

INTRODUCTION

PUBLIC INTERNATIONAL LAW AND ITS TERRITORIAL IMPERATIVE

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Territory is not only the denotation of a certain physical or geographical space: it also happens to be a state of mind—a given way of thinking. We know this when we come to public international law because the concept of territory abounds in a multitude of its provisions—whether it be in terms of one of the qualifications for Statehood under the 1933 Montevideo Convention on the Rights and Duties of States,¹ or on the cartographization of sovereign jurisdiction,² or as one of the conditions for the application of certain obligations to non-State actors involved in non-international armed conflicts.³ Territory, or the concept of territory, thus asserts itself throughout the discipline of public international law, and its influences can be felt either through direct means or discrete. It has informed the modes for the acquisition of sovereignty, essential to the concept of “territorial sovereignty”;⁴ it is a fundamental component in how we distinguish refugees from internally

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1. Montevideo Convention on the Rights and Duties of States, 49 Stat. 3097 (1933).

2. As Article 9 of the Montevideo Convention provides, “[t]he jurisdiction of [S]tates within the limits of national territory applies to all the inhabitants.” *Id.* art. 9; see also DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 20 (2006); Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501 (2005).

3. This also occurs in the Second Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 609. According to Article 1 (1) of the Protocol, whose provisions become applicable to those non-international armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, *exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*” *Id.* at pmbl. (emphasis added). Although the Protocol “develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949” (*id.* art. 1.), this stipulation serves to filter those non-international armed conflicts to which the Protocol becomes applicable. It does so alongside its criterion concerning “responsible command” and its reference to the armed forces of the relevant High Contracting Party, considerations which are not mentioned for the activation of Common Article 3 of the Geneva Conventions of August 1949—which applies “[i]n the case of *armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.*” See Rosemary Abi-Saab, *Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern*, in *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 209, 215 (1991) (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (emphasis added).

4. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 162 (Sir Humphrey Waldock ed., 6th ed. 1963); see also VAUGHAN LOWE, *INTERNATIONAL LAW* 140–44 (2007).

displaced persons;⁵ and the General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States of October 1970 makes clear that "nothing" in its terms

shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, *the territorial integrity or political unity of sovereign and independent States* conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government *representing the whole people belonging to the territory* without distinction as to race, creed or color.⁶

These are all manifestations of what we might call the territorial imperative of public international law.⁷

There is perhaps no greater sense of territorial thinking on the legal imagination than in the development of the high fiction of the "territorial sea,"⁸ so-called because of its connotations to sovereignty—or to the

5. Compare Convention Relating to the Status of Refugees art. 1A(2), July 28, 1951, 189 U.N.T.S. 137, amended by Protocol Relating to the Status of Refugees art. 1(1), Jan. 31, 1967, 606 U.N.T.S. 267 (defining "refugee" as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is *outside the country of his nationality* and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and *being outside the country of his former habitual residence*, is unable or, owing to such fear, is unwilling to return to it") (emphases added) with Forced Migration Online, <http://www.forcedmigration.org/guides/fmo041/> (last visited June 15, 2009) (defining "internally displaced persons" as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an *internally recognized State border*") (emphasis added).

6. G.A. Res. 2625, at 121, 124, U.N. GAOR, 25th Sess., Supp. No. 28 (Oct. 24, 1970) (emphases added). Note, too, that in announcing its Declaration on the Granting of Independence to Colonial Countries and Peoples in Dec. 1960, the General Assembly declared that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." G.A. Res. 1514, at 67, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684A (Dec. 14, 1960).

7. DAVID J. ELKINS, BEYOND SOVEREIGNTY: TERRITORY AND POLITICAL ECONOMY IN THE TWENTY-FIRST CENTURY 13–39 (1995); see also, Bernard H. Oxman, *The Territorial Imperative: A Siren Song at Sea*, 100 AM. J. INT'L L. 830 (2006).

8. The same can be said of its earlier formulation of "territorial waters". See Percy Thomas Fenn, Jr., *Origins of the Theory of Territorial Waters*, 20 AM. J. INT'L L. 465, 478 (1926). The consolidation of the notion of the territorial sea was intimately connected with the "birth of territoriality" that succeeded the Holy Roman Empire. R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 71 (3d ed. 1999).

rights of the territorial sovereign.⁹ It is a most revealing choice of language that continues through to our time, and it betrays the commitment of the 1982 United Nations Convention on the Law of the Sea to the “legal basis” of the five Geneva Conventions of April 1958, as “epitomized by the key words *sovereignty* (internal and territorial waters), *control*, *sovereign rights*, *freedoms*” but where “important changes have taken place within those structures.”¹⁰ According to the 1982 Convention, “[t]he sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”¹¹ This sovereignty further applies to the air space over the territorial sea, as it does to its bed and subsoil,¹² but it must be exercised “subject to this Convention and to other rules of international law.”¹³ It is an arrangement that marks the culmination of various normative affiliations that coastal States have had with their adjoining oceans over time,¹⁴ so

9. See BRIERLY, *supra* note 4, at 162. For an important assessment of the intellectual underpinnings of the concept, however, see Daniel P. O’Connell, *The Juridical Nature of the Territorial Sea*, 1971 BRIT. Y.B. INT’L L. 303.

10. Philip Allott, *Power Sharing in the Law of the Sea*, 77 AM. J. INT’L L. 1, 13 (1983). These Geneva Conventions, known collectively as the “Geneva five,” include the Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205; the Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11; the Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285; the Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311; and the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes Arising from the Law of the Sea Conventions, Apr. 29, 1958, 450 U.N.T.S. 169; see also Oxman, *supra* note 7, at 835.

11. 1982 United Nations Convention on the Law of the Sea art. 2(1), Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter 1982 United Nations Convention].

12. *Id.* art. 2(2).

