

## THE REBIRTH OF TERRITORY

The concept of territory is central in international law, but a detailed analysis of how the concept is used in both discourse and practice has been lacking until now. Rather than reproducing the established understanding of territoriality within the international legal order, this study suggests that the discipline of international law relies on an outmoded spatial paradigm. Gail Lythgoe argues for a complete overhaul of our understanding of territory, to engage more effectively with key processes, structures, and actors relevant to contemporary global law and governance. In this new theoretical account of an essential aspect of public international law, she argues that territory is a dynamic social reality created by the exercise of power. Territories are constituted by the practices of a more diverse array of actors than is acknowledged. Mapping the reassembling of functions, Lythgoe argues these new spaces are being constituted by state and non-state actors alike.

GAIL LYTHGOE is a lecturer in Global Law at the University of Edinburgh. Her research has appeared in *International Organizations Law Review*, *Canadian Yearbook of International Law*, and *European Journal of International Law*.

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# THE REBIRTH OF TERRITORY

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## CONTENTS

<i>Acknowledgements</i>	vi
<i>Table of Cases</i>	ix
<i>Table of Treaties, Resolutions, and Acts of International Organisations</i>	xi
<i>List of Abbreviations</i>	xiv
<b>1 Introduction</b>	1
<b>2 Deterritorialisation Discourse in International Law</b>	30
<b>3 Excavating the Territory of International Law</b>	71
<b>4 Re-imagining the Concept of Territory</b>	143
<b>5 Reterritorialising International Law</b>	190
<b>6 A New Legal Geography for International Law</b>	249
<i>Bibliography</i>	259
<i>Index</i>	281
<i>Series List</i>	284

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vii

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## TABLE OF CASES

- Al-Skeini and Others v The United Kingdom* [2011] Grand Chamber, European Court of Human Rights Application no. 55721/07
- Application Instituting Proceedings, Aerial Incident of 10 August 1999, Pakistan v India* (ICJ)
- Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Eritrea and Yemen Award* [1998] Permanent Court of Arbitration (PCA) 1996-04, 1 Vol XXII pp. 209–332, 17
- Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada–United States of America), Judgment* (1984) ICJ Reports 246 (International Court of Justice)
- Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment* [1986] ICJ Reports 554 (International Court of Justice)
- Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), Judgment* [1999] ICJ Reports 1999, p. 1045
- Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Merits* [2001] ICJ Reports 2001, p. 40 (International Court of Justice)
- Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Judgment (Merits)* [1986] ICJ Reports 1986 14 (International Court of Justice)
- Case Concerning Right of Passage over Indian Territory (Portugal v India), Judgment* [1960] ICJ Reports 1960 6 (International Court of Justice)
- Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment* [2008] ICJ Reports 2008 12 (International Court of Justice)
- Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania), Judgment* [1949] ICJ Reports 1949 4 (International Court of Justice)
- Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, Ukraine and the Russian Federation* [2020] Annex VII Arbitral Tribunal PCA Case No. 2017-06
- Fisheries Case (United Kingdom v Norway), Judgment* 116 (International Court of Justice)

- Georgia v Russia (II) (Application no 38263/08), Judgment Merits* [2021] European Court of Human Rights, Grand Chamber 38263/08
- Government of the Cayman Islands v Commission, Case T-85/03* (Court of Justice of the European Union)
- In the Matter of the Chagos Marine Protected Area Arbitration between the Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland, Award* (Annex VII Arbitral Tribunal, UNCLOS)
- In the Matter of the South China Sea Arbitration, The Republic of the Philippines and the People's Republic of China, Award* [2016]
- Island of Palmas Case (Netherlands/USA)* (1928) Volume II Reports of International Arbitral Awards 829 (Permanent Court of Arbitration)
- Jaloud v The Netherlands* [2014] Grand Chamber, European Court of Human Rights Application no. 47708/08
- Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening), Judgment* [1992] ICJ Reports 1992 351 (International Court of Justice)
- Legal Status of Eastern Greenland (Norway v Denmark)* [1933] PCIJ Ser. A/B, No. 53 (Permanent Court of International Justice)
- Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] 1 ICJ Reports 1996, p. 226 (International Court of Justice)
- Maritime Delimitation in the Black Sea, Romania v Ukraine, Judgment* [2009] ICJ Reports 2009, p. 61 (International Court of Justice)
- Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua), Judgment* [2018] ICJ Reports 2018, p. 139 (International Court of Justice)
- Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, Great Britain v France, Advisory Opinion* (1923) no. 4 (1923) PCIJ Series B no. 4 (Permanent Court of International Justice)
- North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment* 3 (International Court of Justice)
- Pretty v United Kingdom* [2002] European Court of Human Rights Application no. 2346/02
- Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* [1949] ICJ Reports 1949, p. 174 (International Court of Justice)
- The Government of the State of Eritrea and The Government of the Republic of Yemen, Award on Territorial Sovereignty and Scope of the Dispute* [1996] (1998) XXII RIAA 211 (Permanent Court of Arbitration)

