODSON, *supra* note 248, at 111–15. For salaries of the Taliban administration, see RASHID, TALIBAN, *supra* note 259, at 183.

273. RAIS, *supra* note 266, at 29, 44–47.

274. *See* RASHID, TALIBAN, *supra* note 259, at 187; HUSSAIN, FRONTLINE PAKISTAN, *supra* note 9, at 30. In 2000, the military dictator of Pakistan stated, "Afghanistan's majority ethnic Pashtuns have to be on our side. This is our national interest . . . . The Taliban cannot be alienated by Pakistan. We have a national security interest there." *Quoted in* RASHID, DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 50 (Viking Penguin 2008) [hereinafter RASHID, DESCENT].

Taliban's brutal political and social order[275] did not derail global geopolitics of energy supplies, when all neighboring states and many others, including the U.S., started "romancing the Taliban" during a "battle for pipelines" in the late 1990s. [276] By the late twentieth century, global capital and its attendant state machinations had moved well beyond territorial colonialism to neo-imperial modes of exploitation and accumulation.[277] The spatial dimension to the cycle of accumulation, however, remained indispensible.[278] This is particularly true of the geopolitical imperatives of the global energy markets.[279] The break-up of the Soviet Union triggered an intense competition between global oil companies and their sponsoring states, including the U.S. and Pakistan, to extract and transport oil and gas from Central Asia via Afghanistan.[280] In immediate contention were two plans for alternative gas pipelines from Turkmenistan to run through Afghanistan: one would go to Pakistan, and the other would go to Iran and Turkey with a possible link to Europe. Alternatives to transport oil from Kazakhstan via the Caspian Sea further complicated the picture.[281]

The events of September 11, 2001, dramatically transformed the geopolitical profile of the region. The very next day the U.S. demanded that Pakistan stop terrorist operatives in its border areas or "be prepared to be bombed back to the Stone Age."[282] Pakistan made its decision "swift-

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275. *See* MALEY, *supra* note 257, at 218–50. Even ancient carvings of the Buddha on a mountain-side were not immune from the drive to enforce the Taliban's version of Islam. *Id.* at 241.

276. RASHID, TALIBAN, *supra* note 259, at 157–82.

277. *See* DAVID HARVEY, THE NEW IMPERIALISM 180–82 (2003).

278. *See* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 87–119 (2005); Susan Roberts, Anna Secor & Matthew Sparke, *Neoliberal Geopolitics*, 35 ANTIPODE 886, 890–92 (2003); Jan Nederveen Pieterse, *Neoliberal Empire*, 21 THEORY, CULTURE & SOC'Y 119, 234–35 (2004).

279. For emerging geo-politics of energy in the region, see ROBERT G. WIRSING, BALOCH NATIONALISM & THE GEOPOLITICS OF ENERGY RESOURCES (2008), *available at* www.strategicstudiesinstitute.army.mil/pdffiles/PUB853.pdf.

280. A U.S. corporation, UNICOL, and the Saudi corporation, Delta, signed an agreement with Turkmenistan that included construction of a gas pipeline through Afghanistan and Pakistan. UNICOL "went along with" Pakistan's analysis of the Taliban, and termed the Taliban's takeover of Kabul a "positive development." Maley, *supra* note 257, at 244–45. The Taliban was also in negotiations with the Argentinean Company Bridas. *See* RASHID, TALIBAN, *supra* note 259, at 157–82; NAWAZ, CROSSED SWORDS, *supra* note 11, at 480.

281. PETER MARSDEN, THE TALIBAN: WAR AND RELIGION IN AFGHANISTAN 128–29 (2002).

282. PERVEZ MUSHARRAF, IN THE LINE OF FIRE 201 (2006).

ly . . . [and] agreed to all . . . demands,"[283]also making available airbases and transit facilities for supplies for U.S. forces in Afghanistan.[284] However, Pakistan's military continued its special relations with the Taliban across the Durand Line in Afghanistan. When the U.S. launched its attack on Afghanistan, the Taliban "escaped in droves into Pakistan, where they melted into their fellow tribesmen in the FATA."[285] After the now infamous "battle of Tora Bora,"[286] Pakistani authorities "looked the other way as foreign fighters crossed over to the Pakistani side and many in the ISI arranged safe passage[s]."[287] In collaboration with ISI, the borderlands became a "safe haven for the Taliban and other insurgent and terrorist elements."[288] FATA, long a sanctuary for fugitives from state law,[289] now became a sanctuary and staging ground for Afghan militants resisting the U.S.-led war effort in Afghanistan.[290]

As Pakistan's active support of U.S. war efforts increased, Afghan militants made common cause with religious militants among the Pashtun tribes of FATA.[291] Pakistan's military, designed for conventional warfare on its eastern border with India, was "ill-prepared to tackle this new kind of . . . conflict that slipped across its western border."[292] As a result, Pakistan vacillated between military operations against the militants and peace deals with them.[293] In the meantime, militants started to extend their area of influence beyond FATA, the "buffer to a buffer," into

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283. For a list of the demands, see THE 9/11 REPORT: THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 473–74 (2004).

284. *See* RASHID, DESCENT *supra* note 274, at 24–32.

285. NAWAZ, CROSSED SWORDS, *supra* note 11, at 544. There are unconfirmed reports that after the fall of the Afghan city of Kunduz in November 2001, Pakistani transport planes evacuated hundreds of militants for two weeks in the dark of the night with U.S. consent. MALEY, *supra* note 257, at 266.

286. For an account of the battle of Tora Bora in the U.S. Army's official history of the war in Afghanistan, see A DIFFERENT KIND OF WAR, *supra* note 12, at 122–24.

287. HUSSAIN, FRONTLINE PAKISTAN, *supra* note 9, at 121. *See also* JONES, GRAVEYARD OF EMPIRES, *supra* note 260, at 95–108; MALEY, *supra* note 257, at 264–65.

288. Johnson & Mason, *No Sign, supra* note 236, at 58.

289. *See* Eliza Griswold, *In the Hiding Zone*, THE NEW YORKER, JULY 26, 2004, at 34-41.

290. NAWAZ, CROSSED SWORDS, *supra* note 11, at 585.

291. RASHID, DESCENT, *supra* note 274, at 219–39, 265–92

292. NAWAZ, CROSSED SWORDS, *supra* note 11, at 544.

293. INT'L CRISIS GROUP, ASIA REP., NO. 125, PAKISTAN'S TRIBAL AREAS: APPEASING THE MILITANTS 15-20 (2006) [hereinafter INT'L CRISIS GROUP, PAKISTAN'S TRIBAL AREAS; JONES, PAKISTAN, *supra* note 199, at 29–35; JONES, GRAVEYARD OF EMPIRES, *supra* note 260, at 259–71.

NWFP and beyond.[294] In the midst of all this, Pakistan stood firm that the Durand Line be recognized and respected as an international border, while its military considered Afghanistan "within Pakistan's security perimeter."[295] On the other hand, Afghanistan continued to reject the Durand Line because "it has raised a wall between the two brothers."[296]

This story of the Durand Line is a more than century-long saga of predatory colonialism, postcolonial insecurities, and incessant conflict. This is a tale of colonial cartography bequeathed to a postcolonial formation, bringing in its wake bitter fruits of oppression, violence, and war. This leads to the broader questions of the challenges colonial borders present to postcolonial states and the role of international law.

IV. COLONIAL BORDERS AND POSTCOLONIAL INSECURITIES

> Every established order tends to produce . . . the naturalization of its own arbitrariness.[297]

A. *Inherited Borders and Postcolonial State-nations*

Forged on the anvil of modern European history and enshrined in modern international law, modern statehood and sovereignty are deemed the preserve of differentiated "nations" existing within exclusive and defined territories. While "the struggle to produce citizens out of recalcitrant people accounts for much of what passes for history in modern times,"[298] the prototype of the "nation-state" combines a singular nation-

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294. A turning point in the military's response was the takeover of Swat Valley, an area adjacent to FATA, by religious militants in 2008. The military launched a wide operation to regain control of the region in early 2009. Later, similar operations were extended to FATA. At the end of 2009, while these operations were continuing, militants responded with a wave of suicide-bombings across Pakistan, including the capital city Islamabad and the headquarters of the military. Concurrently, operational engagement of U.S. forces in FATA was escalating. *See* Eric Schmitt, *Elite U.S. Force Expands Hunt in Afghanistan*, N.Y. TIMES, Dec. 27, 2009, at A1; Souad Mekhennett & Richard A. Oppel Jr., *Even Where Pakistan Law Exists, Taliban Find a Porous Border*, N.Y. TIMES, Feb. 5, 2010, at A4; Scott Shane & Eric Schmitt, *C.I.A. Deaths Prompt Surge In Drone War*, N.Y. TIMES, Jan. 23, 2010, at A1; Eric Schmitt & David E. Sanger, *Pakistan's Rebuff Over New Offensive Rankles U.S.*, N.Y. TIMES, Jan. 25, 2010, at A8; Jane Perlez and Pir Zubair Shah, *Pakistani Military Retakes Key Town in Tribal Belt From Taliban*, N.Y. TIMES, Feb. 9, 2010, at A6.

295. Barnett R. Rubin & Ahmed Rashid, *From Great Game to Grand Bargain: Ending Chaos in Afghanistan and Pakistan*, 87 FOREIGN AFF. 30, 37 (2008).

296. *Quoted in*, Johnson & Mason, *No sign, supra* note 236, at 69.

297. PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 164 (Richard Nice trans., 1977).

298. Sankaran Krishna, *Cartographic Anxiety: Mapping the Body Politic in India*, *in* CHALLENGING BOUNDARIES: GLOBAL FLOWS, TERRITORIAL IDENTITIES 193, 194 (Michael

al identity with state sovereignty, understood as the territorial organization of unshared political authority. "The territoriality of the nation-state" seeks to "impose supreme epistemic control in creating the citizen-subject out of the individual."[299] "Inventing boundaries"[300] and "imagining communities"[301] work together "to naturalize the fiction of citizenship."[302] Modern international law underscores this schema. It extends recognition only to the national form, with acceptance attached to the ability to hold territory in tune with "Western patterns of political organization."[303] As a result, the "nation-state" is the dominant model of organized sovereignty today. This spatially bounded construct, one that frames both the geography of actualizing self-determination and the order of the resulting political unit, put in circulation a *territorialist epistemology*."[304] Postcolonial formations had to subscribe to this Euro-centric grammar of state-formation to secure eligibility in the inter-state legal order.[305] This statist frame precludes imaginative flowerings of self-determination in tune with the interests and aspirations of diverse communities both within and beyond received colonial boundaries.

Across the global South, colonial demarcations of zones of control and influence left in their wake political units lacking correspondence be-

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J. Shapiro & Hayward R. Alker eds., 1996). *See also* EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914, at 485–86 (1976); PETER SAHLINS, BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES 270–71(1989); WINICHAKUL, *supra* note 26.

299*. See* ANANYA JAHANARA KABIR, TERRITORY OF DESIRE: REPRESENTING THE VALLEY OF KASHMIR 8–9 (2009).

300. INVENTING BOUNDARIES: GENDER, POLITICS AND THE PARTITION OF INDIA (Mushirul Hasan ed., 2000).

301. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM (1991).

302. KABIR, *supra* note 299, at 8. This project remains haunted by the foundational irresolution of the very construct of the nation. As Renan summed up the dilemma in his celebrated 1882 lecture, "[m]an is slave neither of his race nor his language, nor of his religion, nor of the course of rivers nor of the direction taken by mountain chains." Ernest Renan, *What is a Nation?* (Martin Thom trans.), *in* NATION AND NARRATION 20 (Homi K. Bhabha ed., 1990). *See also* FITZPATRICK, MODERNISM, *supra* note 39, at 111–45.

303. GONG, *supra* note 53, at 88 (1984) (citation omitted); *see also* Peter Fitzpatrick, *'We know what it is when you do not ask us': Nationalism as Racism*, *in* NATIONALISM, RACISM & THE RULE OF LAW 3, 19–20 (Peter Fitzpatrick ed., 1995).

304*. See supra* notes 26–30 and accompanying text.

305. As Koskenniemi reminds us regarding the inclusion of non-Europeans into the international system, "everything depended on . . . the degree to which aspirant communities were ready to play by European rules." KOSKENNIEMI, *supra* note 43, at 135. Tagore observed that the entire East was "attempting to take unto itself a history which is not the outcome of its own living." RABINDRANATH TAGORE & MANABENDRANATH ROY, NATIONALISM 63 (Renaissance Publishers Pvt. Ltd. 2004) (1917).

tween their territorial frame and the cohesion of culture and political identity.[306] The colonial demarcations, with little regard for the history, culture, or geography of the region, often split cultural units or placed divergent cultural identities within a common boundary.[307] As a consequence, the crisis of the postcolonial state stems from its artificial boundaries and the specter of the colonial still haunt the postcolonial nation.[308] The "retrospective illusion"[309] of nationalism remains "suspended forever in the space between the ex-colony and not-yet-nation."[310] Decolonization movements and postcolonial states adopted and retained the

306*. See* PAKENHAM, *supra* note 62, at 669–80; MALCOLM N. SHAW, TITLE TO TERRITORY IN AFRICA 248–63 (1986); EDWARD HERTSLET, THE MAP OF AFRICA BY TREATY (1894) (showing how by treaty or otherwise, parts of the African continent came under various European powers); MARK FRANK LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW (1926) (exploring the law and practice of colonial expansion).

307*. See* David B. Knight, *Territory and People or People and Territory?: Thoughts on Postcolonial Self-Determination*, 6 INT'L POL. SCI. REV. 248, 249–251 (1985). *See generally* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996) (discussing the rationale and consequences of uti possidetis and possible alternatives); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1994–95) (discussing how state boundaries are drawn, why they fail, and prospects for alternatives); Ranabir Samaddar, *The Failed Dialectic of Territoriality, and Security and the Imperatives of Dialogue*, 35 INT'L STUD. 107 (1998); ALEXIS HERACLIDES, THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS 147–49 (1991); PARTITIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES, 1884–1984 (A. I. Asiwaju ed., 1985) (looking at the social, cultural, and economic relations across State boundaries to give a more complete context in which laws and politics operate). Colonizers often drew borders in light of "how they could best break down traditional social and economic networks for more efficient social control and resource extraction." Brian Athow & Robert G. Blanton, *Colonial Styles and Colonial Legacies: Trade Patterns in British and French Africa,* 19 J. THIRD WORLD STUD. 219, 220 (2002). Disarticulation of internal economic circuits and articulation of local economic channels with the economy of the empire were a foundational gesture of colonial rule. *See* SAMIR AMIN, ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT 392–94 (Brian Pearce trans., 1974); ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 67–73 (1995); DAVID HARVEY, THE NEW IMPERIALISM 101–08 (2003).

308*. See* RANJANA KHANNA, DARK CONTINENTS: PSYCHOANALYSIS AND COLONIALISM 15–16 (2003).

309. Etienne Balibar, *The Nation Form: History and Ideology*, *in* RACE, NATION: AMBIGUOUS IDENTITIES 86–106 (Etienne Balibar & Immanuel Wallerstein eds., 1991).

310. Krishna, *supra* note 298, at 195. As a result of cultural heterogeneity within fixed boundaries "the central difficulty of 'nation-building' in much of Africa and Asia is the lack of any shared historical mythology and memory on which state elites can set about 'building' the nation." Anthony Smith, *State-Making and Nation-Building, in* STATES IN HISTORY 258 (John A. Hall ed., 1986).

construct of a territorially bound "nation-state" even as they attempted to imagine the "nation" at variance from its European iterations.[311] Imprisoned in inherited colonial territorial cartographies, postcolonial formations inverted this grammar to produce *state-nations*. While conventional understanding assumes a preexisting nation that subsequently forms a state, post-colonial formations start with a territorial state that aims to constitute a homogenized nation.

Building state-nations generates conflicts about minorities, ethnicities, ethno-nationalism, separatism, and sub-state nationalism. "[T]he nation dreads dissent"[312] and "the nation-state's limits implicate its geographic peripheries as central to its self-fashioning."[313] In the process, a co-constitutive role of "nation and ethnicity" develops as a "productive and dialectical dyad."[314] It is by the construction of ethnicity as a "problem" that the "nation" becomes the resolution and the state incarnates itself as the authoritative problem solver. In this way often "the very micropolitics of producing the nation are *responsible* for its unmaking or unraveling."[315] Incessant rhetoric of endangerment and discursive production of threats to the nation render "nation-building" a coercive enterprise and facilitate the overdevelopment of the coercive apparatuses of the state.[316] While inherited boundaries represent the postcolonial state-nation's "geo-body,"[317] cultural and ethnic heterogeneity within induces "geo-piety."[318] It is no surprise, then, that most postcolonial states have as their *raison d'etre* the production, maintenance, and reproduction of the discourses and apparatuses of national security.[319] The career of Pakistan

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311. *See* PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE? 26–30 (1986); FARZANA SHAIKH, MAKING SENSE OF PAKISTAN 116–46 (2009).

312. JACQUELINE ROSE, THE QUESTION OF ZION 69 (2005).

313. *See* KABIR, *supra* note 299, at 8–9.

314. SANKRAN KRISHNA, POSTCOLONIAL INSECURITIES: INDIA, SRI LANKA, & THE QUESTION OF NATIONHOOD, at xxxvii (1999).

315. *Id*. (emphasis added).

316. This phenomenon puts a postcolonial gloss over Weber's classic definition of the state, namely that "a compulsory political organization with continuous operations . . . will be called a 'state' insofar as its administrative staff successfully uphold the claim to *the monopoly of the legitimate use of physical force in the enforcement of its order.*" MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 54 (Guenther Roth & Claus Wittich eds., 1978) (emphasis added).

317. WINICHAKUL, *supra* note 26, at 129.

318. Yi-Fu Tuan, *GeoPiety: A Theme in Man's Attachment to Nature and to Place*, *in* GEOGRAPHIES OF THE MIND 11 (David Lowenthal & Martyn J. Bowden eds., 1976).

319. While the problem is accentuated in postcolonial formations, it is rooted in the very construct of modern nationalism. Nearly a century ago, Tagore identified "the spirit of conflict and conquest . . . at the origin and in the centre of Western nationalism," and

as a postcolonial state circumscribed within an inherited territorial frame substantiates this political grammar.
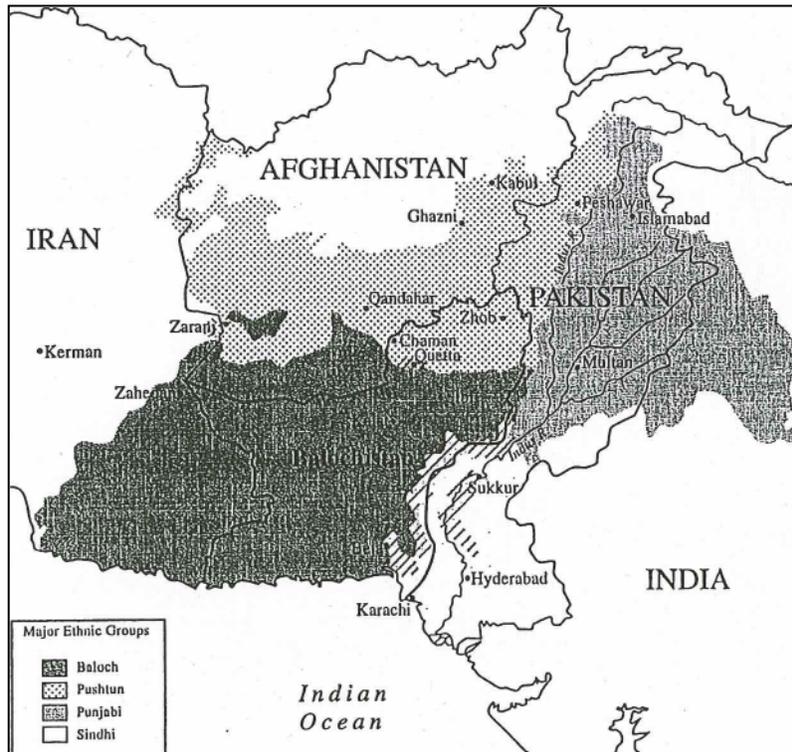