13. *Id.* art. 2(3). The most significant of these other rules is the “right of innocent passage,” a term defined in Articles 18 and 19. See *id.* art. 17 (“Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea”). Note, however, the ideas and the language that are used to construct the concepts of the contiguous zone, the exclusive economic zone and the continental shelf in the Convention: there are shades or semblances of sovereignty here, of what it is to be *sovereign*. In the contiguous zone, the coast State “may exercise the control necessary” to prevent infringements of *its* custom, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea and to punish infringement of these aforementioned laws. See *id.* art. 33. For the exclusive economic zone, the coastal State is awarded “sovereign rights” for the purpose of exploring and exploiting, conserving, and managing the natural resources, and jurisdiction with respect to (i) the establishment and use of artificial islands, installations, and structures; (ii) marine scientific research, and (iii) the protection and preservation of the marine environment. *Id.* Art. 56. And, as far as the continental shelf is concerned, the coastal State “exercises over the continental shelf sovereign rights for the purpose of exploring it and exploring its natural resources”—rights which are “exclusive,” according to the Convention, “in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities *without the express consent of the coastal State.*” *Id.* art. 77 (emphasis added). On this point, see also Oxman, *supra* note 7, at 836.

14. See O’Connell, *supra* note 9.

that British and American jurisdictional claims of the early nineteenth century need to be set against the sovereign claims made in the civil codes of several Latin American countries, and, further still, ought to be differentiated from the qualified jurisdictional competences claimed by States such as France and Spain (in respect of defense and the regulation of customs and fishing).¹⁵

The oceans, then, have become an important platform for the projection of territorial thinking: it has been said that “[t]he territorial temptation thrust seaward with a speed and geographic scope that would be the envy of the most ambitious conquerors in human history.”¹⁶ We see the same sort of reasoning applied to the legal status of air space following the First World War,¹⁷ though we can observe crucial occasions when public international law has been informed by other considerations: “[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means,”¹⁸ and, as far as the high seas are concerned, the 1982 United Nations Convention on the Law of the Sea instructs that “[n]o State may validly purport to subject any part of the high seas to its sovereignty.”¹⁹ The Convention also provides for the seabed and ocean floor and subsoil thereof, together with its resources, as the common heritage of mankind,²⁰ not subject to the

15. CHURCHILL & LOWE, *supra* note 8, at 74 (remarking that “[w]ith hindsight it is possible to see that the trend in doctrine and State practice was steadily towards recognition of coastal States’ sovereignty over their territorial seas.”); *see also* John A. Duff, *Assemblage-Oriented Ocean Resource Management: How the Marine Environment Washes over Traditional Territorial Lines*, 30 MICH. J. INT’L L. 643, 646 (2009).

16. Oxman, *supra* note 7, at 832 (pinning “[t]he effective start of this process” to the Truman Proclamation concerning the continental shelf of Sept. 28, 1945, and citing Presidential Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. This was codified as 10 Fed. Reg. 12,305 (1945)). *See further*, *The Scramble for the Seabed: Suddenly, A Wider World Below the Waterline*, ECONOMIST, May 16, 2009, at 29. *See also*, 1982 United Nations Convention, *supra* note 11, art. 2(2) (provision made for the air space above the territorial sea).

17. *See* Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 174; BRIERLY, *supra* note 4, at 218. The Convention on International Civil Aviation art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 confirms that “[t]he Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.” By virtue of Article 2 of the Convention, the territory of a State is defined as “the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.” *Id.* art. 2. For further assessment, *see* STUART BANNER, WHO OWNS THE SKY? THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008).

18. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 2, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

19. 1982 United Nations Convention, *supra* note 11, art. 89.

20. *Id.* art. 136. On the evolution of this concept, *see* ARVID PARDO, THE COMMON HERITAGE: SELECTED PAPERS ON OCEANS AND WORLD ORDER 1967–74 (1975).

sovereignty or to the sovereign rights of any State.²¹ These are important formulations for public international law to have made, and can be usefully contrasted with the position it has taken on Antarctica, where

[n]o acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty shall be asserted while the present treaty is in force.²²

No identical arrangement is in place for the Arctic,²³ where we have observed an escalation in State interest and activity (not to mention diplomatic tensions) of late.²⁴

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The essays that have been convened for this Symposium, held in Ann Arbor on February 6 and 7, 2009, demonstrate the ebbs and flows of the territorial imperative within public international law, which are reflected in the very title chosen for the deliberations of those days, that of “Territory Without Boundaries.”²⁵

21. 1982 United Nations Convention, *supra* note 11, art. 137.

22. The Antarctica Treaty art. IV(2), Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. It is the “freezing” of territorial claims—rather than the outlawry of them altogether—that has been heralded as the treaty’s chief success. See D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 233 (6th ed. 2004).

23. See HARRIS, *supra* note 22, at 234–35. But see LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1570 (4th ed. 2001). The provisions of the 1982 United Nations Convention are, however, applicable—i.e., in respect of the continental shelf. See Hans Correll, *Reflections on the Possibilities and Limitations of a Binding Legal Regime for the Arctic*, 37 ENV. POL’Y & L. 321 (1997).

24. *The Great Arctic Oil Rush*, N.Y. TIMES, Aug. 12, 2007, at 9 (describing the Russian Federation’s planting of its national flag on the seabed two miles under the polar ice cap—behavior which Peter McKay, the Canadian Foreign Minister, has described as redolent of the fifteenth century); see also MALCOLM SHAW, *INTERNATIONAL LAW* 534–36 (6th ed. 2008); Alok Jha, *Frozen Assets: How New Survey of Arctic’s Riches Could Stoke International Strife*, GUARDIAN, May 29, 2009, at 9.

The “sector principle” associated with the Arctic does provide a classic instance of territorial thinking, since “land territory facing the Arctic is argued to afford a basis for claiming sovereignty over all territory lying to the north and within a sector bounded by the eastward and westward meridians of longitude at either end of the land territory and extending northward until they meet at the Pole.” 1 OPPENHEIM’S *INTERNATIONAL LAW* 693 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). The principle therefore takes as its premise that we are dealing with territory—possibly “territorial ice”?—when, in fact, the Arctic comprises “frozen sea” where “the ice shifts with the currents.” *Id.* at 692; see also Juliette Jowitz, *Thinner than We Thought: Alarm at Arctic Ice Study*, GUARDIAN, Apr. 7, 2009, at 13. This matter is briefly addressed in the article of Ted L. McDorman: *Canada-United States Cooperative Approaches to Shared Marine Fishery Resources: Territorial Subversion?*, 30 MICH. J. INT’L L. 665, 670–71 (2009).

