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Steven R. Ratner
University of Michigan Law Schoo, sratner@umich.edu

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LAND FEUDS AND THEIR SOLUTIONS: FINDING INTERNATIONAL LAW BEYOND THE TRIBUNAL CHAMBER

*By Steven R. Ratner**

The resolution of conflicting claims to land has long stood at the heart of the project of international law. Indeed, the encounter between the order envisaged by advocates of the law of nations and what Georges Scelle called the "obsession with territory"[1] has been a defining struggle for our field, demonstrating to some its promise and to others its futility. Much, perhaps even most, legal scholarship on this subject over the last century has focused on adjudication by ad hoc tribunals or standing courts, in which jurists have derived and invoked hallowed principles that enabled them to draw lines—across mountains, deserts, rivers, and human settlements—where mere politicians had never succeeded. The doctrines on territorial sovereignty emanating from these decisions suggested a bright future for law. Yet a more pessimistic appraisal would see a darker image, one characterized by war—interstate, colonial, and civil—and territorial settlement whose lines have reflected power and politics, but surely not norms.[2] Adjudications could be viewed as a sideshow for addressing small-scale conflicts, the results dictated more by a desire to appease both parties than by reasoning toward some principled solution.

The equation of international law with international adjudication is nowhere as pronounced as in the area of territorial sovereignty. The *American Journal of International Law* and its peers have duly covered the major and minor arbitrations and court cases of the last century, from generally forgotten episodes in Latin America to the interentity borders within Bosnia and disputed islands between Eritrea and Yemen. The fascination with courts when it comes to borders stems from the very freedom that international law has accorded states to resolve these disputes by agreement.[3] Territorial negotiations seem dominated by power, politics, bargaining, and compromise; determining the role for law in this process has seemed almost impossible.[4] Thus, when border disputes were resolved through adjudication, the literature gravitated toward it to enlighten us on the state of the law.

* Of the Board of Editors. I greatly appreciate useful suggestions and corrections from Marcelo Kohen and Bruno Simma.

[1] Georges Scelle, *Obsession du territoire*, *in* SYMBOLAE VERZIJL 347 (1958).

[2] *See* Paul R. Hensel, *Charting a Course to Conflict: Territorial Issues and Interstate Conflict 1816–1992*, *in* A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 115, 130–32 (Paul F. Diehl ed., 1999) (data showing that territorial disputes are more likely to escalate into military conflicts than other disputes); *see generally* GARY GOERTZ & PAUL F. DIEHL, TERRITORIAL CHANGES AND INTERNATIONAL CONFLICT (1992).

[3] *See* NGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC §300, at 467 (Patrick Daillier & Alain Pellet eds., 7th ed. 2002).

[4] Daniel Bardonnet, *Les frontières terrestres et la relativité de leur tracé (Problèmes juridiques choisis)*, 153 RECUEIL DES COURS 9, 22 (1976 V) ("Les frontières terrestres . . . résultent, le plus souvent, de dispositions conventionelles négociées . . . sur la base de considérations de nature avant tout politique.").

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This attention to courts and case law, however, has obscured some of the most salient features of the law of nations as it regulates territory. This essay offers a corrective to that tradition. I begin with an overview of the most basic doctrinal tenets of the law of nations regarding sovereignty over land. Some of these general principles have been the staple of arbitrations for generations; but most have emerged and developed outside tribunals. I then seek to explain both the appeal of the judicial model as a way of understanding the law on territory and shortcomings to that approach. This examination permits me to make a series of observations about the place of international law in resolving land disputes outside the tribunal chamber. I hope to show that while adjudication retains promise for ending territorial disputes, the law plays critical roles in a wide range of arenas for conflict resolution.

Before beginning, I note that my conception of territorial disputes is broad, covering any set of competing claims between states (or in some cases nonstate or substate actors as well) over legal title to land, that is, territorial sovereignty. It thus includes disputes over the demarcation of an agreed border, claims over small tracts of borderlands or islets (e.g., the Chamizal dispute between the United States and Mexico, and the Minquiers and Ecrehos dispute between the United Kingdom and France), and broad claims by one state to much, or even all, of the territory controlled by another (e.g., Iraq's claims against Kuwait before 1991, and Pakistan and India's dispute over Kashmir). It does not include disputes over political influence (e.g., Syria's claim for a role in the governance of Lebanon). I therefore make no distinction between what some describe as border (or boundary) disputes and territorial (or land) disputes; nor do I assume that these disputes need erupt into armed conflict. I am also not considering maritime boundary disputes, for although they share some traits with land disputes, for the most part the former entail significantly different legal and political claims. Finally, although my purpose is not to review comprehensively the *Journal*'s offerings on this subject since 1906, in the spirit of this centennial volume I will refer at various places to key *AJIL* contributions to the field.

I. The Doctrine Reviewed

While the evolving doctrinal intricacies of the law on territorial sovereignty are beyond the scope of an essay of this sort,[5] the last century has been marked by several obvious continuities, as well as marked changes, in legal doctrine. The continuities might be described as follows.

First, the boundary between states, and between political entities within the state, is an artificial, legal construct, determined by humans, not geography. This fundamental insight of early twentieth century geographers, accepted by legal scholars, forms the baseline for all law on the subject. The geographers' and the jurists' paradigms thus coincide.[6]

Second, the boundary between states has had and continues to have momentous political and legal significance. Boundaries are central to a state's identity and a population's ties to its territory. They also mark the outer reach of the territorial jurisdiction of a state, that is, its plenary authority to prescribe, adjudicate, and enforce its laws and policies. This limit on the reach

[5] The best recent doctrinal review remains MARCELO G. KOHEN, POSSESSION CONTESTÉE ET SOUVERAINETÉ TERRITORIALE (1997); the best earlier classic is ROBERT Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW (1963).

[6] *See* S. WHITTEMORE BOGGS, INTERNATIONAL BOUNDARIES: A STUDY OF BOUNDARY FUNCTIONS AND PROBLEMS 25 (1940); PAUL DE LA PRADELLE, LA FRONTIÈRE: ETUDE DE DROIT INTERNATIONAL 172–75 (1928).

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of a state's laws and policies remains critical even though (1) states may have legal bases for asserting jurisdiction beyond the border (whether through an effects-based gloss on the territorial basis or other bases like nationality or universality); (2) states have agreed on various regional and global regimes that have lessened the obstructive effect of boundaries on interactions; (3) states have often acted illegally by asserting jurisdiction beyond their borders; and (4) individuals, businesses, and other transnational entities have permeated borders effectively. As Marcelo Kohen has noted, despite all these attempts, "the ultimate destiny of all territories . . . is to be submitted to sovereignty."[7] Indeed, the emergence of new states from former empires has made the need for identifiable and durable borders more, rather than less, important.[8]

Third, the stability of boundaries remains a core norm of the international legal system. Even in an era when states had legal recourse to war, they recognized the advantages that flow from the settlement of boundary disputes. Boundaries secured by legal agreement can be changed by future agreement, but states and international organizations view revision as an exceptional remedy. Contemporary manifestations of this principle include the rule in the Vienna Convention on the Law of Treaties precluding reliance on *rebus sic stantibus* to challenge a border treaty,[9] the rule in the Vienna Convention on the Succession of States in Respect of Treaties denying that succession has any effect on border treaties,[10] and the presumptive inheritance of colonial-era boundaries by new states.

Fourth, title to territory is determined through recourse to two methods that have remained essentially unchanged in theory—though not always applied in practice—through the century: (1) Title is sufficiently proved, and the resulting borders determined, if a claimant state can show that it lawfully received the territory from a prior sovereign, whether from another state through a treaty of cession or by way of state succession, including decolonization. (2) In the absence of such proof, or in determining whether the prior sovereign in fact had title, the guiding principle remains that set nearly eighty years ago in the *Island of Palmas* case, that "continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty."[11] Title thus derives from the actual exercise of state power over a territory; the amount of display must be as much as, but not more than is, in Michael Reisman's phrase, "contextually appropriate," depending on the territory's accessibility and habitability.[12]

[7] Marcelo G. Kohen, *Is the Notion of Territorial Sovereignty Obsolete? in* BORDERLANDS UNDER STRESS 35, 44 (Martin Pratt & Janet Allison Brown eds., 2000); *see also* Stanley Waterman, *States of Segregation, in* THE RAZOR'S EDGE: INTERNATIONAL BOUNDARIES AND POLITICAL GEOGRAPHY 57, 70 (Clive Schofield et al. eds., 2002) (stating that "despite the destabilisation of notions of bounded categories and groups, . . . boundaries are very much alive and well, both in the legal divisions separating nation-states and in the internal social and spatial patterns of separation and segregation").

[8] SAADIA TOUVAL, THE BOUNDARY POLITICS OF INDEPENDENT AFRICA 24–45 (1972).