Fig 3. Major Ethno-Linguistic Groups of Pakistan in relation to international boundaries of the region[320]

Pakistan, hailed as "the triumph of ideology over geography,"[321] is literally caught and exists between lines drawn by colonial powers—the Durand Line (1893) in the northwest, the Goldsmid Line (1872) to the west, the Radcliffe Line (1947) in the east, and the MacMahon Line (1904) to the north. [322] For good measure, in the northeast, a Line of Con-

cautioned that "[i]t is like the pack of predatory creatures that must have its victims." TAGORE & ROY, *supra* note 305, at 22. He adds: "With all its heart it cannot bear to see its hunting—grounds converted into cultivated fields." *Id.*

320. Titus, *supra* note 147, at 659.

321. ROSS MALLICK, DEVELOPMENT, ETHNICITY AND HUMAN RIGHTS IN SOUTH ASIA 150 (1998).

322. The Goldsmid Line was drawn between Persia and colonial Balochistan, with Baluchis on both sides. A.W. HUGHES, THE COUNTRY OF BALOCHISTAN 229–30 (1877). The Radcliff Boundary Commission partitioned the Punjab and Bengal at the time of the

trol, "a sequence of ellipses" "[d]rawn and redrawn by battles and treaties . . . identifiable by traces of blood, bullets, watchtowers, and ghost settlements left from recurring wars,"[323] provisionally divides Kashmir into areas held by India and Pakistan.[324] The "state-building" and "nation-building" saga that unfolded between these lines since 1947 has produced what is variously characterized as the "viceregal system,"[325] the "overdeveloped state,"[326] the "hyper-extended state,"[327] and the "praetorian" state.[328] In efforts to constitute a state-nation, coercion always outweighed persuasion in claims of domination, in tune with a political grammar set in place by colonial rule.[329] The project of "conjuring Pakistan,"[330] that would envelop ethnic, linguistic, and cultural differences within inherited borders, necessitated deployment of "security as hegemony."[331] Festering territorial disputes with neighboring states furnished the primary justification for the military to consume a dispropor-

decolonization of India. *See* JONES, PAKISTAN, *supra* note 199, at 58–62; Joya Chatterji, *The fashioning of a Frontier: The Radcliffe Line and Bengal's Border Landscape, 1947– 52*, 33 MOD. ASIAN STUD. 185, 185–88 (1999). Cyril Radcliffe later remarked, "I was so rushed that I had not time to go into the details . . . . What could I do in one and a half months?" *Quoted in* WILLEM VAN SCHENDEL, *supra* note 26, at 74. The MacMahon Line was drawn between colonial India and China. *See generally* Paula Banerjee, *Borders as Unsettled Markers in South Asia: A Case Study of the Sino-Indian Border*, 35 INT'L STUD. 179 (1998) (looking at the wider political context that lead to problems along borders); Samina Yasmeen, *The China Factor in the Kashmir Issue*, *in* PERSPECTIVES ON KASHMIR: THE ROOTS OF CONFLICT IN SOUTH ASIA 319, 324 (Raju G. C. Thomas ed., 1992).

323. RAVINA AGGARWAL, BEYOND LINES OF CONTROL: PERFORMANCE AND POLITICS ON THE DISPUTED BORDERS OF LADAKH, INDIA 1 (2004).

324. Representing the unfinished business of the 1947 Partition of India, this Line was drawn in 1949 at the end of the first India-Pakistan war in Kashmir and was styled the "Cease Fire Line." Following the 1971 India-Pakistan war, it was readjusted and renamed the "Line of Control" through the Simla Accord of 1972. *See* KABIR, *supra* note 299, at 7.

325. KHALID B. SAYEED, PAKISTAN: THE FORMATIVE PHASE, 1857–1948, at 299 (2d ed. 1968).

326. PAKISTAN, THE ROOTS OF DICTATORSHIP: THE POLITICAL ECONOMY OF A PRAETORIAN STATE 42 (Hassan Gardezi & Jamil Rashid eds., 1983).

327. *See* Mustapha Kamal Pasha, *The 'Hyper-Extended' State: Civil Society and Democracy*, in STATE, SOCIETY AND DEMOCRATIC CHANGE IN PAKISTAN 182 (Rasul Bakhsh Rais ed., 1997)

328. Hamza Alavi, *Formation of the Social Structure of South Asia Under the Impact of Colonialism*, *in* SOUTH ASIA 5, 17 (Hamza Alavi & John Harris eds., 1989).

329. *See* RANAJIT GUHA, DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA 65–66 (1998).

330. *See* Ayesha Jalal, *Conjuring Pakistan: History as Official Imagining*, 27 INT'L J. MIDDLE E. STUD. 73 (1995).

331. Mustapha Kamal Pasha, *Security as Hegemony*, 21 ALTERNATIVES 283, 283 (1996).

tionate share of resources and to play a leading ideological and political role.[332] Denial of representation, suppression of federalism, and destruction of alterity are the hallmarks of the state since its inception. As successor to the colonial "garrison state" in the Punjab, a Punjab-centered military-bureaucracy oligarchy retains a dominant position in the ruling bloc.[333] Denial of equal citizenship to the people of the provinces of Balochistan, East Bengal, NWFP, and Sind—even when they constituted the majority of the population—remains a defining feature of the state. Dissent and resistance were squelched by unbridled state violence, including repeated military actions—the most infamous being the one in 1971 that prompted the eastern wing of Pakistan to break off and establish a separate state of Bangladesh.[334] Phases of *coups d'etat*, martial laws, abrogation of constitutions, and declarations of emergency rule constitute the "constitutional" history of the country. A docile judiciary serially deployed doctrines of "state necessity," "revolutionary legality," "constitutional deviation," and *de facto* power to furnish legitimacy to repressive orders.[335]

In building a postcolonial state-nation, the FATA, the colonial "*buffer to a buffer*," retained its special status—approximating spaces of exception as invoked by Giorgio Agamben.[336] Today, FATA is "a Massachu-

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332. It has been observed that "[t]he story of Pakistan is the story of ambitious and adventurist generals denying the people their rights." Mohammad Asghar Khan, a former chief of Pakistan's air force, *quoted in* JONES, PAKISTAN, *supra* note 199, at 250.

333. *See* HASAN ASKARI RIZVI, MILITARY, STATE AND SOCIETY IN PAKISTAN 240–48 (2002); AYESHA SIDDIQA-AGHA, MILITARY INC.: INSIDE PAKISTAN'S MILITARY ECONOMY 62–65 (2007).

334. *See* WASEEM, *supra* note 243, at 266–96; NAWAZ, CROSSED SWORDS, *supra* note 11, at 249–81.

335. *See generally* Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional breakdowns in Pakistan*, 1993 UTAH L. REV. 1225 (discussing when and how each of these doctrines was used); PAULA R. NEWBERG, JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN 3 (1995); ZULFIKAR KHALID MALUKA, THE MYTH OF CONSTITUTIONALISM IN PAKISTAN 121–24 (1995); ALLEN MCGRATH, THE DESTRUCTION OF PAKISTAN'S DEMOCRACY 209–17 (1996); HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 151–54 (2001).

336. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 17–19 (Daniel Heller-Roazen trans., 1998). Agamben takes as his point of departure, Schmitt's claim that "[s]overeign is he who decides upon the exception." CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (1985). Agamben argues that the formation of a political community is based not on inclusion but on exclusion. He deploys the figure of *homo sacer* from Roman law to identify a zone where law suspends itself, rendering the zone not merely of exclusion but also of abandonment—the space of the exception. Under Roman law, *homo sacer* could not be sacrificed because being outside divine law, their death was of no value to the gods. However, they could be

setts-sized wedge between Afghanistan and NWFP of Pakistan," with a population of about 4 million, "virtually all of whom are Pashtuns."[337] Since 1901, this zone has been governed by a unique colonial-era administrative and judicial order—an indirect rule that combines modern technologies of power with instrumental use of customary norms and traditional power structures.[338] The colonial design aimed to govern through selected tribal notables who would be loyal to the British in exchange for fixed monetary allowances. No taxes would be levied on the tribes, who would be left alone to manage their internal affairs through the customary *Pakhtunwali* code in their tribal *jirgas*, which has been characterized as "probably the closest thing to Athenian democracy that has existed since the original."[339] However, any matter that implicated the security

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killed with impunity because being outside juridical law, their lives were of no value to the community. For a lucid introduction to Agamben, see Jenny Edkins, *Sovereign Power, Zones of Indistinction, and the Camp*, 25 ALTERNATIVES 3 (2000). For a critical reading, see Peter Fitzpatrick, *Bare Sovereignty:* Homo Sacer *and the Insistence of Law*, *in* POLITICS, METAPHYSICS, AND DEATH: ESSAYS ON GEORGIO AGAMBEN'S HOMO SACER 49, 50 (Andrew Norris ed., 2005). *See also* GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Atell trans., 2005). Creation of a space on exception is a question of the boundaries and borders of law, in that, the sovereign "decision and the exception . . . are never decisively placed within or without the legal system, *as they are precisely the moving border between the two*." Andrew Norris, *The Exemplary Exception*, 119 RADICAL PHIL. 6, 10 (2003) (emphasis added). The critical result is that those placed in the zones of exception are included as objects of power but excluded from being subjects. For a perceptive analyses of the relationship between sovereignty and zones of exception in the context of empire, see BENTON, *supra* note 34, at 279–99; NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 20–21 (2003).