25. An important contribution to those deliberations, although not published here, is that of Vasuki Nesiah (Brown University), *Slumdog Million Reforms: Bollywood Fantasies*

The collection resulting from the Symposium has been prepared for publication and is presented in four sections. It commences, however, with the keynote address of Saskia Sassen, of Columbia University, New York and the London School of Economics and Political Science. Sassen is ideal for this task. Her Essay identifies how “[t]he globalization of a broad range of processes shows us that borders can extend deep into national territory, they are constituted through many more institutions than simply the nation State, and they have many more locations than is sug-

and the Global City, at 2 (on file with author and with the *Michigan Journal of International Law*) (considering in a persuasive and refreshing light how global cities “simultaneously occupy different, contradictory spaces in the global economic system”). So “[j]ust as these cities are marked with new opportunities and rewards, they also have their exclusions and hierarchies; they are strategic nodal points of finance and technology on one accounting, but also below the radar flows of illicit commodities and marginal communities on the other.” *Id.* at 3; see also Saskia Sassen, *The Urban Map of Terror*, *GUARDIAN*, May 28, 2009, at 32. Note how the concept of territory, and of territory as metaphor, have informed other aspects of Nesiiah’s scholarship: see, e.g., *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 *HARV. HUM. RTS. J.* 75 (2004) (examining “how legitimacy is sought in contemporary approaches to international engagement through proposed legal and normative discussions between military offensives and humanitarian intervention”); Vasuki Nesiiah, *Placing International Law: White Spaces on a Map*, 16 *LEIDEN J. INT’L L.* 1 (2003) (looking “at the paradoxes attending the endurance of the statist framework in conceptualizing territorial self-determination as well as in curtailing it”).

The concept of the global city derives from Saskia Sassen, *The Global City: Introducing a Concept*, 11 *BROWN J. WORLD AFF.*, Winter/Summer 2005 at 27 (2005); see also SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2nd ed. 2001). Nesiiah adopts a looser appreciation of this concept for her paper, however. With its welcome focus on cities from the global South—in particular Mumbai and Bangalore—a critical perspective is brought to bear on proposals for reforming the governance and the well-being of these cities. “Much of the regulatory apparatus that governs [the] lives [of the urban poor] are in fact the effects of transnational processes and supranational institutions.” See Nesiiah, *Slumdog Million Reforms*, at 8. Nesiiah also notes that

[u]ndoubtedly there is a democracy deficit . . . when suicides and violence are the primary expressions of political protest but it is difficult to see how this deficit is addressed by a more participatory local government structure. There is a gulf between the vision of democratization that is informing the urban policy reform project and the technologies of governance that obtain in globalized urban spaces. Clearly, democratization and participation cannot translate into redistribution.

Id. at 9–10. These reforms of urban planners, sociologists, and economists do not have a firm handle on the “contradictory spaces” of the global cities examined, on the urban landscape upon which they are seeking to make their mark. And it is maldistribution—one can argue endemic maldistribution—which establishes the need for reform: “From class to gender, religion to caste, maldistribution is the defining mark of access to information, judicial services, health services, education and transportation.” Nesiiah, *Slumdog Million Reforms*, at 3. We might take this as a point of difference in examining how other cities (and towns) affect our understanding of border relations and of the spatial dynamics of a State. See, e.g., Dan Bilesky, *Slovenia Border Spat Imperils Croatia’s NATO Bid*, *N.Y. TIMES*, Mar. 23, 2009, at A8; Eamon Quinn, *A Northern Ireland Town Is a Shoppers’ Paradise*, *N.Y. TIMES*, Dec. 18, 2008, at A14.

gested by standard geographic representations”²⁶ to the point where foundational changes are occurring within the international system:

we are now seeing the incipient formation of new bordering capabilities and of new state practices regarding territory. These entail the partial denationalizing of what historically has been constructed as national, a process that unsettles the meaning of geographic borders. Critical to this argument is the proposition that global processes also take place at subnational levels, thereby disrupting the notion of mutual exclusivity between the national and the global.²⁷

We are therefore transported beyond concepts and analogies of “state territorial authority”²⁸ toward “subnational constitution of global processes” and “the partial unbundling of traditional national territorial borders and the formation of new bordering capabilities, both subnational and transnational.”²⁹ The purpose here is to gain a deeper awareness of “the proliferation of subnational scalings of global processes and institutions,”³⁰ both in their variety as well as their formidable complexity, in our bid to understand better the changing configurations of State and institutional techniques of power and control. To this end, we can no longer treat borders as “geographic events” Sassen argues,³¹ but must award them their descriptive and normative due—a process that might require more relevant methodologies (i.e. “categories for analysis”),³² and perhaps even innovative vocabularies to allow us to come to terms with “the specificities of the current changes.”³³

26. Saskia Sassen, *Bordering Capabilities Versus Borders: Implications for National Borders*, 30 MICH. J. INT’L L. 567, 575 (2009). Professor Sassen’s essay is based on an article that first appeared in NEW POLITICAL ECONOMY. See Saskia Sassen, *When National Territory Is Home to the Global: Old Borders to Novel Borderings*, 10 NEW POL. ECON. 523 (2005).

27. *Id.* at 573.

28. *Id.* at 573 (“When we conceive of globalization as enacted at subnational scales and institutional domains, we can posit the proliferation of borderings within national territories.”).

29. *Id.* at 571.

30. *Id.* at 573. This is the subject of the collection of essays edited by Sassen: *DECIIPHERING THE GLOBAL: ITS SCALES, SPACES AND SUBJECTS* (Saskia Sassen ed., 2007).

31. *Id.* at 574.

32. *Id.* at 574.

33. *Id.* at 576. Sassen argues that “the mix of processes we describe as globalization is indeed producing an incomplete yet significant form of authority deep within the national State, that is, a hybrid authority that is neither fully private nor fully public, neither fully national nor fully global.” *Id.* at 579. Sassen writes at another point that the “critical conceptual task” of “the need to decode particular aspects of what is still represented or experienced as ‘national,’ which may, in fact, have shifted from its historical conception.” *Id.* at 584; *see also id.* at 578. Indeed, this forms a general theme of John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L ORG. 139 (1993).