[9] Vienna Convention on the Law of Treaties, May 23, 1969, Art. 62(2)(*a*), 1155 UNTS 331.

[10] Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, Art. 11, 1946 UNTS 3.

[11] Island of Palmas (Neth./U.S.), 2 Rep. Int'l Arb. Awards 829, 840 (1928); *see also* Frontier Dispute (Burk. Faso/Mali), 1986 ICJ REP.554, 586–87, para. 63 (Dec. 22) (on relationship between title and colonial acts of administration).

[12] W. Michael Reisman, Case Report: The Government of the State of Eritrea and the Government of the Republic of Yemen, *in* 93 AJIL 668, 679 (1999); *see also* SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 338 (1997).

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Finally, states generally are free to agree on the disposition of disputed noncolonial (or non-trust or -mandated) territory and its ultimate borders as they see fit. More specifically, despite the evolution of the norm of self-determination of peoples, states are still under no general duty to consult or act according to the wishes of the population of a disputed territory with respect to its future status. Moreover, international law does not require territorial autonomy for distinct regions within states. This aspect of the law may be changing, however, especially with respect to indigenous peoples' claims to land.

Nonetheless, the law on boundaries has hardly remained static. The following developments mark the last century.

First, with the advent of the United Nations Charter, conquest is now prohibited as a method for acquiring territorial sovereignty. All states are under an obligation to settle all their boundary disputes through peaceful means. And as the 1970 Friendly Relations Declaration makes clear, the belief by one state that it has legal title to the territory of another does not legitimate the unilateral use of force across even a provisional border.[13] The incorporation of this core norm in the Vienna Convention on the Law of Treaties means that boundary treaties procured through the threat or use of force are void ab initio.[14] And as Mark Zacher has pointed out, the Charter era has been characterized by significantly less acquisition of territory through aggression than periods before it.[15]

Second, the norm of self-determination has signified that certain peoples have a legal right to alter certain borders unilaterally. Thus, although colonial powers defined their borders to include territories under colonial control, those territories came to have a separate legal status, and peoples living in them a legitimate claim to alter the borders of the empire by carving out a state of their own. Under my and others' understanding of the Friendly Relations Declaration, peoples who are subject to systematic persecution and are denied participation in the national governance structures of the states where they live have a similarly legitimate claim.[16]

Third, *uti possidetis* has evolved into a norm of customary international law, presumptively requiring states emerging from decolonization to inherit the interimperial or intraimperial (administrative) borders in place at the time of independence. Nevertheless, some decolonization processes have resulted in different borders; states are free to agree with neighbors upon different borders; and the rule does not address the lawfulness of secessions.[17]

Fourth, the notion of *terra nullius* is now archaic. All land territory (other than Antarctica) falls under the territorial sovereignty of one state or another.

Finally, the UN Security Council can direct the parties to a boundary dispute to solve it according to certain terms, as well as require states to adhere to a border agreement they previously concluded. The Council took the former step regarding the Middle East in Resolutions 242 and 338, and the latter regarding Iraq and Kuwait in Resolution 687. The Council's power

[13] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex, princ. 1, UN GAOR, 25th Sess., Supp. No. 28, at 121, 122, UN Doc. A/8028 (1970) [hereinafter Friendly Relations Declaration].

[14] Vienna Convention on the Law of Treaties, *supra* note 9, Art. 52.

[15] Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215, 223–34 (2001).

[16] *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 120 (1995).

[17] Steven R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AJIL 590, 598–601 (1996).

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to impose a border *de novo* or transfer territory from one state to another remains contested in theory and untested in practice.

I must add one critical hybrid of continuity and change in the legal order—the persistence of what the League of Nations Committee of Jurists for the Aland Islands dispute, the Canadian Supreme Court, and others have called "de facto situations,"[18] those in which the outcomes of territorial disputes do not conform to key rules governing the disposition of territory. The century has witnessed such situations during periods of upheaval when borders were redrawn (1) by the strongest powers (e.g., after the two world wars); (2) by successful colonial rebellions or wars before the norm requiring decolonization was accepted (e.g., in Indonesia and Indochina); and (3) through secessions that may not have met the criteria for legality (e.g., East Pakistan and, in my view, parts of the former Yugoslavia). Smaller-scale episodes involved the Indian takeover of Goa and the Indonesian absorption of East Timor for twenty-seven years. Most of these territorial changes were accepted by key states and the United Nations as faits accomplis—principally through the effective dropping of the accompanying dispute from the international agenda (even if some states formally reserved their legal positions) or the admission of new states to the United Nations—regardless of the qualms about their underlying legality.[19] Thus, Robert Jennings noted that the ban on acquisition of territory by force had not prevented eventual title by consolidation and recognition by other states.[20] This trend is hardly over, as the Moroccan government (vis-à-vis the Western Sahara), proindependence groups in Quebec, and proannexation movements in Israel (vis-à-vis the West Bank) look forward to a day when so-called facts on the ground displace legal norms. At the same time, states and international organizations have sometimes resisted acknowledging such situations, for example, some Western governments regarding the Baltic states from 1940 to 1991, and many states regarding East Timor from 1975 to 1999.

The above schema leaves out many subsidiary aspects of today's doctrine, including (1) the critical date, the cutoff point beyond which one state's actions concerning territory do not affect title; (2) the definition and place of colonial *effectivités* in determining title; (3) the role of intertemporal law; and (4) the relevance of, and weight to be given to, various aspects of state practice such as recognition, protest (or lack thereof), and maps. These doctrinal elements feature heavily in judicial and arbitral decisions, and remain essential to the jurisprudence of the International Court of Justice (ICJ).[21] Yet my sketch points up that most of the fundamental principles have evolved independently of those decisions. With the exception of the *Island of Palmas* rule, in which an arbitrator played a formative role, most of these principles derive from treaties, custom, and the decisions of significant international organizations. Courts have helpfully elaborated their contours but have not created them.

[18] Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, LEAGUE OF NATIONS O.J., Spec. Supp. No. 3, at 5–6 (1920); Reference *re* Secession of Quebec, [1998] 2 S.C.R. 217, 296.

[19] *See, e.g.*, Quincy Wright, *The Goa Incident*, 56 AJIL 617, 631 (1962) (predicting UN acquiescence in Indian takeover and perfunctorily equating it to acceptance of Israel's possession of land beyond 1947 partition lines, as UN recognition of "a situation which it regards as, on the whole, beneficial, even if this situation originated in illegality").

[20] JENNINGS, *supra* note 5, at 67. For a careful recent treatment of the tensions between effectiveness and legality, see ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW (2006).

[21] *See, e.g.*, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 ICJ REP. 625 (Dec. 17).

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II. TERRITORIAL DISPUTES AND THE JUDICIAL MODEL

Scholars in the early twentieth century, attracted to the idea of increased use of international judicial mechanisms for terminating conflicts, devoted significant attention to the justiciability of interstate disputes. The eighteenth annual meeting of the American Society of International Law in 1924 featured a panel entitled "The Distinction Between Legal and Political Questions." Reflecting the conventional wisdom, Professor Charles Fenwick defined legal, and therefore justiciable, questions as those "in which the dispute as to the respective rights of the parties is governed by a fairly definite rule of law."[22] Edwin Borchard, on the other hand, offered a more pragmatic position, noting that the distinction lies "in the willingness of the nation to submit it to judicial determination; in the importance which the question is deemed to possess for the national interests rather than in its source."[23] The following year, J. L. Brierly adopted a similar view in a speech in London, noting that "a dispute is justiciable whenever, willingly or perforce, [each claimant] makes that claim conditional upon its satisfaction being declared to be its legal right; it is not justiciable if the claim is unconditional and the party is resolved and able to persist in it"; "[t]he really important distinction is that between disputes which we may fairly expect that States will submit to judicial decision and those which we may not."[24]

Yet Borchard and Brierly seemed to disagree on whether border disputes were especially justiciable. Borchard stated that "many boundary disputes" had shown themselves to be justiciable; states were willing to submit them to arbitration because such disputes did not "affect the vital interests of the nations."[25] Brierly, on the other hand, rejected the idea that justiciability turned on subject matter, noting in particular that even boundary disputes are not per se justiciable given the reluctance of states to submit them to courts.[26] One scholar in the *Journal* effectively split the difference in pointing out that in the past states had agreed on arbitrations of border disputes—making them justiciable—but had empowered arbitrators to decide on grounds other than the law.[27]

Data showing that the overwhelming number of territorial disputes have not been resolved by courts[28] do not alone answer whether Brierly or Borchard was right; yet there is a sense in which boundary cases seem ripe for judicial solution. First, the case law on boundary disputes is rich, so rich that Georg Schwarzenberger claimed that courts have made "an even greater contribution than state practice to the elucidation of the operative rules"[29]—a point with which

[22] Charles G. Fenwick, Remarks, *in The Distinction Between Legal and Political Questions*, 18 ASIL PROC. 44, 44 (1924); *see also* Robert Yorke Hedges, *Justiciable Disputes*, 22 AJIL 560, 564 (1928) (same view).