337. Johnson & Mason, *No Sign, supra* note 236, at 45.

338*. See supra* notes 202–208 and accompanying text. Indirect rule and hybrid legal orders were widespread practices in British colonies. *See* MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 72–74 (1996); Mahmood Mamdani, *Historicizing Power and Responses to Power: Indirect Rule and Its Reform* 66, SOC. RES. 859, 869 (1999); ACHILLE MBEMBE, ON THE POSTCOLONY 77–90 (2001). *See generally* H.F. Morris, *The Framework of Indirect Rule in East Africa*, *in* INDIRECT RULE AND THE SEARCH FOR JUSTICE 3–40 (1972) (giving examples of the widespread nature of indirect rule in British colonies).

339. SPAIN, PEOPLE OF THE KHYBER: *supra* note 147, at 143.

> A *jirga* in its simplest form is merely an assembly. Practically all community business both public and private, is subject to its jurisdiction…It exercises executive, judicial, and legislative function, and yet frequently acts as an instrument for arbitration or conciliation . . . . The *jirga*, as it operates today, has three main functions. In its broadest and purest form, it regulates life at all levels within a tribal society requiring community attention, e.g., the choice of a site for a new mosque, punishment for domestic infidelity, settlement of a blood feud, or a decision to take up arms against a neighboring tribe. Secondly, the *jirga* provides a mechanism by which the decisions or opinions of the tribe

interests of colonial authorities was to be handled by a parallel system—a hybrid construct that retains the name *jirga*, but empties it of any semblance to "Athenian democracy" to make room for a process and a set of sanctions designed for harsh control and violent discipline to facilitate external domination.[340] This system took the shape of the Frontier Crimes Regulation ("FCR"), originally formulated in 1858, and amended in 1872 and 1901, turning FATA into a constitutional and legal anomaly.[341] Decolonization did not bring any change. Since 1947, FATA is formally a part of Pakistan.[342] However FCR remains entrenched, and sets the FATA tribes apart from and unequal to other citizens of the country.[343]

To enable this state and space of exception, Pakistan's constitution reposes all executive and legislative authority for FATA in the President of Pakistan, who is given the authority to exercise his powers regarding FATA "as he may deem necessary."[344] Parliamentary enactments do not apply to FATA, unless the President so directs.[345] FATA is placed outside the jurisdiction of the Supreme Court and High Courts that otherwise have extensive powers to guarantee fundamental rights.[346] The Su-

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are communicated to the government and the decisions of the government passed to the tribe. In this sense, the *jirga* handles the foreign relations of the tribe and has the authority to commit it to a course of action. A third form, the so-called 'official' *jirga*, composed of men appointed by an officer of the Government of Pakistan, has little to do with *Puktunwali* in the traditional sense. It acts as an advisory jury to an officer in trying crimes under the Frontier Crimes Regulations . . . .

Id. at 143.

340*. See generally* Francois Teney-Renaud, *Post-Colonial Pluralism, Human Rights and the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan*, 6 SINGAPORE J. COMP. & INT'L L. 541, 562–72 (2002); Shaheen Sardar Ali & Kamran Arif, *Blind Justice For All? Parallel Judicial Systems in Pakistan: Implications & Consequences for Human Rights* 24–29 (Women & L. Project, Working Paper No. 1, 1994).

341*. See* SHAHEEN SARDAR ALI & JAVAID REHMAN, INDIGENOUS PEOPLES AND ETHNIC MINORITIES OF PAKISTAN: CONSTITUTIONAL AND LEGAL PERSPECTIVES 49 (2001).

342.   JAFFRELOT, *supra* note 243, at 31.

343*. See generally* PESHAWAR CHAPTER, HUMAN RIGHTS COMM'N OF PAK., FCR: A BAD LAW NOBODY CAN DEFEND (2005) (summarizing the law that rules FATA and relating consultations in various communities); Shaheen Sardar Ali, *Minority Rights in Pakistan: A Legal Analysis*, 6 INT'L J. MINORITY & GROUP RTS. 169 (1999) (discussing how the formation of the state and state structures cannot address and respect the needs of various groups resulting in gaping chasms).

344.   PAK. CONST. 1973 art. 247(2).

345*. Id.* art. 247(3).

346*. Id*. art. 247(7). For fundamental rights enumerated by the constitution, see id. arts. 8–28. For jurisdiction of the Supreme Court and High Courts, see *id.* arts. 184–85, 199.

preme Court has recognized these "special provisions" for the area "so that their inhabitants are governed by laws and customs with which they are familiar and which *suit their genius*."[347]

The FATA itself stands divided into 7 administrative units styled "agencies." An evocatively titled "Political Agent" ("PA"), appointed in each agency by the federal government and backed by a para-military militia, is the locus of Pakistan's authority. Besides exercising extensive executive, judicial, and revenue powers, the PA is also each agency's development administrator.[348] He is assisted by *maliks*, paid intermediaries from among tribal elders, who are appointed and removed at his discretion.[349] Maintenance of order and suppression of crime are deemed the PA's primary responsibilities.[350] The PA is authorized to dispose of any civil or criminal matter at his discretion.[351] The PA may decide the matter himself, or refer it to a tribal *jirga*, consisting of tribal *maliks* chosen by the PA. The PA initiates cases, appoints the *jirga*, presides over trials, and the final decision is subject to his discretion.[352] The *jirga* is supposed to decide the matter under FCR, supplemented by customary tribal norms.[353] The PA retains the discretion to sentence the accused as determined by the *jirga*, refer the matter back to the *jirga*, or appoint a new *jirga*.[354] The determinations of the PA are not subject to review by any court of law.[355] The process is that of an inquiry rather than presenta-

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347. Manzoor Elahi v. Fed. of Pak., (1975) 66 PLD (SC) 133 (Pak.) (emphasis added). For a detailed account of the judicial treatment of questions related to FATA, see Tanguay-Renaud, *supra* note 340, at 549–55.

348. *See* Tanguay-Renaud, *supra* note 340, at 556. The Constitution requires separation of judicial and executive powers. PAK. CONST. art. 175 (3).

349. *See* Tanguay-Renaud, *supra* note 340, at 563; INT'L CRISIS GROUP, PAKISTAN'S TRIBAL AREAS, *supra* note 293, at 3; ALI & REHMAN, *supra* note 340, at 47–55; Omrani, *supra* note 144, at 187.

350. *See* Tanguay-Renaud, *supra* note 340, at 562–64.

351. The Supreme Court of Pakistan rejected the application of the FCR "justice" system in Balochistan in 1993, stating that "mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedures of criminal law, trial and detention which is enforceable in the entire country." Government of Balochistan v. Azizullah Memon, 341 PLD 361 (Pak. Sup. Ct. 1993). In this case, the Supreme Court could rule on FCR as the issue arose about its use in Balochistan, where it was outlawed by this judgment. FATA, however, remains beyond any court's jurisdiction.

352. *See* Tanguay-Renaud, *supra* note 340, at 563–64; INT'L CRISIS GROUP, PAKISTAN'S TRIBAL AREAS, *supra* note 293, at 3; ALI & REHMAN, *supra* note 341, at 47–55.

353. *See* Tanguay-Renaud, *supra* note 340, at 564.

354. *See id.*

355. *See id.* at 566; INT'L CRISIS GROUP, PAKISTAN'S TRIBAL AREAS, *supra* note 293, at 3.

tion of evidence and cross examination. Assistance of counsel is prohibited.[356]

Draconian sanctions under the FCR, executed at the discretion of the PA, include: detention and imprisonment to prevent crime or sedition; requiring "a person to execute a bond for good behavior or for keeping the peace;" expulsion from the agency of "dangerous fanatics" and those involved in blood feuds; removal or prevention of settlements close to the border; demolition of buildings used for "criminal purposes;" collective punishment of fines and blockade; and the "right to cause the death of a person" on suspicion of intent to use arms to evade arrest.[357] The federal agency charged with overseeing FATA considers FCR an "effective 'iron-hand'" whose withdrawal would create an "administrative vacuum."[358]

In 1962, under a design of limited franchise, an electoral college of 35,000 tribal *maliks,* appointed by the PA, selected representatives to the national parliament.[359] In 1996, direct election of representatives was introduced, though "politics and political parties are curse words in official circles."[360] Because the law prohibits political parties from extending their activities in FATA, only "non-party/independent" representatives can be elected. This makes for a unique political anomaly: FATA residents elect representatives to a legislature whose legislation does not extend to FATA. FATA also suffers from abysmal levels of poverty, illiteracy, and lack of health care.[361] Analysts find FATA "a virtual prison for public-spirited and reform-minded individuals. Dissenting voices are quickly dubbed anti-state and silenced by imprisonment."[362] State functionaries, however, claim that the system in place for over a hundred years "*suits the genius of the people* and has stood the test of time."[363] It is more appropriate to characterize FATA as a zone where bodies and

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356. *See* Tanguay-Renaud, *supra* note 340, at 571–72.

357. *See* INT'L CRISIS GROUP, PAKISTAN'S TRIBAL AREAS, *supra* note 293, at 7. *See also* Omrani, *supra* note 144, at 187.

358. ALI & REHMAN, *supra* note 341, at 49–50.

359. *See* INT'L CRISIS GROUP, PAKISTAN'S TRIBAL AREAS, *supra* note 293, at 3.

360. *Id.* at 11.

361. Per capita income in FATA is $250 a year, half that of the rest of Pakistan. 71% men and 97% women are illiterate. There is one doctor for every 6,762 people, compared to one for every 1,359 in Pakistan. INT'L CRISIS GROUP, PAKISTAN'S TRIBAL AREAS, *supra* note 293, at 9.

362. *Id.* at 12.