The first of the four sections of the Symposium concerns the “colonization of natural resources,”³⁴ where Eric A. Bilsky of Oceana draws our attention to the limitations of archetypal techniques of law enforcement—of territorial law enforcement, that is—as applied to the conservation of marine wildlife. In his carefully worked Essay, we are made aware of how and why this is so, of (among other things) the industrial revolution that has occurred upon the oceans,³⁵ its consequences, and of the measures that might be developed to stall the trend of the depletion of these resources. According to Bilsky, “[t]he crucial questions for advocates of an agreement to reduce overfishing subsidies include (1) whether the WTO negotiating system is up to the task of creating another package deal, or ‘single undertaking,’ reflecting a major new international trade agreement and, if so, (2) whether the political will exists to include effective and new disciplines on fisheries subsidies.”³⁶

There is a keen sense here of the significance of international institutions in stemming the colonization of resources,³⁷ and of the dangers that will result if States are left (as so often they are) to their own vices. From another angle, this could be read as an argument for a more coherent and less fragmented system of public international law—the pursuit, one could say, of unified ambitions and purpose for the discipline.

John Duff (University of Massachusetts) picks up on some of these themes in his contribution to this Issue, arguing that marine resource development “has often been affected less by territorial considerations than by the initiative of people and the actions of lawmakers.”³⁸ We are given a good flavor of the sorts of circumstances where this came to pass, such as the Guano Islands Act of August 1856, in which the United States Congress provided that

[w]henver any citizen of the United States discovers a deposit of guano on any island, rock, or key, *not within the lawful jurisdiction of any other government, and not occupied by the*

34. This was addressed in a recent survey in *THE ECONOMIST*, where, as the result of its quest for natural resources in Africa, China was described as being among “The New Colonists” of the world, with important consequences for the relationship of certain States—Angola and the Sudan are mentioned—with the International Monetary Fund. *See A Ravenous Dragon*, *ECONOMIST* (London), Mar. 15, 2008, at 3–4.

35. Eric A. Bilsky, *Conserving Marine Wildlife Through World Trade Law*, 30 *MICH. J. INT’L L.* 599, 605 (2009); *see also* Duff, *supra* note 15, at 648.

36. Bilsky, *supra* note 35, at 622.

37. This is also the approach of the 1982 United Nations Convention, *supra* note 11, pt. XI (establishing an International Sea Bed Authority with respect to the Area). *But see* CHURCHILL & LOWE, *supra* note 8, at 239. For a general critique of our commitment to international institutions, however, *see* B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 *EUR. J. INT’L L.* 1 (2004).

38. Duff, *supra* note 15, at 654.

citizens of any other government, and takes peaceful possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President [of the United States], be considered as appertaining to the United States.³⁹

Duff invites us to consider this legislation as an assemblage,⁴⁰ “tailored to address the national governance and private utilization desires of state and commercial actors.”⁴¹ It is precisely this theme that is seized and developed to persuasive effect by Ted L. McDorman (University of Victoria) in his Essay, “Canada–United States Cooperative Approaches to Shared Marine Fisheries Resources: Territorial Subversion?,”⁴² which usefully explores both the promise and the shortcomings of bilateral cooperation between the United States and Canada with respect to cross-border marine living resources. The failed initiatives that have occurred within this relationship “indicate the authority of territorialism and property in shaping attitudes and inhibiting compromise that departs from a rigid application of territorialism,”⁴³ although McDorman does well to remind us that these experiences do not form the essence of the relationship between Canada and the United States: that, he maintains, is defined by a series of cooperative successes.⁴⁴ And, to be sure, “territorialism”

39. 48 U.S.C. § 1411 (1856) (emphasis added); see also Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57 AM. Q. 779 (2005).

40. Pace the title of Duff’s contribution, *supra* note 15, as well as SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006). Duff addresses a concept that “focuses on how territory, authority, and rights have been aggregated to form the foundations of nation-states during the Late Middle Ages and how they are often assembled in our present era to serve as the foundation for global systems.” Duff, *supra* note 11, at 660–61. However, as Duff writes, “the term is also used in a narrower sense by ecologists and natural resources managers to describe some group of biological organisms and/or physical habitat structures that occupy the same space and time such that they ought to be considered and managed with an understanding of those relationships and simultaneities.” Duff, *supra* note 15, at 661.

41. Duff, *supra* note 15, at 661.

42. McDorman, *supra* note 24, at 665.

43. *Id.* at 672. This had the consequence of hurting the very thing the 1979 East Coast Fishery Agreement and the 1985 Pacific Salmon Treaty were designed to assist, fish stocks.

44. *Id.* at 677. This idea was also acknowledged by no less than the International Court of Justice:

Canada and the United States have to their credit too long a tradition of friendly and fruitful co-operation in maritime matters, as in so many other domains, for there to be any need to fear an interruption of that co-operation, which clearly now becomes all the more necessary, not only in the field of fisheries but also in that of hydrocarbon resources.

Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, § 240 (Oct. 12); see also, McDorman, *supra* note 24, at 686.

has had its fair share in shaping the outlook and strategic thinking of both of these countries.⁴⁵

We then move to the second section of the Symposium, on the concept of “urban territory” in a global world, where Hari M. Osofsky of Washington and Lee University Law School opens up the idea of legal spaces in her consideration of “the territory of San Bernardino County,” California,⁴⁶ which is “certainly ‘local’ from a formal legal perspective, but its physical and spatial characteristics resemble those of a much larger entity.”⁴⁷ Osofsky argues for a law and geography approach in registering the “layered interactions” that affect the county with respect to the question of climate change,⁴⁸ and the results make us take a step back and consider which epistemic units ground not only our interpretations but also our legal solutions—in other words, which structures govern our thinking. Her contribution offers important insights on a much-neglected “window into the complexities of defining a local scale in an interconnected world,”⁴⁹ which will, in turn, bring us much closer (and helpfully so) into contact with the “common threads of micro-interactions and multiscalar networks which . . . shed light on the scale of the ‘local.’”⁵⁰

45. As in Article 1 of the 1990 Canada–United States Fisheries Enforcement Agreement, which provides that

[e]ach Party shall take appropriate measures consistent with international law to ensure that its nationals, residents and vessels do not violate, within the waters and zones of the other Party, the national fisheries laws and regulations of the other Party. Such measures shall include prohibitions on violating the fisheries laws and regulations of the other Party respecting gear stowage, fishing without authorization, and interfering with, resisting, or obstructing in any manner, efforts to enforce such laws and regulations; and may include such other prohibitions as each Party deems appropriate.