[23] Edwin M. Borchard, Remarks, *in The Distinction Between Legal and Political Questions*, *supra* note 22, at 50, 53.

[24] J. L. Brierly, *The Judicial Settlement of International Disputes,* 4 J. BRIT. INST. INT'L AFF. 227, 236, 240 (1925).

[25] Borchard, *supra* note 23, at 54.

[26] Brierly, *supra* note 24, at 240.

[27] Miroslas Gonsiorowski, *Political Arbitration Under the General Act for the Pacific Settlement of International Disputes*, 27 AJIL 469, 472–73 (1933); *see also* NORMAN HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 197–208 (1945).

[28] Todd L. Allee & Paul K. Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*, 100 AM. POL. SCI. REV. 219, 220–21, 229 (2006) (of 1490 cases of territorial negotiations involving 348 disputes from 1919 to 1995, 30 resulted in pursuit of judicial or arbitral solution).

[29] Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AJIL 308, 308 (1957).

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I can agree if by such rules he means not the key principles noted above but, rather, details such as the critical date regarding title. Although only a fraction of border disputes get settled through courts or arbitral bodies, a large percentage of the arbitral case law concerns boundary disputes.[30] In the Americas in particular, arbitrations have represented an important method for resolving territorial disputes, from numerous cases decided in the late nineteenth and early twentieth centuries to more recent cases between Chile and Argentina over the Beagle Channel and Laguna del Desierto.[31]

Second, judicial settlement takes particular advantage of the skills of lawyers. Lawyers can take command of the streams of documents and maps that need to be presented; indeed, the process resembles any other litigation with an extraordinarily large amount of evidence. Lawyers are also skilled at parsing the cases to determine the doctrines and approaches to be adopted or rejected. These are the "operative rules" to which Schwarzenberger referred—as complex as any in tort or contract. Jennings described this corpus of norms as "very much lawyers' law."[32] In essence, lawyers like arbitration of any kind because we, and not the diplomats, can control the process.

Third, there is some evidence to confirm the lawyer's intuition that boundary disputes are more amenable to judicial settlement than other interstate disputes because courts can deflect blame for an adverse decision from domestic actors, and thereby provide political cover for a concession that domestic actors would be unwilling to make in negotiations. Political scientists have conducted quantitative analysis to support the view that governmental leaders are willing to send boundary disputes to arbitration when they face strong domestic opposition to negotiated territorial concessions.[33] Scholars have not, however, tested the proposition that boundary disputes per se are more amenable to arbitration than other disputes. Nonetheless, the enormous sums that governments are willing to spend presenting their cases before tribunals seem to be a small price to pay for the avoidance of political blame for any loss of national pride.

Beyond these traits, I believe the judicial method has two special attractions to the international lawyer—one about the substantive law and one about its process. First, the omnipresence of treaties and the richness of the case law allow lawyers to state their claims without delving too far into custom—the soft underbelly of international law—and the challenges of demonstrating state practice and *opinio juris*. Treaties and judicial opinions can be parsed carefully for what is said and what is left open, with a sense that the content of those treaties and cases is the full expression of the law. Indeed, a finding by an arbitral tribunal that a certain rule has achieved the status of custom becomes all that is needed to show that it has. To mention one obvious example, the ICJ's pronouncements on the contours of *uti possidetis* in the *Burkina Faso/Mali* case are now the primary source for that rule, so that the actual practice of states merits only secondary mention.[34]

[30] By way of a crude calculation, roughly one-third of the contentious cases decided by the ICJ have involved land or maritime boundary disputes. When I took a public tour of the Peace Palace in the early 1990s, the young guide, upon our approach to the ICJ courtroom, informed us that the Court mostly decided border disputes.

[31] L. H. Woolsey, *Boundary Disputes in Latin-America*, 25 AJIL 324 (1931). Woolsey wrote case notes on numerous such arbitrations for the *Journal.*

[32] R. Y. Jennings, *General Course on Principles of International Law*, 121 RECUEIL DES COURS 323, 430 (1967 II). For one insider's perspective, see Jeremy Carver, *The Practicalities of Boundary Dispute Resolution*, *in* INTERNATIONAL BOUNDARIES AND BOUNDARY CONFLICT RESOLUTION 119 (Carl Grundy-Warr ed., 1990).

[33] Allee & Huth, *supra* note 28, at 229–32.

[34] *See, e.g.*, Conference on Yugoslavia, Arbitration Commission, Opinion No. 3, para. 2, 31 ILM 1499, 1500 (1992) (citing *Frontier Dispute* case) [hereinafter Opinion No. 3].

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Second, I suspect that the judicial settlement of border disputes shores up the faith of lawyers in the clarity and decisive effect of legal rules. A ruling such as that on the Aouzou Strip, where the ICJ, in awarding the territory to Chad, helped terminate a dispute that had led to war, and where a state often branded as a law violator (Libya) quickly withdrew from the strip after losing the case, gives us ammunition against political realists: where guns and diplomats could not succeed, the Court stepped in and reached a ruling on the basis of legal sources. A marvelous example of this faith in the judicial resolution of land disputes appeared in the *Journal*'s 1970 article about the Arab-Israeli conflict by Quincy Wright, in which the author suggested that the ICJ or an arbitral tribunal decide the final borders of Israel and its neighbors, on the basis of a mandate to reopen all territorial changes since the 1947 partition plan.[35] (One doubts that the arbitration over the hotel strip at Taba, as useful as it was for resolving a thorny issue between Israel and Egypt, was what he had in mind.[36])

Yet lawyers also grasp, or at least they should, the limitations of the judicial method. As for the substantive rules, although panels and courts have invoked numerous rules, the challenge of reading opinions is to discern whether the doctrine drives the outcome or the reverse. One example is the fate of the black letter doctrine on the acquisition of territory. Although treatises posit that territory can be acquired by cession, occupation, accretion, conquest, and prescription,[37] scholars have long noted that tribunals, at least beginning with the *Island of Palmas*, have engaged in analysis without relying on these categories.[38] Charles de Visscher reconceptualized a court's decision-making process as a search for the "consolidation of title," a concept over which courts still differ;[39] while Schwarzenberger referred to sovereignty, consent, and recognition as the three governing principles driving the outcome of cases.[40]

Still others have suggested that courts are not likely to follow any clear doctrine at all, however much they make reference to rules and precedents. Thus, as A. L. W. Munkman wrote in 1972 after examining twenty-five arbitral awards, because tribunals tend to

> weigh all the links of the territory with each claimant, and to award sovereignty to the claimant with preponderant links with the whole of the territory—or, if the authority is given, to split the territory—the process cannot be merely quantitative, and the criteria listed can serve only as guide-lines, not rules.[41]

Daillier and Pellet pointed to a "great empiricism," as the courts combine proof of effective authority with equity.[42] Surya Sharma's policy-oriented approach emphasized the complexity of the process of territorial acquisition and the need for courts to balance all the interests of the

[35] Quincy Wright, *The Middle East Problem*, 64 AJIL 270, 278 (1970).

[36] Boundary Dispute Concerning the Taba Area (Egypt-Isr. Arb. Trib. 1988), 27 ILM 1421 (1988).

[37] *See, e.g.*, 1 OPPENHEIM'S INTERNATIONAL LAW 679 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

[38] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 127 (6th ed. 2003) (tribunal "will not apply the orthodox analysis to describe its process of decision").

[39] CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 209 (rev. ed. 1968); *see also* Award of the Arbitral Tribunal in the First Stage of Proceedings (Eritrea/Yemen), para. 451 (1998), *available at* <http://pca-cpa.org> (endorsing this approach). *But see* Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea Intervening), Merits, 2002 ICJ REP. 303, 352, para. 65 (Oct. 10) (rejecting historical consolidation in favor of "established modes of acquisition") [hereinafter Cameroon v. Nigeria].

[40] Schwarzenberger, *supra* note 29, at 312–23.

[41] A. L. W. Munkman, *Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes*, 1972–73 BRIT. Y.B. INT'L L. 1, 109.

[42] NGUYEN QUOC DINH, *supra* note 3, §301, at 471.