363. Ali, *supra* note 343, at 186 (quoting interview with Lt. General (retd) Muhammad Arif Bangash, THE NEWS (Nov. 16, 1997)) (emphasis added) (internal quotations omitted).

spaces are placed on the other side of universality, a "moral and legal *no man's land*, where universality finds its *spatial* limits."[364]

FATA, admittedly an extreme case, is symptomatic of the problem of reconciling territorial straitjackets with the principle of self-determination.[365] For the territorial state, self-determination has always been a concept "loaded with dynamite."[366] In postcolonial formations, its explosive potential increases. The primary problem is not how to determine identities and desires of a people eligible for self-determination;[367] the problem, rather, is how to reconcile realization of this right with existing territorial configurations. The unresolved questions surrounding the Durand Line, FATA, and Pashtun political identity persist because their resolution is sought within a territorial "nation-state." Nesiah terms the imprisonment of postcolonial polities within modern territorial constructs of statehood "failures of the imagination."[368] A major hurdle in breaking free of this imprisonment is international law itself.

B. International Law and the Territorial Straitjacket

For many a postcolonial "contrived state"[369] the crisis of identity and security "lies in its 'artificiality.'"[370] International law enforces the territorially-bound grammar of the "nation-state" upon postcolonial formations plagued by "cartographic anxiety inscribed into [their] very genetic code,"[371] through the doctrine of *uti possidetis*. Based on a maxim of Roman law, the doctrine of *uti possidetis ita possidetis* (as you possess, so you possess), treats the acquisition and possession of a state's territory as given, with no territorial adjustments allowable without the consent of the currently occupying parties.[372] Applied to international borders, it

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364. Denise Ferreira da Silva, *Towards a Critique of the Socio-Logos of Justice:* The Analytics of Raciality *and the Production of Universality,* 7 SOC. IDENTITIES 421, 422 (2001).

365. *See generally* Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991) (arguing that ethnic groups making secessionist claims do so over disputed territory).

366. ROBERT LANSING, THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE 97 (1921).

367. For a review of the various methods used in the post-WWII period, see A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF DETERMINATION 294–323 (1973).

368. Vasuki Nesiah, *Placing International Law: White Spaces on a Map*, 16 LEIDEN J. INT'L L. 1, 29 (2003).

369. Makau wa Mutua, *supra* note 307, at 1134.

370. Mark Simpson, *The Experience of Nation-Building: Some Lessons for South Africa,* 20 (3) J. S. AFRICAN STUD. 463, 363 (1994).

371. Krishna, *supra* note 298, at 196.

372. Malcolm N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis Juris *Today,* 67 BRIT. Y.B. INT'L L. 75, 98 (1996).

favors actual possession irrespective of how it was achieved, assumes that valid title belongs to current possessor, and does not seek to differentiate between the *de facto* and *de jure* possession.[373] By recognizing legitimate title to *de facto* territorial holdings, it becomes an instrument to maintain the *status quo* and impedes imaginative resolutions of territorial conflicts.

The doctrine of *uti possidetis* was formulated in connection with colonialism in Latin America in the early nineteenth century when Spanish colonies agreed to apply the principle both in their frontier disputes with each other and in those with Brazil.[374] During the decolonization era of the twentieth century, this norm was extended to the withdrawal of colonial powers from Asia and Africa.[375] The principle mandated that "new States . . . come to independence with the same borders that they had when they were administrative units within the territory or territories of one colonial power."[376] This froze colonial boundaries and presented a challenge to postcolonial formations to imagine and manage a "nation" and "national identity" in the heterogeneity contained within inherited boundaries.[377] In some instances, particularly in Africa, this attempt failed completely and ended in genocide and/or fracturing of the state.[378]

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373. The concept of *uti possidetis de facto* emerged in international law after the War of 1801 fought by Spain and France against Portugal to recognize the territorial results of the war. *See* The Minquiers and Ecrehos Case (Fr. v. U. K.)*,* 1953 I.C.J. 47, 96–97 (Nov. 17) (separate opinion of Judge Carneiro).

374*. See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 129 (6th ed. 2003) [hereinafter BROWNLIE, PRINCIPLES]; S. WHITTMORE BOGGS, INTERNATIONAL BOUNDARIES: A STUDY OF BOUNDARY FUNCTIONS AND PROBLEMS 74–85 (1966).

375*. See* Kaiyan Homi Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 49 BRIT. Y.B. INT'L L. 119 (1983).

376. Shaw, *supra* note 372, at 97. *See also* Dianne Otto, *Subalternity and International Law: The Problem of Global Community and the Incommensurability of Difference*, *in* LAWS OF THE POSTCOLONIAL, *supra* note 43, at 145, 150.

377*. See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 41–49 (1983); THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD (Joseph A. Camilleri & Jim Falk eds., 1992) (looking at globalization, political fragmentation, and the influence of social movements on the concept of sovereignty); Costas M. Constantinou, *Before the Summit: Representations of Sovereignty on the Himalayas*, 27 MILLENNIUM J. INT'L STUD. 23, 32 (1998); BASIL DAVIDSON, THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE 162–70, 181–82 (1992); RUPERT EMERSON, FROM EMPIRE TO NATIONS: THE RISE TO SELF ASSERTION OF ASIAN AND AFRICAN PEOPLES (1960) (discussing how the spread of Western European civilization caused the rise of nationalism among non-European peoples); GROVOGUI, *supra* note 51 (analyzing the inadequacies of international law in African decolonialization).

378*. See* J.N. SAXENA, SELF DETERMINATION: FROM BIAFRA TO BANGLA DESH 35 (1978); EYASSU GAYIM, THE ERITRIAN QUESTION: THE CONFLICT BETWEEN THE RIGHT OF

The ICJ[379] and international tribunals[380] were quick to put their imprimatur on the doctrine of *uti possidetis* and its application to postcolonial states. The ICJ has designated it "a general principle, which is logically connected with the phenomenon of [] obtaining [] independence, wherever it occurs."[381] The ICJ went on to state that "[i]ts obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."[382] The bottom line is that through "application of the principle of *uti possidetis*," colonial "administrative boundaries" are "upgraded" and "transformed into international frontiers in the full sense of the term."[383]

The ICJ acknowledged that by giving fixity and legitimacy to colonial boundaries, the principle *uti possidetis* "at first sight . . . conflicts outright with another one, the right of peoples to self-determination."[384] In

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SELF-DETERMINATION AND THE INTERESTS OF STATES 31–34 (1993). Investigating the 1994 genocide in Rwanda, Mahmood Mamdani found a "synthesis between history, geography and politics" necessary in order to "show how the unthinkable [became] thinkable." MAHMOOD MAMDANI, WHEN VICTIMS BECAME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 5, 8, 18 (2001).

379*. See* Western Sahara, Advisory Opinion 1875 I.C.J. 12, at 25–27 (Oct. 16); Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, ¶¶ 16–26 (Dec. 22). *See also* Joshua Castellino, *Territory and Identity in International Law: The Struggle for Self-Determination in the Western Sahara*, 28 MILLENIUM J. INT'L STUD. 523, 524–25 (1998); Gino J. Naldi, *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali): Uti Possidetis in an African Perspective*, 36 INT'L & COMP. L. Q. 893, 897–902 (1987).

380*. See* Indo-Pakistan Western Boundary (Rann of Kutch), 50 I.L.R. 2, 407 (1968); Dubai-Sharjah Border Arbitration, 91 INT'L L. REP. 543, 543–45 (1981); Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.: Nic. intervening), 1992 I.C.J. 351, at 363 (Sept. 11); Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C. J. 6, 15 (Feb. 3); Eritrea-Ethiopia Boundary Commission (Eri. v. Eth.), Permanent Court of Arbitration (2000 – continuing) *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1150 (last visited Aug. 12, 2010); Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague*, 25 WIS. INT'L L. J. 23 (2008).

381. Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, ¶ 20 (Dec. 22).

382*. Id*.

383*. Id.* at 566.

384*. Id.* at 567. The Court was mindful of the dilemma of how this principle "has been able to withstand the new approaches to international law . . . where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law." *Id*. at 566–7. For an insightful analysis of the terms and the structure of the discourse of self-determination in international law, see Nathaniel Berman, *Sovereignty in Abeyance: Self Determination and International Law*, 7 WIS. INT'L L.J. 51 (1988).

the face of this dilemma, the ICJ fell back on pragmatism to claim that "maintenance of the territorial status quo" is essential to "preserve what has been achieved by peoples who have struggled for their independence."[385] The Court sought support for this claim with a gesture toward the practice of post-colonial states:

> [t]he 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.[386]

Here Nesiah rightly sees a "double bind" infecting the Court as it is committed to decolonization but "[t]erritorial integrity emerges here as a statist spatial representation intelligible to international law, and posited as indispensible to the self-determination of the postcolony."[387]

As the saga of the Durand Line shows, colonial frontiers, boundaries, and borders fluctuated over time. This raises the question of the exact territorial bounds of postcolonial states. The ICJ injected an unequivocal temporal cut-off in this historically ambivalent temporal and spatial issue, by holding that:

> [*U*]*ti possidetis*—applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to *the photograph of the territorial situation then existing*. The principle of *uti posidetis* freezes the territorial title; it stops the clock but does not put back the hands.[388]

As fashioned by the ICJ:

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385. Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, ¶ 28 (Dec. 22).

386*. Id.* (emphasis added). The Court also noted that the member states of the Organization of African Unity ("OAU") had pledged in 1964 "to respect the frontiers existing on their achievement of national independence." *Id.* at ¶ 19, *quoting* AGH/ Res. 16(1). The OAU Assembly of Heads of State and Government through Resolution 17(1) expressly affirmed the principle of *uti possidetis* in 1964. A.C. MCEWEN, INTERNATIONAL BOUNDARIES OF EAST AFRICA 22 (1971). *See generally* Jeffrey Herbst, *The Creation and Maintenance of National Boundaries in Africa*, 43 INT'L ORG. 673 (1989) (arguing that the way boundaries are drawn in Africa is the only thing that could work given the constraints imposed by the structure of the continent); Ravi Kapil, *On the Conflict Potential of Inherited Boundaries in Africa,* 18 WORLD POL. 656 (1966) (discussing conflicts over boundaries in Africa); JEFFEREY HERBST, STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL (2000) (examining the creation of African States and the problem of distributing governmental authority).