Fisheries Enforcement Agreement, at 38–39, Can-U.S., Sept. 26, 1990, 30 I.L.M. 419. For McDorman, “[t]his obligation simultaneously respects territorialism (a State can only directly enforce within its territory) and undermines territorialism (by ensuring that a fisher of one State will be prosecuted and punished for illegal activity in the other State).” McDorman, *supra* note 24, at 684. It is interesting that in his discussion of the 1985 Pacific Salmon Treaty, McDorman does not view “the State-of-origin” concept as territorial in character, but as a “quasi-property right” that prevailed in Canada, against “the territorialist approach of the salmon being present in Alaskan waters”—the prevalent view in the United States. *Id.* at 676.

46. Hari M. Osofsky, *Scaling “Local”: The Implications of Greenhouse Gas Regulation in San Bernardino County*, 30 MICH. J. INT’L L. 689, 690 (2009).

47. *Id.* at 690–91 (observing that San Bernardino County is “almost twice the size of Israel”); see also Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).

48. Osofsky, *supra* note 46, at 691–92.

49. *Id.* at 691; see also DANIEL W. DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* (2007).

50. Osofsky, *supra* note 46, at 705.

Very much in the spirit of this approach, Lisa R. Pruitt, of University of California (Davis) School of Law, asks us to rethink our concentration on *urban* spaces and to think more in terms of the “rural–urban axis”;⁵¹ hers is a clarion call to challenge “an implicit urban norm.”⁵² This norm, it is true, might provide useful counterpoints to statist dispensations and forms of analysis, but it is clear from Pruitt’s fine and cogent piece that refocusing our attentions upon urban spaces might itself be deserving of its own critique:

Perhaps it is contrarian to talk about rural people and places when invited to participate in a panel entitled “Urban Territory in a Global World,” which is part of a [S]ymposium titled “Territory Without Boundaries.” But surely a panel with a title using the word “urban” invites—at least implicitly—a discussion of the rural “other.” Indeed, a necessary complement to thinking about and studying global cities is thinking about and studying the global countryside. I use the term “global countryside” deliberately, to refute rurality’s long-standing association with the local, because our global economy is bringing country dwellers to the city and sometimes, more recently, sending them back.⁵³

The shift to the global countryside alerts us to the real as well as potential gender implications of globalization—its direct impact, for example, on rural women as agricultural producers, but also the indirect consequences of high levels of debt incurred by developing countries. “[R]ising debt,” writes Pruitt, “severely limits [S]tate spending on education, health care, and other services,” such that “[w]omen and children, often beneficiaries of such spending, frequently bear the brunt of debt’s consequences.”⁵⁴ Even so, the essay then commits itself to explaining how migratory patterns from the global countryside might hold out some *potential* for increasing “women’s agency and decision-making power,”⁵⁵ all told through the prism of the 1979 Convention Against the Elimination of All Forms of Discrimination Against

51. Lisa R. Pruitt, *Migration, Development, and the Promise of CEDAW for Rural Women*, 30 MICH. J. INT’L L. 707, 749 (2009); *id.* at 731 (discussing the “rural–urban difference”).

52. *Id.* at 757.

53. *Id.* at 709 (footnotes omitted).

54. *Id.* at 715. This rising debt leads to what Pruitt calls the ‘economic vulnerability’ of rural women. *Id.* at 721. Note, however, the disparities in governmental expenditure that do not account for, or correspond to, rural demographics. *Id.* at 725.

55. *Id.* at 721.

Women.⁵⁶ This Convention, we learn, “seeks to confer agency on rural women in ways that have material consequences,”⁵⁷ as its:

framework . . . proposes getting resources into the hands of rural women right where they are. This, in turn, implicates not only local officials but also the stances and priorities of rural development organizations. Such development agencies might constructively and strategically make material assistance contingent on the inclusion of women “at all levels” and stages of development planning. Alternatively, these organizations could monitor the ways in which recipients facilitate women’s access to the types of resources for which [the Convention] recognizes their need.⁵⁸

Then, in the third section of the Symposium which is devoted to “Immigration Beyond Territory,” my colleague Alice Edwards of the University of Nottingham addresses the concept of human security. In an invigorating *tour d’horizon* of the subject, she explains how certain intellectual energies have shifted focus from sovereign security to human security—or, better, how sovereign security can be achieved *through* human security. A critical element emerges, though, on the relationship of human security to the existing canon of human rights within public international law, and Edwards navigates what the complexities of this relationship entail for refugees—a vital aspect of her overall argument and synthesis.⁵⁹ Recognizing the “reasonably robust, albeit imperfect” provisions of public international law,⁶⁰ she launches a cautious but crucial appeal for serious consideration of the concept of human security and for interdisciplinary thinking:

Human security, as a fluid and broad ranging concept compatible with human rights and supplementary to international law, may be one means through which the rights, dignity, and security of refugees can be furthered. Human security speaks to state interests, while reinforcing human rights objectives. Law is the

56. G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979).

57. Pruitt, *supra* note 51, at 749. This is because the rights itemized in Art. 14 of the Convention are “not of the standard civil rights variety (for example, freedom of speech).” *Id.*

58. *Id.* at 755 (footnotes omitted).