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parties, not apply abstract doctrine. He pointed out that, in the end, courts have awarded territory to the state with the "preponderant administrative, social, geographical, historic and cultural links with the disputed territory"[43] and relied upon multiple sources of evidence of the attitudes of the relevant actors. As seen in an appraisal of the *Yemen/Eritrea* decision in this *Journal*, even such core doctrines as the critical date, which was devised to prevent the parties from submitting self-serving information to the tribunal, has proved to be flexible and, indeed, expendable,[44] as have doctrines on the relationship between treaties conferring title and colonial *effectivités*.[45]

I am hardly suggesting that tribunals routinely split the difference to appease both parties; the *Libya/Chad*, *Botswana/Namibia*, and *Indonesia/Malaysia* cases entailed relatively simple interpretations of treaties, resulting in a complete victory for one side.[46] But one cannot be sure to what extent the doctrine is malleable enough to justify numerous outcomes and whether the arbitral awards are candid about the bases for the decisions (even if international courts are no more guilty of lapses in this regard than domestic courts). The ICJ's judges themselves have gently traded barbs about whether the Court's rulings improperly favor political realities over legal principles.[47] On the other hand, from the perspective of the litigants, who see the court as providing political cover, a certain amount of doctrinal inconsistency or opacity will not really matter—the opinion need only be good enough to convince key domestic constituencies that it has treated their claims seriously.

As for the process, international tribunals cannot solve boundary disputes through recourse to law alone. L. H. Woolsey noted various repudiations by Latin American states of adverse arbitral decisions;[48] the long delay in resolving the Chamizal dispute was due to the rejection by the United States of an arbitral award in favor of Mexico; and Nigeria's initial refusal to withdraw from the Bakassi Peninsula despite the ICJ's 2002 judgment awarding the area to Cameroon triggered intense UN diplomatic involvement before Nigeria began its evacuation in the summer of 2006. In more systematic reviews, Beth Simmons noted recently that eleven Latin American boundary arbitrations since 1888 had resulted in some or total noncompliance, while ten had led to compliance;[49] and in an *AJIL* article studying compliance with ICJ judgments since 1987, Colter Paulson indicated that three of the five disputes marked by some noncompliance concerned a land boundary, though he found full compliance with five other

[43] SHARMA, *supra* note 12, at 338; *see also id.* at 196–211, 335–40.

[44] Reisman, *supra* note 12, at 677–82; *see also* Jennings, *supra* note 32, at 425–26.

[45] Marcelo G. Kohen *La relation titre/effectivités dans le contentieux territorial à la lumière de la jurisprudence récente*, 108 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 561, 571–72 (2004) (criticizing Eritrea-Ethiopia commission).

[46] Territorial Dispute (Libya/Chad), 1994 ICJ REP. 6 (Feb. 13); Kasikili/Sedudu Island (Bots./Namib.), 1999 ICJ REP. 1045 (Dec. 13); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 ICJ REP. 625 (Dec. 17).

[47] *Compare* Cameroon v. Nigeria, *supra* note 39, at 474 (Koroma, J., dissenting), *with id.* at 506 (Mbaye, J., sep. op.); *see also* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 227 (1994) (condemning Court's failure to articulate choices about desired ends in relying upon equity in continental shelf cases).

[48] *See, e.g.*, Woolsey, *supra* note 31; *see also* L. H. Woolsey, *The Settlement of the* Chaco *Dispute*, 33 AJIL 126, 128 (1939) (limited scope of arbitration between Bolivia and Paraguay due to "the military victory of doughty Paraguay").

[49] Beth A. Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 J. CONFLICT RES. 829, 848–49 (2002).

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boundary decisions.[50] While tribunals can significantly advance the conflict resolution process, compliance often requires close follow-up by regional actors and, in many cases, renewed negotiations, as the recent Bakassi episode demonstrates. The parties' overall political relationship will directly affect the prospects for successful implementation of judicial settlements.[51] Thus, the willingness of states to submit their boundary dispute to adjudication need not indicate a willingness to comply with an adverse judgment.

III. INTERNATIONAL LAW AND THE POLITICS OF BOUNDARY SETTLEMENT

If, despite the numerous arbitral and judicial decisions on boundaries, courts have limitations as institutions for resolving disputes, then we are back to the central challenge noted earlier: since states enjoy a large measure of freedom of contract in the resolution of border disputes, with little or no *jus cogens* to constrain them, what role has international law played and can it play in their decision making?

International Law as Rationalization

The large number of land disputes resulting in armed conflict over the last century suggests that in many instances, disputants invoked international law only after deciding to advance their claims through armed force—to justify a fait accompli. This strategy, particularly prevalent in the pre-Charter era, has been used for both laudable and illicit ends. One example of the former involves the attitude of the British government toward the Munich Agreement of 1938, which ceded the Sudetenland to Germany.[52] Once Hitler had invaded and occupied most of Western Europe and the Allies had committed themselves to the defeat of Germany, the Czech government-in-exile was concerned that in the end the Munich Agreement might bind Britain to continue to accept the transfer of the Sudetenland to Germany.[53] In a 1942 note to Czech foreign minister Jan Masaryk, Anthony Eden wrote that Germany had "deliberately destroyed" the Munich Agreement, leaving Britain "free from any engagements in this respect" and the Czechoslovak borders open to final settlement at the end of the war.[54] The British position is defensible under modern treaty law as a response to a material breach by Germany (in taking over the rest of Czechoslovakia), although it is at odds with the principle of stability of boundaries in that states cannot invoke a fundamental change in circumstances to challenge a boundary treaty.[55] Yet, assuming that the British were justified in terminating the Munich

[50] Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AJIL 434, 457 (2004). I do not include the *Gabčíkovo-Nagymaros* dispute in my count even though Paulson did.

[51] A. O. CUKWURAH, THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW 150–51 (1967) (noting links between state of diplomatic relations and results of boundary negotiations). On the difficulties of implementing the boundary arbitral award between Ethiopia and Eritrea, see Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?* 17 EUR. J. INT'L L. 699, 707–10 (2006).

[52] Munich Agreement, UK-Fr.-Italy-Ger., Sept. 29, 1938, 36 Martens Nouveau Recueil 26. For a strong critique, see Quincy Wright, *The Munich Settlement and International Law*, 33 AJIL 12 (1939).

[53] Today, however, it would be found under the Vienna Convention that the Munich Agreement created no obligations for Czechoslovakia. Vienna Convention on the Law of Treaties, *supra* note 9, Arts. 35, 52.

[54] Letter from Anthony Eden to Jan Masaryk (Aug. 5, 1942), *in* Postwar Territorial Settlements, 3 Whiteman, DIGEST §15, at 158.

[55] Vienna Convention on the Law of Treaties, *supra* note 9, Arts. 60, 62. *But see* SC Res. 687, para. 2 (Apr. 3, 1991), 30 ILM 847 (1991) (treating 1960 Iraq-Kuwait boundary agreement as still in force despite Iraq's very material breach in invading Kuwait).

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accords, the government would seem to have invoked international law rules on treaty termination principally to rationalize the Allied position on the future borders of Czechoslovakia. For all intents and purposes, the war had created a tabula rasa with respect to that border and others.

A second, more nefarious example concerns the Soviet Union's invocation of international law after the war. During the critical negotiations on the borders of Poland, the USSR insisted on using the Curzon line as a boundary between the two states. That line, originally proposed by the United Kingdom after World War I to end fighting between Poland and the USSR, had been immediately rejected by the latter, which eventually ended up losing significant territory east of the line to Poland, as recognized in the USSR-Poland Riga Treaty of 1921. The Molotov-Ribbentrop Pact of 1939 had given the Soviet Union a sphere of influence approximately up to the Curzon line, and the USSR soon reconquered the land. Despite pleas from the Polish government in London, the U.S. and British governments were prepared in the spring and summer of 1945 to meet Stalin's demands. But what of the Riga Treaty—how could it be changed without Poland's consent? Again, the parties invoked international law to defend their solution. Though Eden principally argued to a skeptical House of Commons in terms of the justice and stability of the modified Curzon line, he also emphasized that Poland had violated the post–World War I minority treaty regarding Eastern Galicia; he added that the United Kingdom had never guaranteed Poland's 1939 frontiers, implying that Britain was legally free to endorse a new line that took significant territory away from Poland.[56] For good measure, however, the Allies agreed at Yalta that the "opinion" of the new Polish government would be "sought in due course" and that the final decision would await a peace conference, that is, be confirmed by treaty.[57] In August 1945, Poland, through its Moscow-installed regime, concluded a border treaty with the USSR that recognized the changes imposed by the Allies at Yalta.[58] International law was thus invoked both to challenge the Riga Treaty and to ratify the alternative line, but the line was not determined by a careful consideration of the legal claims of the two parties.[59]

In both of these incidents from the World War II era, the law on treaties became a convenient justification for actions the parties were prepared to take regardless of the law. The Allied plans for Germany would not tolerate rewarding it with any of the territory obtained through the threats or use of force from 1938 to 1941, including the Munich Agreement; and the Soviet plans for Poland would not allow for retreating much from the Molotov-Ribbentrop line or for a Polish state to extend as far east as recognized in the Riga Treaty. The parties invoked norms of treaty law and consent, though it is difficult to see how those norms might have influenced their policies. Indeed, the best characterization of the period between 1938 and 1945 is as a prolonged "de facto situation" in which states effectively advanced their territorial claims through the use of force alone, followed by acceptance by international actors either temporarily—for a short period in the case of certain German conquests, and a longer one in that of the Soviet takeover of the Baltic states—or permanently—in the case of most of the map of Europe after Yalta and Potsdam.