387. Nesiah, *supra* note 368, at 20.

388. Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, ¶ 30 (Dec. 22).

> the critical date as a legal concept posits that there is a certain moment at which the rights of the parties crystallize, so that acts after that date cannot alter the legal position. It is a moment which is more decisive than any other for the purpose of the formulation of the rights of the parties in question.[389]

This freeze-framing of boundaries on the date of decolonization by one definitive gesture renders the issue of the history of these boundaries moot. The rationale appears to be that "freezing the carved-up territory in the format it exhibited at the moment of independence"[390] will deter territorial disputes among post-colonial states. Pervasive postcolonial territorial and self-determination conflicts, however, reveal that such a mandated spatial fixity and temporal clarity of boundaries does not keep these conflicts in check.[391] *Uti posidetis* combined with critical date as a legal concept trumps conflicting post-colonial assertion and exercise of effective authority as grounds for sovereign title under the doctrine of *effectivites*.[392] Post-colonial *effectivities* has significance only if colonial practice fails to furnish definitive demarcation and thus trigger application of *uti posseditis*.[393]

The concern with order has been central to modern international law.[394] Decolonization, coming on the heels of two World Wars, raised

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389. Shaw, *supra* note 372, at 130. *See also* L. F. E. Goldie, *The Critical Date,* 12 INT'L & COMP. L. Q. 1251, 1251 (1963).

390. Frontier Dispute (Burk. Faso v. Republic of Mali), 1986 I.C.J. 554, at 661–62 (Dec. 22) (separate opinion of Judge Abi-Saab).

391. For episodes of territorial conquest in the post-World War II era, see Eugene Kontorovich, Professor of Law, Northwestern Univ. Sch. L., International Responses to Territorial Conquest, Remarks at New Voices: Peace and Security Norms and Institutions in Historical Context (Apr. 12, 2009), *in* 102 AM. SOC'Y INT'L L. PROC. 425, 437–440 (2009).

392. For detailed discussion of *effectivites* doctrine, see MALCOLM N. SHAW, INTERNATIONAL LAW 432–36 (5th ed. 2003); Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1929); Clipperton Island Case (Fr v. Mex.), 26 AM. J. INT'L L. 390, 393 (1932); Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 46 (1933).

393. Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.) 2007–08 I.C.J. ANN. REP. 24, 25 (2008); *see also*, Elizabeth A. Kirk, *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, 57 INT'L & COMP. L. Q. 701, 704 (2008).

394. Rosalyn Higgins, *Grotius and the Development of International Law During the United Nations Period*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 267–80 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990). For an insightful analysis of the unstable relationship of law with order, see FITZPATRICK, MODERNISM *supra* note 39, at 1–36.

the specter of disorder. As a result, the norm of self-determination gave way to the caveat of order.[395] Order trumped self-determination, deemed a concept "loaded with dynamite,"[396] and the transition from colonialism to postcoloniality proceeded with the basic requirement that external boundaries remain in place. Managers of postcolonial formations were equally quick to subscribe to the doctrine, and international bodies like the United Nations were quick to give their imprimatur. The same 1960 UN resolution that affirmed that "[a]ll peoples have the right of self-determination," also declared that "[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[397] As a way out of this contradiction, the United Nations contemplates the possibility of non-state modes of actualizing self-determination, by holding that "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination."[398] This contradiction points to the Janus-faced nature of the right of self-determination in a system of states with fixed and inviolable territorial bounds. The right has a "justifying, stabilizing, conserving effect and it has a criticizing, subversive, revolutionizing one."[399] International law and the practice of states have been content with the justifying, stabilizing, and conserving effect.[400]

This bias in favor of existing states is augmented by a doctrinal lacuna, with profound political implications, that remains at the heart of the *uti possidetis* doctrine as reformulated by modern international law and endorsed by the ICJ. In *jus civile*, rightful title via *de facto* possession could only be acquired by a prescriptive claim of *usucapio* established in good

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395. *See* HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 3–13, 27 (1990); A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A STUDY OF THE UNITED NATIONS PRACTICE (1973) (discussing the use and limits of self-determination in the decolonization process and as a legal and political concept).

396. ROBERT LANSING, THE PEACE NEGOTIATIONS 97 (1921).

397. G.A. Res. 1514 (XV), at 67, U.N. Doc. A/4684 (Dec. 14, 1960).

398. UNGA Resolution 2625, *quoted in* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at 33 (Oct. 16).

399. ISTAVÁN BIBÓ, THE PARALYSIS OF INTERNATIONAL INSTITUTIONS AND THE REMEDIES 73 (1976).

400. Emerson is emphatic: "self-determination does not embrace secession." Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 464 (1971). *See also* David B. Knight, *Territory and People or People and Territory? Thoughts on Postcolonial Self-Determination*, 6 INT'L POL. SCI. REV. 248 (1985).

faith.[401] Furthermore, in Roman law, *uti possidetis* is deemed an interim measure in contested vindication proceedings to determine title.[402] A critical restrictive qualifier, *nec vi, nec clam, nec precario* (without force, without secrecy, without permission), limits the scope of the doctrine. Possession would ripen into good title only if possession did not run afoul of the limitations. Modern international law conveniently elides this critical limitation, perhaps because given the colonial modes of acquisition of territory, colonial boundaries run afoul of it.[403] This gloss over the spatial history of colonialism, now bequeathed to post-colonial formations, by treating *de facto* control as rightful title is a foundational reworking of the original construct.[404]

The doctrine of *uti possidetis*, far from being grounded in any sound legal principle, is thus more a political instrument to legitimize existing state boundaries. The precarious status of the norm was underscored by the *Beagle Channel Arbitration's* observation that it is "possibly, at least at first, a political tenet rather than a true rule of law."[405] Koskenniemi sees in the recognition of *uti possidetis* an acknowledgment that the ethical conception of international law cannot override the sociological.[406] Demarcation of boundaries is, essentially, a political act. However, when reified by international law, these boundaries appear to have an identity separate from politics of the international system. The primary rationale for the adoption of the principle has been to avoid territorial conflict among post-colonial states, particularly in the light of international law's primary role—preservation of order.[407] While peace and order remain elusive in the global system, *uti possidetis* furnishes a cloak of legitimacy

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401. In Roman law, *usucapia* is possession capable of ripening into ownership. *See* HERBERT FELIX JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 151–55 (1972).

402. *Id*. at 259–70.

403. *See*, *e.g.*, PAKENHAM, *supra* note 62 (exploring the European rush to build empires in Africa, often involving forceful acquisition); ALI MAZRUI, CULTURAL FORCES IN WORLD POLITICS 1–27 (1990).

404. As Schwarzenberger posits, "Even so 'obvious' a loan from Roman law as the use of *uti possidetis* in the Latin American practice since the early nineteenth century is more indicative of the differences between this remedy in Roman law and its application on the inter-state level than of any supposed likeness between these institutions." George Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM J. INT'L L. 308, 309 (1957). *See also* MCEWEN, *supra* note 386, at 27–31.

405. Case Concerning the Beagle Channel (Argentina v. Chile), 52 I.L.R. 55, ¶ 9 (1977).

406. In his words, "the strong support that the law gives to *uti possidetis* in the delineation of territorial rights seems a clear recognition of this reality." Koskenniemi, *The Wonderful Artificiality of States*, 88 AM. SOC'Y INT'L L. PROC 22, 24 (1994).

407. *See supra* notes 380–390 and accompanying text.

over colonial disposition of territories of the global South by sidestepping the questions of the origins of these dispositions. By forcing disparate people to circumscribe their political aspirations within predetermined territorial bounds, *uti possidetis* reverses the vision of self-determination that seeks to protect vulnerable populations by allowing them political and territorial arrangements of their own.[408] Ian Brownlie is unequivocal in stating that "it is *uti possidetis* which creates the ambit of the pertinent unit of self-determination, and which in that sense has a logical priority over self-determination."[409] The problem is that this logical priority furnishes the grounds for actually giving territory priority over people when confronted with assertions of the right of self-determination.

C. Colonial Boundaries, Unequal Treaties, and International Law

Treaties between imperial powers and a variety of agreements between colonizers and native authorities played a key role in determining the spatial scope of spheres of control and influence.[410] The Durand Line,

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408. *See* Joshua Castellino & Steve Allen, *The Doctrine of* Uti Possidetis*: Crystallization of Modern Post-Colonial Identity*, 43 GERMAN Y.B. INT'L L. 205, 223–26 (2000); Steve Allen & Joshua Castellino, *Reinforcing Territorial Regimes: Uti Possidetis and the Right to Self-Determination in Modern International Law,* 48 AMICUS CURAE 20, 20 (2003).

409. Ian Brownlie, *Boundary Problems and the Formation of New States*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL LAW 191 (David Freestone et al. eds., 2002).