59. See Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders*, 30 MICH. J. INT’L L. 763 (2009).

60. *Id.* at 791. Though Edwards concludes that international human rights law does “strengthen and enhance existing protection standards for refugees,” *id.* at 795, she remarks how it “has increasingly become an important supplement to refugee protection,” *id.* at 797; see also CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* 9–12 (2005).

safety net for refugees, which needs to be strengthened by, in particular, improved access to judicial redress mechanisms. However, law is only one instrument in the toolbox of international relations. Human security, in contrast, offers added benefits in terms of its flexibility, conceptual appeal, and location in the political corridors of the mainstream United Nations.⁶¹

This Essay is followed by that of Ayelet Shachar from the Faculty of Law in the University of Toronto, who meticulously traces the “shifting border” of immigration regulation—and assesses how, through this subtle mechanism, the State has furnished itself with an even greater set of powers.⁶² “[T]he *location* of the border is shifting,” Shachar writes, “at times penetrating into the interior, in other circumstances extending beyond the edge of the territory,”⁶³ so that, in the United States for example, the authority of the State can now be asserted after migrants have entered its territory,⁶⁴ and where expedited removals can be “implemented not only in the interior but also extended beyond the external perimeter of the U.S. borderline.”⁶⁵ A further development—and concern—in her analysis is how the United States has made its presence felt outside its territorial parameters, from the collation of biometric information which:

can take place outside the United States—in foreign territories—sometimes located tens, hundreds, or even thousands of miles away from the country’s actual territorial borders, in places such as Ireland’s Dublin or Shannon international airports, Canada’s Toronto and Montreal international airports, or Bermuda and Bahamas’ international airports. None of these spaces can plausibly

61. *Id.* at 806.

62. Ayelet Shachar, *The Shifting Border of Immigrant Regulation*, 3 STANFORD J.C.R. & C.L. 165 (2007) reprinted in 30 MICH. J. INT’L L. 809 (2009). For a similar analysis, see also Sassen, *supra* note 26, at 572. For further on this particular theme, see States Without Nations: Research and Commentary on State Efforts to Restrict the Movement of People Across Borders, and on the Alternatives, www.stateswithoutnations.blogspot.com (last visited June 17, 2009).

63. See Shachar, *supra* note 62, at 810 (emphasis in original).

64. This authority can be asserted in accordance with Section 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182 (leading Shachar to conclude that “the exclusion-deportation line has become *de-territorialized*: the key factor for the legal analysis is not whether the person has passed through the territory’s frontiers (where the border traditionally resided). Rather the only question that matters for immigration regulation purposes is whether the person has crossed at any time or place through *law’s gates of admission*, which, as the [Act] proclaims without hesitation, are not territorially fixed but rather ‘designated by the Attorney General’” (footnote omitted)). Shachar, *supra* note 62, at 816.

65. *Id.* at 814. Shachar also remarks that expedited removal, “a procedure typically exercised at the ‘edge’ of territory . . . could apply with equal force to individuals who have already been present within the country for a period of up to two years.” *Id.* at 817.

be construed to lie within U.S. territory, yet American immigration officials conduct their business there as a matter of course.⁶⁶

From the shifting border of immigration regulation,⁶⁷ we turn to the contribution of Adam Weiss of the Aire Center in London, on domestic violence in the context of transnational families in Europe.⁶⁸ We might consider this an assessment of the legal protection afforded to members of such families, or the shortcomings thereof, for in his critique of European Community Directive 2004/38,⁶⁹ Weiss comes to the conclusion that the law “superficially gives the impression of protection, but in practice offers its beneficiaries nothing more than a chance to compete in the host State’s labor market for the privilege of remaining [there].”⁷⁰ Weiss argues that the foundations of the rule against domestic violence, though progressive in character,⁷¹ are market-driven,⁷² and there is no relent to his critique on this account:

The domestic violence rule will, until national or European judicial authorities or the Community legislature revise its scope, fail the individuals it purports to help—mainly vulnerable women from poor countries suffering abuse from European spouses reaping the benefits of participation in the common market. But it will also stand out as an anomaly, both in relation to the national immigration laws of Member States that do not

66. *Id.* at 820. The United States is not alone in these exercises, as Shachar points out in her consideration of the “erasing” of territory by virtue of the excision policy adopted by Australia in its Migration Amendment (Excision from Migration Zone) Act of 2001. *Id.* at 832–34. Indeed, these are practices “increasingly popular among well-off countries trying to take anticipatory or preventive action by extending their influence far away from their own geographical boundaries in order to curb territorial entry by irregular migrants.” *Id.* at 822.

67. *Id.* at 811.

68. Adam Weiss, *Transnational Families in Crisis: An Analysis of the Domestic Violence Rule in E.U. Free Movement Law*, 30 MICH. J. INT’L L. 841 (2009).

69. A consolidation Directive of four decades of legislative activity, *id.* at 845, and of jurisprudence from the European Court of Justice, *id.* at 847. The “domestic violence rule,” as Weiss terms it, is set out in Article 13 of the Directive and is reproduced by Weiss. *See id.* at 847–48.

70. *Id.* at 876. Earlier in the essay, the “first glance” of Article 13, Weiss writes, suggests a “fair compromise” for family members of nationals of the European Union. *Id.* at 849 (“In theory, the domestic violence rule in the Free Movement Directive is a progressive measure aimed at preventing gender-based violence related to the power imbalance immigration law creates when one family member derives residence rights through another.”). Weiss considers, though, that the protection is directed toward “an absurdly discrete group”: “abused third-country spouses of E.U. migrants exercising treaty rights, when those spouses are economically active or self-sufficient and have obtained a divorce before their spouse left the country.” *Id.* at 853.

71. *Id.* at 849 (or, at 857, “particularly progressive”).