[56] Whiteman, *supra* note 54, §17, at 268, 270.

[57] *Id.* at 263.

[58] Treaty Concerning the Polish-Soviet State Frontier, Pol.-USSR, Aug. 16, 1945, 10 UNTS 193.

[59] For *AJIL* Editorial Comments condemning the solution, see L. H. Woolsey, *Poland at Yalta and Dumbarton Oaks,* 39 AJIL 295 (1945); Herbert Wright, *Poland and the Crimea Conference,* 39 AJIL 300.

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International Law as Persuasion

This cynical operation of international law is only one of its manifestations during boundary disputes. Actors invoke much of the international law on territory as part of their efforts to persuade important constituencies to support their territorial claims. The target of such argumentation might be the other disputant, but more likely each side realizes that the other will probably not relent on the basis of legal arguments alone. Instead, the targets are third parties that can exert influence to produce a settlement in the side's favor. States might make these claims before international organizations, in bilateral exchanges with other governments, or in white papers available to the public. In the academic realm, one sees a classic instance in an article written by the legal adviser to the Indian Ministry of External Affairs, in which the author "propose[s] to consider . . . the Sino-Indian boundary question from the point of view of international law," but in fact offers a detailed brief, with ample citations to treaty and custom, for the Indian government's claims in the face of Chinese armed acts on the border.[60] China issued its own white paper on Tibet in 1992, one of whose sections is devoted to the territory's "ownership."[61]

Although many political scientists question the persuasive effect of legal argumentation during political disputes, Thomas Franck made a strong case in this *Journal* about its influence on the positions of governments in response to the Argentine invasion of the Falkland/Malvinas Islands in 1982. Franck concluded that British arguments about Argentina's violation of Charter Article 2(4) and the threat represented by unilateral action to resolve territorial disputes resonated more effectively with other states than Argentina's points about the importance of decolonization.[62] Though the distinguished scholar of boundaries, J. R. V. Prescott, downplays the role of legal arguments by noting the obvious point that states do not typically make territorial claims based on legal contentions alone,[63] governments do invoke international law in the hope that it may persuade where claims based on history, geography, or economics will not.

Part of this process resembles the *dédoublement fonctionnel* identified by Scelle many years ago, as states take legal positions that seem at odds with their short-term national interests but are in fact an attempt to develop international norms that will help them in future territorial settlements or even arbitration.[64] Malcolm Shaw pointed out how African governments, in offering views to the International Law Commission during the drafting of the Vienna Convention on Succession of States in Respect of Treaties, took pains to adopt positions that would not prejudice their territorial claims. Somalia, for instance, argued neither for a clean slate doctrine—since it benefited from some UK and Italian treaties—nor for automatic succession—

[60] K. Krishna Rao, *The Sino-Indian Boundary Question and International Law*, 11 INT'L & COMP. L.Q. 375, 375 (1962).

[61] Information Office of the State Council of the People's Republic of China, Tibet—Its Ownership and Human Rights Situation (Sept. 1992), *available at* <http://www.china.org.cn/e-white/tibet/index.htm>.

[62] Thomas M. Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AJIL 109 (1983). As Franck recognized, *id.* at 119–23, appeals to principle often do not carry the day, or may run into appeals to countervailing principles. *See* W. Michael Reisman, *The Struggle for the Falklands*, 93 YALE L.J. 287, 304–08 (1983) (clash between self-determination and decolonization norms).

[63] J. R. V. PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES 107 (1987).

[64] Georges Scelle, *Le phénomène juridique du dédoublement fonctionnel*, *in* RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION: FESTSCHRIFT FÜR H. WEHBERG 324, 331 (1956).

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because of its longstanding claims to parts of Kenya and Ethiopia.[65] States are thus seriously engaging with international law principles on territorial sovereignty, even when the positions they adopt are inconsistent with other political interests.

International Law as a Motivator for Action

Governments have also regarded legal claims as so central to their quest for land that they are willing to use more than words to advance them. For example, all the states laying claim to the Spratly Islands—whether for military reasons or their petroleum reserves—are acutely aware of the *Island of Palmas* rule: in the absence of evidence of clear title, to the state with the strongest peaceful display of governmental authority go the spoils. The reach of Judge Huber's rule is not only the arbitral tribunal. For any negotiated solution to the Spratlys, perhaps in the framework of the Association of Southeast Asian Nations, will surely follow Huber's guidance, even if states have the freedom to contract around it. The results are the displays of Chinese, Taiwanese, Filipino, Vietnamese, Bruneian, and Malaysian authority in the islands, to the point of planting flags and hapless sailors on uninhabitable rocks.[66] In the end, a tribunal might allocate the islands according to old documents showing legal title in one or another of the states. But if effective occupation is taken into account—or, more important, if the dispute never reaches a tribunal—the parties will still seek the strongest legal position on the basis of the *Palmas* rule.

Other states have followed this protocol. The dispatch by Morocco of 350,000 citizens to Western Sahara since 1975 is not merely about affecting the results of a perpetually delayed UN plebiscite; rather, it suggests an awareness of the power—in the courtroom and in the negotiating room—of the self-determination norm. Morocco is keen to demonstrate that Western Sahara is integrally part of Morocco.[67] By so doing, it can claim to the United Nations and others that it is respecting self-determination in denying the territory's independence. Israel's settlements in the West Bank in part aim at the same goal, though any legal strategy based on self-determination is misplaced, as it ignores the ban on settlements by occupying powers under the Fourth Geneva Convention of 1949.[68]

International law on territory may motivate governments in a far more benign sense; namely, when states that have taken aggressive action against neighbors end up withdrawing under international pressure, there is at least the possibility that both the outside involvement and the decision to withdraw are motivated in part by Article 2(4) itself. I advance this claim more cautiously, because in contrast to the prior situation, where the state behavior itself seems

[65] MALCOLM SHAW, TITLE TO TERRITORY IN AFRICA 236–40 (1986).

[66] *See* Liselotte Odgaard, *The Spratly Dispute and Southeast Asian Security: Towards a Pluralist Regional Order? in* BORDERLANDS UNDER STRESS, *supra* note 7, at 421, 423. This sort of posturing also takes place even about very unimportant islands. *See Tobin Announces That Eighteen Lightstations Will Be Destaffed,* Canada NewsWire, Aug. 2, 1995, *available in* LEXIS, News Library, Wire Service Stories File (Canadian ministerial decision to maintain personnel at lighthouse at Machias Seal Island, in dispute between the United States and Canada, "[f]or sovereignty reasons"). I appreciate this morsel from John Crook.

[67] For an official statement, see Historical Foundations of the Moroccanity of the Sahara (n.d.), *at* <http://www.mincom.gov.ma/english/reg_cit/regions/sahara/s_hist.htm> (noting, regarding the Moroccan-organized assembly following Morocco's 1975 Green March: "This way of consulting the population is in conformity with international law and international practice in the matter of decolonization.").

[68] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 49(6), 6 UST 3516, 75 UNTS 287.

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evidence of an awareness of the law—why else spend military resources to occupy isolated rocks?—the decision to withdraw may stem equally from other considerations. Zacher's data showing a significant reduction in territorial aggrandizement in the Charter era, compared to prior years, suggest that Article 2(4) has limited the ability of states to effect boundary changes through force.[69]

International Law During Boundary Negotiations

In the domestic setting, the paradigmatic role for legal rules during negotiations—from plea bargains to divorce settlements—is captured in Robert Mnookin and Lewis Kornhauser's concept of "bargaining in the shadow of the law."[70] Their classic article posits that the parties to divorce negotiations will always be guided by what courts have ruled in the past and how they might rule in their case if they fail to agree.[71] In the international setting, despite the large proportion of arbitrations that concern boundaries, the Mnookin-Kornhauser dynamic, which emphasizes the effect of adjudication on negotiation, fits less well. The absence of compulsory jurisdiction outside Article 36(2) of the ICJ Statute and compromissory clauses in treaties means that only in rare cases does the law require two sides to face an adjudication of their border dispute. States may be pressured to resolve their dispute in court—as were Libya and Chad by the Organization of African Unity (OAU) in the case of the Aouzou Strip—but the low proportion of land disputes referred to arbitration suggests either that third parties are reluctant to push that mode upon disputants or that the disputants effectively resist that pressure.[72] Thus, border negotiators would seem infrequently to bring international law to bear in their talks out of fear that the other party will force such law upon them through judicial settlement.