410. *See* Charles Henry Alexandrowicz, *The Role of Treaties in the European-African Confrontation in the Nineteenth Century*, *in* AFRICAN INTERNATIONAL LEGAL HISTORY 27–68 (A. K. Mensah-Brown ed., 1975); Wm. Roger Louis, *The Berlin Congo Conference, in* FRANCE AND BRITAIN IN AFRICA: IMPERIAL RIVALRY AND COLONIAL RULE 167 (Prosser Gifford & Wm. Roger Louis eds., 1971). It is important to note that these agreements and treaties were between colonial powers and native power-holders, not native communities. This brings into relief the question about who consents to a treaty. Is it the state, a legal abstract, or the people and communities that exist within the bounds of a state? What are the implications of this choice for participatory democracy and for the emerging right to democratic governance? It has been argued that "international law must recognize that governments are agents of only a part of the communities they purport to represent at the international negotiating table." Eyal Benvenisti, *Domestic Politics and International Resources: What Role for International Law*?, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 109, 114 (Michael Byers ed., 2000). *See also* Uwe Kischel, *The State as a Non-unitary Actor: The Role of the Judicial Branch in International Negotiations,* 39 ARCHIV DES VOLKERRECHTS 268 (2001); HILLARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000) (discussing how treaties are incorporated into the national politics and women's participation); BALAKRISNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW (2003) (discussing territorial control as a basis of sovereignty); STEPHEN D. KRANSER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

like borders of most postcolonial states, is a legacy of such treaties, particularly the 1893 agreement between the Afghan Amir and the British.[411] As disputes arise about the validity of these borders, questions about the legal status of the treaties that determined these borders surface. Most salient among these is the issue of unequal treaties. However, in tune with its gloss on the doctrine of *uti possidetis* to protect the *status quo*, modern international law has similarly resisted confronting the question of unequal treaties for the same purpose.

   The Durand Line raises the question of the validity of the 1893 agreement dictated by the British to the reluctant Amir of Afghanistan, a vassal installed over a protectorate in all but name.[412] While examining the validity of such arrangements, one is confronted with the fact that the question of unequal treaties appears to have "evaporated as an issue from the domain of international law," and stands "consigned to the dustbin of 'redundant ideas,'"[413] deemed a mere "political" argument with scant legal valance.[414] How does a question implicated in colonial territorial treaties that imprison the postcolonial world in arbitrary spatial cages become invisible to international law? It took a series of conceptual and institutional maneuvers to make it disappear from sight.

   The status of unequal treaties[415] in international law first arose in the nineteenth century in the context of treaties between Western powers and East Asian states[416] and was rehearsed in the early twentieth century by

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411. *See supra* notes 188–193 and accompanying text.

412. Both Afghanistan and Pakistan rest their respective legal position about the matter primarily on the contested legal status of the 1893 agreement between the British and the Afghan Amir. For Afghanistan's position, see M. HASAN KAKAR, A POLITICAL AND DIPLOMATIC HISTORY OF AFGHANISTAN, 1863–1901 (2006); Leon B. Poullada, *Pushtunistan*, *in* PAKISTAN'S WESTERN BORDERLAND, *supra* note 143, at 134–35. For Pakistan's position, see AZMAT HAYAT KHAN, THE DURAND LINE: ITS GEO-STRATEGIC IMPORTANCE (2000); IJAZ HUSSAIN, ISSUES IN PAKISTAN'S FOREIGN POLICY 42–89 (1988).

413. M. Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, *in* INTERROGATING THE TREATY: ESSAYS IN THE CONTEMPORARY LAW OF TREATIES 43, 44 (M. Craven & M. Fitzmaurice eds., 2005). It is claimed that the question has never had any place in international law. *See* BROWNLIE, PRINCIPLES, *supra* note 374, at 591.

414. Lucius Caflisch, *Unequal Treaties*, 35 GERMAN Y.B. INT'L L. 52, 78 (1992).

415. *See generally* F. NOZARI, UNEQUAL TREATIES IN INTERNATIONAL LAW (1971) (discussing the origin and status of unequal treaties); Ingrid Detter, *The Problem of Unequal Treaties,* 15 INT'L & COMP. L.Q. 1069 (1966) (discussing the problems associated with unequal treaties).

416. The treaties with Asian states typically involved opening of ports to foreign trade, fixing of import duties, cession or lease of territory, immunities from local jurisdiction, extraterritorial jurisdiction of Western powers, right of navigation in inland waters, concessions for mining, railways and shipping, and overt non-reciprocity. *See, e.g.,* Q.

Soviet jurists.[417] Drawing on extra-textual contexts that animated the texts of colonial treaties, Asian states and Soviet jurists argued that because imperial powers had used their dominant military position to gain concessions through treaties forced upon weaker states, such treaties were invalid. Because these agreements were the products of coercion, they implicated questions of status of parties, the context in which agreements were secured, and the nature of consent involved. The issue of inequality arises both in terms of unequal bargaining power of the parties and the substantive lack of equilibrium with respect to benefits and burdens allocated by these treaties. Note here that in some instances, the harsh and humiliating terms of unequal treaties were instrumental in the rise of anti-colonial resistance and nationalism in Asia and unprecedented collective military action by Western powers to quell this resistance.[418] Indeed it was the coordinated military action in China by Western powers to put down the anti-Western Boxer Uprising of 1900 that fashioned a new and enduring stratagem of international politics—collective military action by the Western powers in the global South.[419]

Faced with questions about the validity of unequal treaties, the initial Western response was that these treaties were necessary given the "backwardness" of Asian societies and legal orders, and that once those "shortcomings" are remedied, the treaties will lose their force by the ab-

WRIGHT, LEGAL PROBLEMS IN THE FAR EASTERN CONFLICT 69–73 (1941); Wang Tieya, *International Law in China: Historical and Contemporary Perspectives,* 221 RECUEIL DES COURS 195, 237–40 (1990); Sompong Sucharitkul, *Asian Perspectives Of the Evolution of International Law: Thailand's Experience at the Threshold of the Third Millenium*, 1 CHINESE J. INT'L L. 527, 531–33 (2002); Douglas Howland, *The Foreign and the Sovereign: Extraterritoriality in East Asia, in* THE STATE OF SOVEREIGNTY, *supra* note 15, at 35–55. For similar treaties before the nineteenth century, see Charles H. Alexandrowicz, *Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Century*, 100 RECUEIL DES COURS 203 (1960).

417. The Soviet position reflected the definitions of treaties fashioned by early Marxist legal theorists. For example, "A treaty obligation is nothing other than *a special form of the concentration of economic and political relationship*." E. PASHUKANIS, SELECTED WRITINGS ON MARXISM AND LAW 181 (Piers Bierne & Robert Sharlet eds., Peter B. Maggs trans., 1980) (emphasis added). "Every international agreement is *the expression of an established social order*, with a certain balance of collective interests." Eugene A. Korovin, *Soviet Treaties and International Law,* 22 AM. J. INT'L L. 753, 763 (1928) (emphasis added).

418. *See*, *e.g.*, Edmund S. K. Fung, *The Chinese Nationalists and the Unequal treaties 1924-1931*, 21 MOD. ASIAN STUD. 793, 794 (1987).

419. *See supra* note 67 and accompanying text. For recent advocacies of collective intervention, see generally STANLEY HOFFMANN ET. AL., THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION (1996); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (Amy Gutmann ed., 2001).

sence of their *raison d'être*.[420] By the late nineteenth century, international law's turn to positivism, with its recognition of differentiated sovereignties, stepped in to acknowledge and accommodate a diplomatic practice rooted in culture and history as the primary source of norms.[421] The contemporary Concert of Europe rested upon the Act of the Vienna Congress (1815), the peace treaty at the culmination of the Napoleonic Wars, and related agreements.[422] Preservation of the Concert of Europe and the attendant distribution of power became a primary preoccupation of international law.[423] Since peace treaties are unavoidably unequal in nature, international law now framed the question of sovereign consent as a purely formal one subject to overarching norms of preservation of order in the international system.[424] The classic notion that validity of

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420. *See, e.g.,* Lucius E. Thayer, *The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States*, 17 AM J. INT'L L. 207 (1923) (discussing the unequal rights of Americans in the Ottoman Empire); K. Chan, *The Abrogation of British Extraterritoriality in China 1942–43: A Study of Anglo-American-Chinese Relations*, 11 MOD. ASIAN STUD. 257 (1977) (looking at why and how extraterritoriality had to be renegotiated); JOHN C. VINCENT, THE EXTRATERRITORIAL SYSTEM IN CHINA: FINAL PHASE (examining the political and militaristic maneuvering of western powers in order to maintain their treaty interests) (1970).

421. *See supra* notes 46–56 and accompanying text.

422. *See* PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY 74 (Randall Lesaffer ed., 2004); 4 CONCERT OF EUROPE, THE NEW ENCYCLOPAEDIA BRITANNICA (15th ed. 2005).

423. *See* CARTY, *supra* note 44, at 66–67.

424. The Permanent Court of International Justice ("PCIJ") was quick to jump on the positivist bandwagon: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." Nationality Decrees in Tunis and Morocco Case, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, ¶ 38. Unequal peace treaties had to be honored because "welfare of society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territory by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party." WHEATON, *supra* note 45, at 284–85. Peace treaties "were respected in an almost metaphorical way: they embodied the Concert of Europe." David Bederman, *The 1871 London Declaration, Ribus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT'L L. 1, 7 (1988). As for the inequality of peace treaties,

> [w]hile finding it morally outrageous that [] a treaty should be legally binding even if imposed at the end of a war by a victorious 'aggressor' on the victim of 'aggression' [one has] seen no way of rescuing mankind by legal precepts from this particular kind of outrage . . . . [One can find no modalities] whereby international law can summon sufficient power to defeat every victor at the moment of his victory.

treaties rests upon consent by formally equal and sovereign states gave way to a positivist recognition that "[t]he obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two states, which may have induced them to enter into certain engagements."[425] Political realities trumped formal legal categories now deemed quaint. In this frame, unequal treaties of yesterday, however secured, furnished the grounds of the prevailing international order. To question their validity retrospectively raised the specter of unraveling the fragile order of things. With the question of state consent rendered a formal one, today any arguments based on consent to explain validity of treaties become "deceptively simple. . . . [because t]heir theoretical power lies in the suggestion that perhaps nothing really needs to be justified."[426]

International lawyers deployed the same line of reasoning to defang the classic doctrine of *ribus sic stantibus* (things thus standing), whereby a fundamental change of circumstances can justify unilateral termination of treaties. Unequal treaties are particularly vulnerable to this line of attack with the passage of time and changes in the post-Napoleonic European balances of power.[427] When the issue arose within Europe in the late nineteenth century, international law's response was that because sanctity of treaties is essential to the maintenance of order, even in the face of changed circumstances, termination or modification of treaty obligations requires the consent of other parties.[428] As pressure for revision of treaty arrangements mounted, in light of a changed balance of power within Europe in the early twentieth century, international law's turn to institutions to deal with problems of order, now seen as essentially political in nature, provided an opening—signaling "a movement from a moment of law to politics."[429] The doctrine of *ribus sic stantibus* was now read as embracing two separate issues to be framed and resolved along two separate tracks. The political issue of accommodating changes in the

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Julius Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA J. INT'L L. 356, 357, 358 (1968).