## TABLE OF TREATIES, RESOLUTIONS, AND ACTS OF INTERNATIONAL ORGANISATIONS

### Treaties

- Covenant of the League of Nations 1919 (108 LNTS 188)  
 Convention on the Rights and Duties of States 1933 (165 LNTS 19)  
 ('Montevideo Convention')  
 Convention on International Civil Aviation 1944 (15 UNTS 295) ('ICAO Convention')  
 Charter of the United Nations 1945 (1 UNTS XVI) ('UNC')  
 Statute of the International Court of Justice 1946 (33 UNTS 993) ('ICJ Statute')  
 Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331) ('VCLT')  
 United Nations Convention on the Law of the Sea 1982 (1833 UNTS 3, UN Reg No I-31363) ('UNCLOS')  
 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1836 UNTS 3) ('1994 Implementing Agreement')  
 Marrakesh Agreement Establishing the World Trade Organization 1994 (1867 UNTS 3) ('WTO Agreement')  
 Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts 1997 (OJ C340/1) ('Treaty of Amsterdam')  
 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012 (2012/C 326/01) ('TEU' and 'TFEU')  
 Treaty on the Prohibition of Nuclear Weapons 2017 (A/CONF.229/2017/8) ('TPNW')  
 Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment 2018 ('AEC Protocol')

### UN Resolutions and Documents

- United Nations General Assembly Resolution 1514 (XV): Declaration on the granting of independence to colonial countries and peoples (1960) (UN Doc A/RES/1514 (XV)) ('UNGAR 1514 (XV)')

xii TABLE OF TREATIES, RESOLUTIONS, & ACTS

- United Nations General Assembly Resolution 2625 (XXV): Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970) (UN Doc A/RES/2625 (XXV)) ('UNGAR 2625 (XXV)')
- United Nations General Assembly Resolution 48/263: Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994) (UN Doc A/RES/48/263) ('UNGAR 48/263')
- United Nations Security Council Resolution 1031 (1995) on implementation of the Peace Agreement for Bosnia and Herzegovina and transfer of authority from the UN Protection Force to the multinational Implementation Force 1995 (UN Doc S/RES/1031(1995)) ('UNSCR 1031')
- United Nations Security Council Resolution 1244 (1999) on the deployment of international civil and security presences in Kosovo 1999 (UN Doc S/RES/1244(1999)) ('UNSCR 1244')
- Regulation No 1999/1 on the Authority of the Interim Administration in Kosovo 1999 (UNMIK/REG/1999/1)
- Draft Articles on the Responsibility of International Organisations 2011 (UN Doc A/RES/66/100, Annex) ('DARIO')
- United Nations General Assembly Resolution 67/19. Status of Palestine in the United Nations 2012 (UN Doc A/RES/67/19) ('UNGAR 67/19')

### EU Law

- Commission Regulation (EC) No 2257/94 of 16 September 1994 laying down quality standards for bananas [1994] OJ L245/6 ('Commission Regulation No. 2257/94 (1994)')
- Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, [1998] OJ L350/58 ('Directive 98/70/EC (1998)')
- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time 2003 ([2003] OJ L299/9)
- Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1 ('Council Regulation 2007/2004 (2004)')
- Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23 ('Regulation 995/2010 (2010)')
- Regulation (EU) No 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide

## TABLE OF TREATIES, RESOLUTIONS, &amp; ACTS

xiii

emissions from maritime transport, and amending Directive 2009/16/EC [2015] OJ L123/55 ('Regulation 2015/757 (2015)')

Commission Implementing Decision (EU) 2015/789 of 18 May 2015 as regards measures to prevent the introduction into and the spread within the Union of *Xylella fastidiosa* (C(2015) 3415)

Regulation (EU) No 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders ([2016] OJ L77/1) ('EU Regulation 2016/399')

Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market ([2016] OJ L193/1)

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC ([2016] OJ L251/1) ('EU Regulation 2016/1624')

### Other

Global Charter-Agenda for Human Rights in the City, United Cities and Local Governments, Committee for Social Inclusion, Participatory Democracy and Human Rights 2011

The Nantes Declaration of Mayors and Subnational Leaders on Climate Change 2013

## ABBREVIATIONS

AEC	African Economic Community
ALR	American legal realism
AO	Advisory Opinion
ASEAN	Association of Southeast Asian Nations
AU	African Union
BIT	bilateral investment treaty
CHM	common heritage of mankind
CIL	customary international law
CIS	Commonwealth of Independent States
CLS	critical legal studies
ea	emphasis added
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEZ	exclusive economic zone
EIB	European Investment Bank
EPZ	export processing zone
EU	European Union
FAO	Food and Agriculture Organization
FATF	Financial Action Task Force
IAEA	International Atomic Energy Agency
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
IR	international relations
ISA	International Seabed Authority
ISO	International Organization for Standardization
ITU	International Telecommunication Union
LoN	League of Nations
NATO	North Atlantic Treaty Organization

## LIST OF ABBREVIATIONS

xv

NGO	non-governmental organisation
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OPCW	Organisation for the Prohibition of Chemical Weapons
PCIJ	Permanent Court of International Justice
SDG	sustainable development goal
SEZ	special economic zone
SOFA	status of forces agreement
TEU	Treaty on European Union
TPNW	Treaty on the Prohibition of Nuclear Weapons
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
WFP	World Food Programme
WHO	World Health Organization
WTO	World Trade Organization