Yet the law does have a place in boundary negotiations—as in all negotiations[73]—even if its shadow is not cast by a court. First, international law may represent a sort of fact on the ground that neither party can ignore. In particular, it can create a lever for one party or point of pressure upon the other to produce a major concession. During the long dispute between the United States and Mexico over the Chamizal, Mexico had a key norm of international law on its side—namely, the binding nature of the 1911 award by the Mexican-U.S. International Boundary Commission that had divided the tract between the two states.[74] Despite the U.S. repudiation of the award (on the view that the panel had lacked the power to divide the area), Mexico was determined to see that the award was respected, and it eventually prevailed.[75] Before the negotiations on the reunification of Germany, including settlement of its border with Poland, Poland insisted on the formal recognition by the reunited Germany of its de facto boundary as defined in the Potsdam Agreement and subsequently set forth in the Treaty of

[69] Zacher, *supra* note 15, at 223–34.

[70] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[71] *Id.* at 968–71.

[72] *See supra* note 28; *see generally* PAUL K. HUTH, STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT 195–239 (1996) (describing 129 disputes from 1950 to 1990).

[73] *See* Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 639 (1976) (dispute-negotiation "consists largely of the invocation, elaboration, and distinction of principles, rules, and precedents").

[74] U.S. DEP'T OF STATE, 1911 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 573 (1918).

[75] Philip C. Jessup, *El Chamizal*, 67 AJIL 423 (1973).

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Görlitz between Poland and the German Democratic Republic and the Warsaw Treaty between Poland and the Federal Republic of Germany, despite the official West German position that neither of those instruments could bind a reunited Germany. In the end, Germany relented, permitting the definitive resolution of the border dispute in the November 1990 Polish-German border agreement.[76] The same general process was followed in the boundary negotiations in the 1990s between Saudi Arabia and Yemen. Saudi Arabia had repeatedly insisted on formal recognition of the boundary from the 1934 Treaty of Taif (and the subsequent demarcation in a 1937 report), which Yemen had rejected since the early 1960s. In a 1995 memorandum of understanding and a 2000 treaty, Yemen formally accepted those borders.[77] In these cases, the government that had rejected the prior treaty or arbitration seems to have recognized that the only settlement lay in the reversal of its position.

The second way that international law can contribute to boundary negotiations is by serving as a set of bookends to keep particularly egregious claims off the table. Richard Baxter has described how a "norm will establish new standards of relevance for the negotiations between the parties. Certain arguments will be ruled out."[78] This point resembles the notion from the international legal process school that the law serves as a constraint on decision makers.[79] In whatever negotiations proceed on the final status of the West Bank, Gaza, and the Golan Heights, the illegality of the acquisition of territory by force, the norm of self-determination of peoples, and the decision of the Security Council that Israel must withdraw from territories it seized in 1967 effectively rule out the possibility of Israeli annexation of all the occupied territories, as well as the return of all of mandatory Palestine to Palestinian Arabs or Arab states.[80] (On the other hand, Council resolutions condemning Israel's annexation of East Jerusalem may well not prevent some permanent annexation of that city.[81])

Similarly, *uti possidetis*, the default rule transforming intercolonial and intracolonial boundaries into international frontiers, has taken a huge number of claims off the table in Latin America, Asia, and Africa. Consequently, these governments argue about the location of their borders at the time of independence, not whether those borders themselves accord with international law.[82] The European Commission's opinions about the borders of the new states emerging from Yugoslavia invoked international law on the use of force, as well as *uti possidetis*, to assert that any deviations from the inter-republican borders of the former Yugoslavia were presumptively invalid.[83] The hope was to prevent the Bosnian Serbs from achieving a new state,

[76] *See* Wladyslaw Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 AJIL 163, 164–67 (1992); Jochen Abr. Frowein, *The Reunification of Germany*, 86 AJIL 152, 157.

[77] *See* Askar Halwan Al-Enazy, "*The International Boundary Treaty" (Treaty of Jeddah) Concluded Between the Kingdom of Saudi Arabia and the Yemeni Republic on June 12, 2000*, 96 AJIL 161 (2002).

[78] R. R. Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549, 565 (1980).

[79] Mary Ellen O'Connell, *New International Legal Process*, *in* THE METHODS OF INTERNATIONAL LAW 79, 83 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004).

[80] *See* GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 33–34 (2000). On the legal status of the Council's resolutions, see *id.* at 31–33 (SC Res. 242), 36 (SC Res. 338).

[81] *See* SC Res. 478 (Aug. 20, 1980). On the effect of the ICJ's *Wall* advisory opinion on future negotiations over Jerusalem, see Moshe Hirsch, *The Legal Status of Jerusalem Following the ICJ Advisory Opinion on the Separation Barrier*, 38 ISR. L. REV. 298 (2005).

[82] *See, e.g.*, Frontier Dispute (Burk. Faso/Mali), 1986 ICJ REP. 554 (Dec. 22). On the reasons states have accepted norms against territorial aggrandizement, see Zacher, *supra* note 15, at 237–44.

[83] Opinion No. 3, *supra* note 34; *see also* Ratner, *supra* note 17 (criticizing opinion).

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or merger with Serbia, simply by virtue of their having ethnically cleansed parts of Bosnia. The results, as we know, were only partly successful, since the negotiators preserved the legal existence of a separate Bosnian state but rewarded the Serbs with a sizable chunk of it through Republika Srpska. Even when the Security Council formulates its own positions, with a great range of substantive outcomes open to it, international law operates as a constraint on its options without, however, forcing any single one—in the words of Rosalyn Higgins, as "political operation *within* the law, rather than decision according *to* the law."[84]

Third, and critically, the international law on territory points toward substantive solutions during negotiations, whether offered by the parties or by outsiders. That is, it not merely rules out options, but effectively guides the parties toward certain options or even one option alone.[85] Indeed, A. L. W. Munkman and Jacqueline Dutheil de la Rochère noted strong similarities between the criteria applied by international tribunals and those used by mediators and negotiators recommending or making territorial settlements.[86] To return to *uti possidetis*, beyond removing certain claims during negotiations for a settlement, it provides a clear formula for the location of boundaries, one that former colonies have adopted more often than not in their treaties. In the Aland Islands dispute, the understandings of the League of Nations Commission of Rapporteurs regarding the right of self-determination both ruled out a plebiscite for the islanders and drove its recommendations, accepted by the League Council, to award the islands to Finland subject to an autonomy regime.[87] And the decision of Germany during the two-plus-four negotiations to accept the Oder-Neisse line as its eastern boundary, despite its prior legal qualms about the Potsdam Agreement, conforms with (though it is hard to say if it was influenced by) the norm favoring the stability of boundaries, including the norm's manifestation in the rules preserving boundary treaties in the event of a merger of two states.[88]

Fourth, and relatedly, international law may offer confidence-building formulas to help cement an agreement. For example, the German-Polish treaty of 1990 and the Cambodia settlement agreements included commitments on the inviolability of the border, a comforting term though nothing more than a restatement of a state's duty under Article 2(4). Neutrality, an ancient notion in international law, has been deployed to build the confidence of the parties to a territorial settlement; thus, the 1955 Austria State Treaty provided for permanent neutralization of the state, while the Aland Islands plan led to the neutralization of a border region. Even autonomy, though certainly not required under international law and subject to numerous possible formulas, can serve this function.[89] Outside powers might become party

[84] Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AJIL 1, 16 (1970); *see also* ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 57–59 (1984).

[85] *See* Baxter, *supra* note 78, at 565 ("channel negotiation and settlement into legal and orderly paths").

[86] Munkman, *supra* note 41, at 104, 109; Jacqueline Dutheil de la Rochère, *Les procédures de règlement des différends frontaliers*, *in* LA FRONTIÈRE 112, 149 (Société française pour le droit international ed., 1980); *see also* Agreement on the Political Parameters and Guiding Principles for the Settlement of the India-China Boundary Question, India-P.R.C., Arts. V–VII, Apr. 11, 2005, *available at* <http://www.ipcs.org/guiding_principles.pdf>.

[87] The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106 (1921).

[88] Czaplinski, *supra* note 76, at 165–67.

[89] *See* Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?* 32 N.Y.U. J. INT'L L. & POL. 591, 640–45 (2000) (principles of autonomous regimes offered by minorities commissioner of the Organization for Security and Co-operation in Europe to avoid possible secession of Crimea from Ukraine).