425. WHEATON, *supra* note 45, at 40–41.

426. LEA. BRILMAYER, AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD 75 [hereinafter BRILMAYER, AMERICAN HEGEMONY] (1996).

427. The "nineteenth-century diplomatic history [of a volatile Europe] presents a tale of secret intrigues, entangling alliances, and monarchial imaginations frozen by rigid military plans, inflexible commitments, and ossified notions of national honor and sovereign prerogative." David Kennedy, *The Move to Institutions,* 8 CARDOZO L. REV. 841, 855 (1987) [hereinafter Kennedy, *Move*].

428. *See* L. H. Woolsey, *The Unilateral Termination of Treaties,* 20 AM. J. INT'L L. 346, 347 (1926).

429. Kennedy, *Move*, *supra* note 427, at 871.

interests and powers of states was to be dealt with by the League of Nations under article 19 of its Charter.[430] The legal issue was to be narrowly construed as one of *clausula*—the relationship between underlying consent and changed circumstances—deemed suitable for judicial determination by the Permanent Court of International Justice ("PCIJ").[431] As now enshrined in article 62 of the Vienna Convention, the doctrine of *rebus sic stantibus* stands confined within narrow limits as a legal question—a treaty is terminable only when unforeseen changes in the circumstances underlying the conclusion of the treaty transform radically the extent of the obligations still to be performed.[432] In the end, *rebus sic stantibus* stands sacrificed at the altar of *pacta sunt servanda* (agreements must be kept).

International law deals with the issue of coercion, duress, and unequal treaties with institutional and interpretive moves. The Vienna Convention on the Law of Treaties addresses the issue through articles 51 and 52—making coercion and threat or use of force "in violation of the principles of international law in the Charter of the United Nations" grounds for voiding a treaty.[433] With this iteration of a classic rule, "the problem has been legislated away."[434] The repackaging of what coercion, threat, or use of force is impermissible subtly altered the classic treaty law rule on duress that condemned all coercion. The prohibition on duress in the formation of a treaty now stands conditioned by the legal status of the coercion used. The qualifier "in violation of international law" on the

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430. Some held the view that termination of unequal treaty was not a legal question at all but entirely a political question of what a party could secure through diplomacy and force. Albert H. Putney, Remarks at the 21st Annual Meeting of the American Society of International Law: The Termination of Unequal Treaties (Apr. 28, 1927), *in* 21 Am. Soc'y Int'l L. Proc. 87, at 90.

431. PCIJ did indeed construe the doctrine narrowly to hold that a change in circumstances would warrant lapse of a treaty only if the circumstances in question involved were central to the intent of the parties at the time the treaty was entered into. Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.) 1932 P.C.I.J. (ser. A/B) No. 46, at 156–58 (June 7).

432. The ICJ has held that the changed conditions had to be "so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed." Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 64 (Sept. 25).

433. The Vienna Convention on Law of Treaties, May 23, 1969, 1155 U.N.T.S., 8 I.L.M. 679, arts. 51, 52. It should be noted that the Vienna Convention has "a presumption in favor of the validity and binding force of treaties. A treaty, *any* treaty, is presumed to be valid and in force *unless* one of the grounds listed in the convention has occurred." S. E. Nahlik, *The Grounds of Invalidity and Termination of Treaties*, 65 Am. J. Int'l L. 736, 739–40 (1971).

434. Craven, *supra* note 413, at 46.

prohibition against the threat or use of force is to be read in the light of the U.N. Charter that does not outlaw use of force, only *unlawful* use of force.[435] Consequently, with unequal treaties of the past, the question becomes not the exercise of coercion and duress, but one of the legal status of threat or use of force in the eye of international norms in place at the time the treaties were made. The imperial bent of international law in the colonial age already stood recognized and legitimated by the positivist turn that international law took.[436] The implication is that any alleged use of force in treaties of the past may well have been lawful under contemporaneous norms. For good measure, the ICJ has held that any accusation of coercion to dispute the validity of a treaty must be accompanied by "clear evidence" that goes beyond, e.g., the mere presence of naval forces off the coast of the complaining party.[437] This narrow definition of coercion is particularly troubling in today's global order where effective instruments of economic coercion increasingly complement weapons of physical coercion in relations between states.[438] In the face of these conceptual and institutional moves, any continuing expectation that international law as it stands may interrogate unequal colonial treaties to rescue territorially imprisoned postcolonial formations is futile. To those who may still raise the question of unequal treaties, Brierly has an unequivocal response: "we must not invent a pseudo-legal principle to justify such action. The remedy has to be sought elsewhere, in political, not in juridical action."[439] While the question of colonial unequal treaties stands brushed aside, what about contemporary treaties that reflect existing international relations of domination? Here, it appears that it is sufficient to acknowledge that "bargaining frequently takes place in a world of uneven resources and opportunity costs,"[440] and move on.

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435. *See supra* notes 415–426 and accompanying text.

436. *See supra* notes 45–61 and accompanying text.

437. Fisheries Jurisdiction Case (F.R.G. v. Ice.), 1973 I.C.J. 14, ¶24.

438. *See generally* JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW (2010) (describing ways economic and physical coercion interact); CHERYL PAYER, LENT AND LOST: FOREIGN CREDIT AND THIRD WORLD DEVELOPMENT (1991) (debunking some of the myths of the debt crisis and its role in holding back developing countries); GLOBAL FINANCE: NEW THINKING ON REGULATING SPECULATIVE CAPITAL MARKETS (Walden Bello et al. eds., 2000) (proposing a new international financial system to respond to the needs of those for whom the international economy is managed—the people).

439. J. L. BRIERLY, THE LAWS OF NATIONS 339 (Humphrey Waldock ed., 6th ed. 1963) [hereinafter BRIERLY, THE LAWS OF NATIONS].

440. BRILMAYER, AMERICAN HEGEMONY, *supra* note 426, at 72. Perceptive analysts note, however, that "in view of the rather restrictive definition of 'coercion' in the classic law of treaties (as embodied in Art. 52 of the 1969 Vienna Convention), powerful states would still seem to enjoy a reasonably large freedom to press their claims." Pierre Klein,

The history of unequal treaties underscores that "the history of the international system is a history of inequality *par excellence*."[441] International law's posture towards legacies of colonialism has created a "*legalized hegemony*: the realization through legal forms of Great Power prerogatives."[442] The fleeting and ephemeral career of the unequal treaties doctrine in international law underscores an apparently foundational canon of the law: the specter of disorder necessitates defense of order, even an unjust order. This is in tune with Kant, author of the celebrated foundational injunction of the Enlightenment—"dare to know"—who declaimed that:

> The origin of supreme power, for all practical purposes, is *not discoverable* by the people who are subject to it. In other words, the subject *ought not* to indulge in *speculations* about its origin with a view to acting upon them, as if its right to be obeyed were open to doubt . . . . [W]hether the power came first, and the law only appeared after it, or whether they ought to have followed this order—these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state.[443]

International law, like modern law itself, is not so daring after all. It turns out that its primary function is to enable "[s]tates to carry on their day-to-day intercourse along orderly and predictable lines."[444] It is of little concern to it that the lines within which states have to exist in order "to carry out their day-to-day intercourse" are unstable, contested, and fruits of the exercise of imperial domination.

V. CONCLUSION

Modern colonialism was nothing if not an exercise in audacity. The global reach of colonial rule reordered subjects and reconfigured space. Fixed territorial demarcations of colonial possessions played a pivotal role in this process. Issuing from imperatives of colonial rule and compulsions of rivalries between colonial powers, these demarcations often cut across age-old cultural and historical social units. Postcolonial states inherited these demarcations and, with them, a host of endemic political and security afflictions. The unmistakable spatiality of the so-called

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The Effects of US Predominance on the Elaboration of Treaty Regimes and on the Evolution of the Law of Treaties, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 368 (Michael Byers & George Nolte eds., 2003).

441. ROBERT W. TUCKER, THE INEQUALITY OF NATIONS 3 (1977).

442. GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER, at x (2004).

443. KANT: POLITICAL WRITINGS 143 (Hans S. Reiss ed., 1991).

444. BRIERLY, THE LAWS OF NATIONS, *supra* note 439, at 78.

Great Games, both old and new, brings into relief the continuing salience of space and territory in an age when the forces and processes of globalization had supposedly rendered them irrelevant.

Modern international law, which in its incipient stage lent license to colonial rule, today legitimates colonial cartographies, thereby accentuating postcolonial dilemmas and conflicts. This accords with the larger affliction that plagues international law: its refusal to squarely face its complicity in the process of empire building combines with its inability to break free of the shadow of a sordid past. The career of the Durant Line highlights that when addressing many of today's intractable conflicts, the law as it exists is more of a problem than a solution. As humanity struggles to imagine political communities beyond the straitjackets of territorial states, a primary challenge is to clear the conceptual and doctrinal hurdles that remain in the way. This necessitates breaking free of imperial geographies and economies of knowledge that undergird modern legal constructs and international regimes. Albert Einstein cautioned us that "it is theory which decides what can be observed." The first step in that direction is to align our inquiries and sights with the other side of the lines drawn by international law.