72. *Id.* at 843 (“[T]he goals of European Community law addressing internal movement of citizens have been primarily *economic*.”) (emphasis in original). Consider, however, the more detailed policy background for this rule. *Id.* at 861–63.

have similar rules, and as a fundamental (or *quasi*-fundamental) rights provision embedded in a legislative scheme designed to create a common market.⁷³

The law has once again been found wanting, and the gender inequities that it perpetrates are once again not difficult to miss.⁷⁴

In the final set of contributions to the Symposium, we turn to the matter of universal jurisdiction which—one could say *par definitionem*—removes territorial considerations from the equation of the prosecution of certain crimes under public international law for “the nature of the [criminal] act entitles a state to exercise its jurisdiction to apply its laws, *even if the act has occurred outside its territory*, even if it has been perpetrated by a non-national, and even if nationals have not been harmed by the acts.”⁷⁵ Understood as such, we might reflect differently on the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide as an instance of, or holding out hopes and possibilities for, universal jurisdiction since it provides that

[p]ersons charged with genocide or any of the other acts enumerated in [this Convention] shall be tried by a competent tribunal of the State *in the territory of which the act was committed*, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which have accepted its jurisdiction.⁷⁶

To be sure, there are two components to this provision—one dealing with the jurisdiction of the State, and the other with “such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which have accepted its jurisdiction.” This latter prospect is not tied to any territorial qualification, it must be said, but the former component very much is and, by virtue of this difference, one might incline toward the proposition that “the provisions of Article VI fall short of universal jurisdiction in the sense of an entitlement of any *national* court to assert competence over the offence.”⁷⁷

Anthony J. Colangelo, of the Dedman School of Law, traces the normative lineage of universal jurisdiction, as he explains how its

73. *Id.* at 876 (emphasis in original).

74. This discrepancy is especially stark in view of the “particularly high risk of [immigrant woman in] experiencing domestic abuse.” *Id.* at 842.

75. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 57 (1994) (emphasis added).

76. Convention on the Prevention and Punishment of the Crime of Genocide art. VI, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (emphasis added).

77. See HIGGINS, *supra* note 75, at 62; see also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 92 (3d ed. 2007).

“uniqueness” presents “a species of false conflict for the international legal system.”⁷⁸ He argues that since “the State exercising universal jurisdiction merely enforces shared normative and legal commitments of all, no conflict of laws exists since the law being applied is the same everywhere.”⁷⁹ Those conflicts that do occur—or the “jurisdictional ordering” of competing claims, as he puts it—are “more a question of adjudicative, as opposed to prescriptive, jurisdiction,”⁸⁰ and it is emphatically universal jurisdiction as one of “the bases of prescriptive jurisdiction” that is of concern to us here.⁸¹

What is interesting to note in this synopsis is how the enforcement of public international law is tied to a State’s entitlement—or “shared entitlement”—to take prosecutorial action,⁸² and to do so as a base of “international jurisdiction,”⁸³ when some accommodation must surely be made for both mandatory and permissive modes of universal jurisdiction under public international law.⁸⁴ Regardless of this bifurcation, Wolfgang Kaleck, of the European Center for Constitutional and Human Rights in Berlin, makes an important rejoinder in his contribution when he reminds us of how “territory” might continue to assert its influence even in *prima facie* instances of universal jurisdiction. It does (and will do) so if the relevant national legislation *presumes* the presence of the accused on the territory of the State claiming universal jurisdiction,⁸⁵ a point that is taken up in the context of Belgium’s June 1993 legislation on grave

78. Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 883 (2009).

79. *Id.* at 883 (although also exploring the possibilities for the abuse of universal jurisdiction).

80. *Id.* at 883.

81. *Id.* at 882.

82. *Id.* at 886; *see also id.* at 886 n.6, 889, 898 (“all States *may* prosecute the perpetrators”) (emphasis added).

83. *Id.* at 889. Universal jurisdiction “authorizes States not to enforce any distinctly national entitlement, but to enforce a shared international entitlement to suppress universal crimes as prescribed by international law.” *Id.* at 889.

84. This was done in the formulation concerning grave breaches in Common Article 49/50/129/146 of the Geneva Conventions of August 1949 (“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.” *Id.* (emphasis added)). However, Colangelo later writes of a State’s “shared entitlement and commitment—with all other States—to suppress certain international crimes deemed universal.” *Id.* at 895 (emphasis added).

85. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT’L L. 927, 933, 958 (2009) (discussing legislation including a “presence requirement”); *see also* Wolfgang Kaleck, Presentation to the 102nd Annual Meeting of the American Society of International Law (Apr. 12, 2008).

breaches of international humanitarian law (as amended in February 1999),⁸⁶ the 2001 International Criminal Court Act of the United Kingdom,⁸⁷ and the German Code of Crimes against International Law of June 2002.⁸⁸

The final installment of this concluding section belongs to Anne Orford, who directs the Institute of International Law and the Humanities at the University of Melbourne. In the most wide-ranging and thought-provoking Essay of the collection, Orford positions jurisdiction in respect of territory and does so from a historical perspective. Central to her contribution, however, are the other factors affecting this dynamic—of questions relating to *authority* and *audience* within public international law.⁸⁹ Her analysis leads her to make the distinction between jurisdiction that is claimed and that which is *performed*, “the process by which a worldly claimant to authority is transformed through the successful performance of the power to declare the law.”⁹⁰ It is an analysis that takes us across the challenging terrains of political theory and the history of international institutions, as Orford adapts the traditions of thinking on jurisdiction and territory to “the emergence and institutionalization of the ‘responsibility to protect’ concept.”⁹¹ Her conclusion is that “we see a movement away from the representation of intervention as an exceptional interference in the domestic affairs of States, and towards the representation of international presence as authorized, and indeed mandated, by international legal obligations,”⁹²

86. See Steven R. Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AM. J. INT’L L. 888 (2003). *But see* Luc Reydam, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT’L CRIM. JUST. 679 (2003).

87. Kaleck, *supra* note 85, at 940.

88. *Id.* at 949 (discussing the presence of the accused Germany, or of a “legitimizing link” between the crime in question and Germany).

89. Anne Orford, *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, 30 MICH. J. INT’L L. 981 (2009). Orford, I think, best captures this idea in her statement that “[t]he legitimacy of authority—whether of States or of the international community—depends on the capacity to provide effective protection to populations at risk.” *Id.* at 1003. This is notwithstanding any misgivings I might have about recurrent uses of the concept of an international community. See Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. INT’L L. 961 (2002). Orford notes that “who this ‘we’ refers to”—i.e., in the 2005 World Summit Outcome—“is not spelled out,” even though it is pivotal to any understanding of the “collective action” mentioned therein. *Id.* at 1007. Orford regards the World Summit Outcome as envisaging *two forms of authority*, that of the State and “one in the form of the international community.” *Id.* at 1008. *But see id.* at 1013. For further assessments of these and related themes, see ALFRED P. RUBIN, *ETHICS AND AUTHORITY AND INTERNATIONAL LAW* (1997).