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to a treaty settling a territorial dispute or to a related treaty to demonstrate their interest in preserving the settlement. The 1960 Cyprus accords actually spoke in terms of a guarantee by the key external powers, typical of agreements earlier in the century, while the settlement documents on Germany and Cambodia contain more nuanced commitments by outside powers.[90]

Political scientists and skeptics about international law would point out that I have not proved that the law actually influences the positions of the decision makers during these settlements. Indeed, the parties might rule out the same options and reach exactly the same decisions without the benefit of legal advisers familiar with the treaties, custom, and case law relevant to territorial disputes. This doubt raises a larger question about the relevance of international law that is beyond the scope of this essay. It is a claim, however, that can be directed at the arbitral panels, too, on the grounds that they also, in the end, are somehow subordinating norms to their desire to arrive at a decision that both parties will respect and will make the panel seem credible—a point made long ago by Melvin Eisenberg.[91] My point, however, is to demonstrate that if we believe international law is taken seriously, there is evidence that it is treated that way not only by judges, but also by politicians negotiating, recommending solutions to, or deciding border disputes.

International Law as Institutionalization

Beyond its influence on the outcome of negotiations, international law can also channel the process by which territorial disputes are ultimately resolved.

First, in the most immediate sense, states negotiating over disputed territory operate in a world in which recourse to force should negotiations fail is no longer lawful. Article 2(4) shores up the channel of negotiations, as it were, making alternatives to them far more costly.

Second, claimants generally seek to resolve their claims through a legal instrument. Though the distinction between hard and soft law is sometimes a matter of degree, when it comes to border disputes, parties usually seek a hard law solution. They recognize that the stakes for their future relationships are typically higher if they conclude a treaty; and by choosing a formal and binding agreement, they intend to put the border issue behind them permanently, a course of conduct consistent with the norm on the stability of boundaries.[92] Moreover, the treaty becomes not merely a form of agreement; with it comes an entire set of rules, expectations, and practices as to the negotiation process and the conduct of the parties once it is concluded. When the parties can agree on only a provisional solution—even if it ends up being quite durable—soft law has proved useful, as with the 1975 Helsinki Accords, which effectively accepted, though without formally recognizing, the borders of the two Germanys and Poland for fifteen years.[93] Similarly, the 1964 OAU Resolution on Border Disputes Among African States has now become a border arrangement for Africa.[94]

[90] *See* Frowein, *supra* note 76, at 155 & n.19; Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AJIL 1, 30–31, 36–37 (1993).

[91] *See* Eisenberg, *supra* note 73, at 639.

[92] *See* Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT'L ORG. 495, 508–14 (1991).

[93] Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, princ. III, 73 DEP'T ST. BULL. 323 (1975), 14 ILM 1292, 1294 (1975); *see also* Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?* 70 AJIL 242, 249–53 (1976).

[94] Border Disputes Among States, OAU Res. AHG/Res.16(I) (July 17–21, 1964), *available at* <http://www.africa-union.org/root/au/Documents/Decisions/hog/bHoGAssembly1964.pdf>.

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Third, international law legitimates the delegation of some territorial settlements to international organizations (other than tribunals). After World War I, various treaties delegated a key role in the implementation of territorial accords to the League of Nations. In the case of Mosul, the Treaty of Lausanne called on the League to draw a line between Turkey and Britain (which was later formalized in a treaty). The League also determined the postwar frontiers of Hungary and Austria, and of Poland and Germany in Upper Silesia, pursuant to peace treaties.[95] Still elsewhere, the League was entrusted by treaty with more than (or less than) boundary drawing—in the Saar, with temporary governance and conduct of a plebiscite; in Memel, with taking part in the operation of its ports; in Leticia, with temporary governance; and in Danzig, with a regime meant to be one of permanent governance. In the UN era, the 1947 Peace Treaty with Italy authorized the General Assembly to make recommendations on the disposition of Italy's African colonies (leading to a modest UN role in Libya and Ethiopia); and that treaty envisaged direct UN administration of Trieste, although the regime never saw fruition because of substantial resistance from the relevant actors.[96]

The 1928 General Act of Arbitration represented a failed attempt to institutionalize this settlement process outside the League, creating separate mechanisms for the arbitration of legal and nonlegal disputes (the same distinction noted by the scholars discussed earlier).[97] Max Huber called this delegated decision making to a nonjudicial body "political arbitration," emphasizing a panel's freedom to balance interests rather than apply legal rules.[98] Both the General Act and his terminology were progressive for their time, serving as a reaction to and rejection of the view that arbitration was inherently judicial. Today they remain a relic of an epoch when international organizations were not generally seen as competent to devise binding solutions.

A modern example of such legitimately delegated authority to decide borders is the Brčko arbitration of 1997–1999, in which the parties to the Bosnia peace accords authorized a three-person panel to determine the interentity boundary between the Federation of Bosnia-Herzegovina and the Republika Srpska (RS). Although the peace accords referred to the process as "binding arbitration" and the panel was charged with making its decision according to "relevant legal and equitable principles,"[99] its opinion reveals that it was the sort of political arbitration that Huber had in mind, one where equity and policy determined the rulings.[100] On the one hand, the presiding arbitrator, Roberts Owen, used international law to assist in the ways discussed above, for example, by emphasizing the need for fidelity to the Dayton Accords (bookends) and citing ICJ cases in devising the requisite equitable principles (the law pointing toward substantive options).[101] But in the end, his application of those principles to

[95] Gonsiorowski, *supra* note 27, at 474–76. In the case of Upper Silesia, the League determined the division of the territory after a plebiscite but left the boundary up to the Conference of Ambassadors of the Allied Powers. MÉIR YDIT, INTERNATIONALISED TERRITORIES: FROM THE "FREE CITY OF CRACOW" TO THE "FREE CITY OF BERLIN" 46 (1961).

[96] STEVEN R. RATNER, THE NEW UN PEACEKEEPING: BUILDING PEACE IN LANDS OF CONFLICT AFTER THE COLD WAR 95–99, 115–16 (1995).

[97] General Act of Arbitration (Pacific Settlement of International Disputes), chs. II–III, Sept. 26, 1928, 93 LNTS 345.

[98] Gonsiorowski, *supra* note 27, at 476.

[99] General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.–Croat.–Fed. Rep. Yugo., Annex 2, Art. V, Dec, 14, 1995, 35 ILM 75, 113 (1996).

[100] Rep. Srpska v. Fed. Bosn. & Herz., 36 ILM 396, 426, para. 87 (Arb. Trib. for Boundary in Brčko Area 1997) (stating that "relevant legal principles do not require the award of the area in dispute to one party or the other").

[101] *Id.* at 408–10, paras. 34–41; 427–28, para. 88.

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impose a temporary international administration on the territory, and then to create a neutral, self-governing district belonging to neither entity, was grounded in a combination of justice and pragmatism. The arbitration process included frequent contacts with actors inside and outside Bosnia to gauge the political climate.[102] In the end, Owen was convinced that the RS, which controlled the territory, would not meet its obligations under the peace treaty, but he also recognized that the facts on the ground prevented a simple return to the federation—thus the solution of neutralization, another international law idea. The Brčko arbitration is evidence not of the promise of judicial settlement, but of third-party settlement, legitimated by international law (in this case the Dayton Accords), to reach realistic solutions grounded in, though not determined by, international law.

Delegation can also take the form of permanent commissions entrusted with the regulation of the border, including its demarcation. One such body, the Iraq-Kuwait Boundary Demarcation Commission, was created by the Security Council to demarcate the boundary in accordance with the 1963 Agreed Minutes between the two states, which incorporate 1932 and 1923 border agreements. Though portraying itself as a technical body, it implicitly made numerous substantive decisions over disputed areas, including through reliance on legal concepts.[103] Along the U.S.-Canadian frontier, the International Boundary Commission manages the markers and other physical aspects of the border. Other bodies, such as the France-Switzerland Commission internationale pour la protection des eaux du Léman contre la pollution and the United States–Canada International Joint Commission, focus on the regulation of water resources along the border. The original charter of the International Boundary and Water Commission (IBWC), created by the United States and Mexico in 1889, gave it broad power to decide on all disputes regarding the river border.[104] Despite its failure to solve the Chamizal dispute, the commission has successfully managed many aspects of the border—typically, very technical work involving demarcation, sanitation, dam management, and water-quality control.[105]

In the case of these border-related institutions, international law serves two purposes. The bodies themselves are a creature of law, that is, of a treaty, lending them a permanence and seriousness that reflects a commitment by the sides to peacefully settling future disputes about the border. Moreover, the bodies monitor and implement the obligations of the parties under boundary treaties, according to the model of managerial compliance set forth by Abram Chayes and Antonia Handler Chayes.[106] In so doing, they develop their own institutional law to handle a variety of scenarios as they arise. Thus, international law provides the framework for their

[102] On Owen's political sensitivities, see Sean D. Murphy, Contemporary Practice of the United States, 93 AJIL 641–42 (1999).

[103] *See* Jan Klabbers, *No More Shifting Lines? The Report of the Iraq-Kuwait Boundary Demarcation Commission*, 43 INT'L & COMP. L.Q. 904, 906–11 (1994).

[104] Boundary Waters: Rio Grande and Rio Colorado, U.S.-Mex., Arts. I, VIII, Mar. 1, 1889, 26 Stat. 1512, 9 Bevans 877.

[105] *See* INTERNATIONAL BOUNDARY AND WATER COMMISSION, 2002 ANNUAL REPORT, *available at* <http://www.ibwc.state.gov/Files/Rpt2002E.PDF>; *see also* Larman C. Wilson, *The Settlement of Boundary Disputes: Mexico, the United States, and the International Boundary Commission*, 29 INT'L & COMP. L.Q. 38 (1980). For a list of similar bodies, see Report of the International Law Commission on the Work of Its Forty-sixth Session, [1994] 2 Y.B. Int'l L. Comm'n, pt. 2, at 89, 125–26, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) (Draft Articles on the Law of the Non-navigational Uses of International Watercourses and commentary).

[106] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

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operations—in making them permanent and institutionalized and in linking them to the parties' promises. Their daily work may or may not involve the invocation of principles of international law on boundaries—one presumes that the IBWC staff have to know something about the thalweg, but they need not know the details of the *Island of Palmas* case, those issues having been settled by the two parties.

Fourth, international law plays a critical institutional role when international organizations intervene in territorial disputes even though their solution was not delegated to them. In the cases of the League and the Aland Islands, the OAU and African borders, and the Security Council and the Middle East (and long before that, the General Assembly in its 1947 partition plan), international organizations asserted plenary authority to make recommendations to states about the status of territory. The principal reason for the influence of these resolutions has not been their policy content—a nongovernmental organization (NGO) could have come up with the same plans—or even, as Higgins has pointed out, the care with which they consider and invoke legal principles.[107] Rather, the origin of those guiding principles in an international organization makes the key difference in two senses.

The first sense concerns the legitimacy of the organization vis-à-vis the particular conflict: the perception of relevant actors that it has a mandate to recommend or demand certain solutions imbues its proposals with more authority than recommendations by an NGO. That legitimacy stems from the creation of those organizations through law—though, as the Organization for Security and Co-operation in Europe demonstrates, it need not always be through treaty. By virtue of the organization's organic instrument, its resolutions in such cases may even be legally binding, as are, in Geoffrey Watson's interpretation, Security Council Resolutions 242 and 338.[108] But they need not be binding to be significant to the relevant constituencies, as we know from the 1964 OAU Resolution on Border Disputes.[109] Second, an international organization, in particular one created by law, is capable of sending a message to the parties that it will remain engaged in the process and that noncompliance with its decisions or international norms on disposition of territory will have consequences.[110] The decision by the organization to recommend a solution shows the parties that their dispute is being followed by critical political actors, and that those actors will—or at least could—undertake more active engagement should the parties not settle it. This involvement may take any of the forms noted in Chapter VI of the Charter, from deployment of a mediator to a peacekeeping operation pending or after a settlement—and even, in exceptional circumstances, Chapter VII action. Thus, beyond the substance of a solution, the international organization has the wherewithal to influence the process of settlement.

Institutionalists within the field of contemporary international relations theory have developed a variety of models for explaining the influence of international organizations, though not all recognize the centrality of norms to that role.[111] In the case of territorial disputes, Beth

[107] Higgins, *supra* note 84, at 7 ("[R]esolutions which by implication take a stand on [the status of Jerusalem] have been passed without proper consideration of the legal issues involved.").

[108] *See supra* note 80.

[109] For the resolution, see *supra* note 94.

[110] On authority signals and control intention, see W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 ASIL PROC. 101, 110–11 (1981); *see also* MILANO, *supra* note 20, at 151–73.

[111] *See, e.g.*, Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997).

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Simmons, Todd Allee, and Paul Huth have addressed the possibilities for international organizations to solve territorial disputes. They focus on arbitration and judicial settlement as offering binding decisions, a scope of inquiry that does not address the full potential influence of international organizations but is understandable as a matter of methodological simplicity; however, their findings, which emphasize that third-party settlement can satisfy domestic actors who would not accept negotiated compromises, apply equally to other types of binding decision making (e.g., under Chapter VII), as well as other forms of intervention.[112]

IV. Where to Resolve Land Disputes? Allocating the Competences of Judicial and Extrajudicial Arenas

The founders of the *AJIL* looked forward to the day when international courts would solve the most pressing international problems, none of them more likely to lead to war than competing claims to land. The last century has revealed that states will not send most of these disputes to courts and that when they do, the disputes often persist. This experience has also not proved—though one cannot say that it has disproved—that courts are institutionally the best actors for solving territorial disputes. In those cases they have decided, it is difficult to know if some other border would have better resolved the legal and political claims of the parties. And as for those cases they have not decided, it is hard to imagine how they could settle some of them—one wonders whether the ICJ would really wish to determine Israel's borders, or the final status of Kashmir, Kosovo, or Western Sahara.

The record does suggest, however, that courts serve alongside the various other arenas in the settlement of territorial disputes. Though many of their opinions have been subject to strong criticism by lawyers, they have advanced global and regional public order whenever they have been able to reach a decision that is respected by both parties. But other options remain, including a leading role for nonjudicial intermediaries. Mediation theory, for example, has shown that the successful intermediary is one equipped with the credibility of both sides so that he or she can effectively push through a solution.[113] Pure delegation may work as well, as the Brčko case has demonstrated more recently. The toolbox is highly variegated.

This history invites a challenge for the international lawyer studying boundary disputes or advising governments about them. Beyond devoting her energies to pulling out the best arguments from the various arbitrations, the lawyer or scholar should use her tools to identify the optimal processes for settlement. This intellectual task requires some identification of the factors within territorial disputes that make certain processes more likely to succeed than others. Cooperation between lawyers and specialists in international relations theory and mediation will be required to produce realistic public policy.

Although a fully considered theory of the best arenas for the law-based resolution of territorial disputes is beyond the scope of this article, future appraisals will at least wish to ask the following questions:

[112] Simmons, *supra* note 49; Allee & Huth, *supra* note 28. For a recent approach from the constructivist strand of international relations theory, see Thomas Diez, Stephan Stetter, & Mathias Albert, *The European Union and Border Conflicts: The Transformative Power of Integration*, 60 INT'L ORG. 563 (2006).

[113] *See, e.g.*, INTERNATIONAL MEDIATION IN THEORY AND PRACTICE (Saadia Touval & I. William Zartman eds., 1985); Jacob Bercovitch, *Understanding Mediation's Role in Preventive Diplomacy*, 12 NEGOTIATION J. 241 (1996). For a recent case study, see I. William Zartman, *Explaining Oslo*, 2 INT'L NEGOTIATION 195 (1997).

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— How extensive is the treaty law specific to the territorial dispute?

— Have the parties accepted certain core principles, for example, *uti possidetis*?

— To what extent is the norm of self-determination applicable, and have the parties agreed on who has that right and what it would mean if it were recognized?

— What are the size, geographical features, population patterns, and economic potential of the territory?

— Have the parties already resorted to armed force over the territory?

— Have international organizations with a clear competence over the dispute already made decisions regarding the contours of a settlement or the process by which to reach one?

— Are any outside actors good candidates to serve as intermediaries, and could they be entrusted with binding decision-making power?

— How do the relevant domestic constituencies view the disputed aspects of the territory?

The above list merely sketches questions that merit consideration. They point to certain hypotheses that find at least anecdotal historical confirmation. For instance, where the parties have already agreed on the underlying treaties that govern the dispute, or accepted that a court's mission is simply to determine the borders at the time of independence, the court is likely to be able to handle its role with care and skill. On the other hand, where some of the other norms regarding territorial disputes come into play—in particular, the place of self-determination of peoples—a court is much more prone to be at sea. In the end, for all the conceptual problems of the distinction between boundary disputes and territorial disputes, there may yet be some merit to a division along those lines in terms of the processes for resolving them.[114] The complex array of legal norms, including the absence of some sort of hierarchy between them, makes territorial disputes weaker candidates than boundary disputes for referral to a court. In the former, other mechanisms must be brought to bear—especially since the parties will have been reluctant to send them to a tribunal for resolution in the first place.

The bloody century of land grabs casts a dark shadow over the intermittent triumphs of law in the courtroom. But decision makers have nonetheless utilized international law to manage the territorial obsession through more subtle processes. In the end, states may be free to set their borders as they choose, but the norms governing territorial sovereignty offer them critical signposts to reach agreement on the invisible lines that still define our international order.

[114] See the review of opinions in SHARMA, *supra* note 12, at 21–30. It also might explain the greater promise of courts for resolving maritime disputes compared to land disputes.

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