90. Orford, *supra* note 89, at 988.

91. *Id.* at 982.

92. *Id.* at 999 (what Nesiiah regards as a “framework shift” from humanitarian intervention in Nesiiah, *From Berlin to Bonn to Baghdad*, *supra* note 25, at 77).

though the extent to which these *representations* reflect an earlier theme from her discussions for this Issue—that is of “soft” as opposed to “hard” regimes⁹³—must for now remain an open question. It is a separate matter, too, as to the *depth* of the political commitment which has accompanied (and which will succeed) this array of noble pronouncements which Orford relates.⁹⁴

* * * *

The thematic designation for this Symposium oddly awards “territory” pride of place in our conceptual thinking, for it suggests that we are now encountering territory “without boundaries” as opposed to territory *with* boundaries, possibly symptomatic of Thomas L. Friedman’s “flat world,”⁹⁵ conceived as his eyes scoured the horizons of Bangalore—one of the global cities of the global South.⁹⁶ Or perhaps it is reminiscent of William Gibson’s “post-geographical feeling,” as articulated in *No Maps for These Territories* (2000).⁹⁷ That said, it is evident just how much territory continues to fashion our perceptions and our interpretations: it has consolidated its hold on our consciousness, since we take up territorial frames of reference and modes of thinking even when we are least aware that *that* is what we are in fact doing.⁹⁸ The Essays of the Symposium have noted, too, the “considerable power” that territorial considerations have had, and continue to have, in legal logic as well as

93. Orford, *supra* note 89, at 995. For “‘soft’ forms of U.N. intervention” see also *id.* On the General Assembly’s World Summit Outcome of Oct. 2005, see Orford, *id.* at 999–1000, 1002, 1003–1009 and ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 22 (2007).

94. See BOYLE & CHINKIN, *supra* note 93, at 22.

95. Pursuant to a remark made by Nandan Nilekani, then the CEO of Infosys, see THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005). For a critical perspective of this position, consider Bill McKibben, *Green Fantasia*, N.Y. REV. BKS., Nov. 6, 2008, at 53, 55 (“In [HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA (2008)] [Friedman is] still describing a world, completely consonant with his ‘flatness’ metaphor, where the number of American airline passengers will double by 2025. But in the real world of expensive energy, the air carriers are shedding routes and parking planes—*The New Republic* reported in August on a new study that showed America might go from four hundred primary airports to as few as fifty by 2025, and traffic might fall by 40 percent”).

96. See A.R. Vasavi, *Brand Bangalore: Emblem of Globalizing India*, in *MULTIPLE CITY: WRITINGS ON BANGALORE* 264 (Aditi De ed., 2008); see also GURCHARAN DAS, *INDIA UNBOUND: THE SOCIAL AND ECONOMIC REVOLUTION FROM INDEPENDENCE TO THE GLOBAL INFORMATION AGE* 251–53 (2000).

97. See *NO MAPS FOR THESE TERRITORIES* (Chris Paine/907 Productions 2000); see also *No Maps for These Territories*, <http://www.nomaps.com> (last visited May 11, 2009).

98. See Elkins, *supra* note 7, at 18; see also SARAH RADCLIFFE & SALLIE WESTWOOD, *REMAKING THE NATION: PLACE, IDENTITY AND POLITICS IN LATIN AMERICA* 56 (1996).

legal imagination,⁹⁹ though we can appreciate how important, as a practical matter, territory might be to the survival and the sustainability of a State.¹⁰⁰ Territory and the concept of territory indeed remain fundamental to the organization of the State and, thus, to the very being of public international law:

The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its government exercises authority.¹⁰¹

Yet, many of the essays in this collection will force us to think *outside* of the territorial box as it were, not of “territory without boundaries,” but rather, as Vasuki Nesiiah has put it, of “territories where the boundaries are porous and shifting between scale and between different networks.”¹⁰² The focus, then, is on the persistence but also on the changing characteristics of these *boundaries* and of their relation to “the territorial [S]tate”¹⁰³—and, we could add, to various orthodoxies of public international law. We have observed this phenomenon in action most especially in the contributions of Saskia Sassen, Ayelet Shachar, and Anne Orford, and, from these and from other accounts, it would appear that for public international law to deliver on the goods that are part of its perennial promise—peace, justice, human rights, and environmental security, amongst other things—it will remain in constant need of creative and critical modes of thinking. This suggests a delicate balance between an appreciation of how territory and territorial thinking can and should inform new legal regimes, methods, structures, and solutions, and

99. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW* 128 (2000). This is pedaled at times through “powerful fantasy,” as argued by Anne Orford, *A Jurisprudence of the Limit*, in *INTERNATIONAL LAW AND ITS OTHERS* 1, 8 (Anne Orford ed., 2006).

100. This is, for example, evident from the plan of President Mohamed Nasheed of the Maldives to purchase land elsewhere as “an insurance policy for the worst possible outcome” from the effects of climate change. See Randeep Ramesh, *Paradise Almost Lost: Maldives Seek to Buy A New Homeland*, *GUARDIAN*, Nov. 10, 2008, at 1.

101. U.S. Ambassador to the United Nations Philip C. Jessup, Remarks at U.N. SCOR, 383d mtg. at 11, Supp. No. 128, U.N. Doc. S/P.V. 383 (Dec. 2, 1948); see also Michelle Burgis, *Faith in the State? Traditions of Territoriality, International Law and the Emergence of Modern Arab Statehood*, 9 *J. HIST. INT'L L.* 37 (2009).

102. Nesiiah, *Slumdog Million Reforms*, *supra* note 25, at 3, 14 (urging that “[o]ur conceptual architecture and reform proposals need to scale up to the complexity of global technologies of urban governance”); see also BRUCE MAU ET AL., *MASSIVE CHANGE* (2004).

103. Oxman, *supra* note 7, at 830 (“[A]ll in time came to be subordinated in the international legal order to the insistent quest for supremacy of the territorial [S]tate.”).

an acknowledgement of the limitations that such approaches bring—
together with an assessment of the preferred alternatives for action.¹⁰⁴

104. *See supra* notes 18–21 and 75 (and accompanying text).