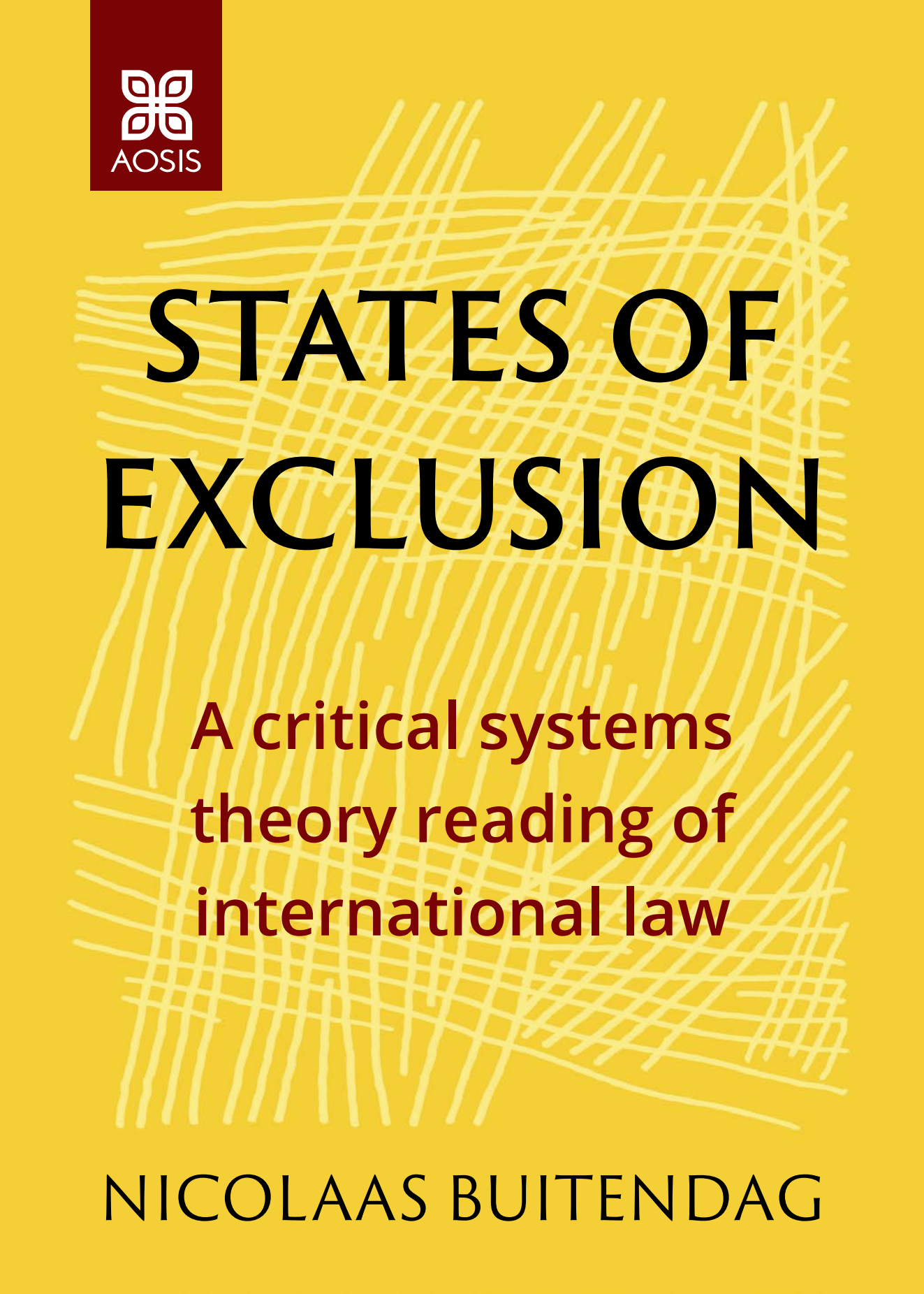
AOSIS
STATES OF EXCLUSION
A critical systems theory reading of international law
NICOLAAS BUITENDAG

# States of exclusion

## A critical systems theory reading of international law

Published by AOSIS Books, an imprint of AOSIS Publishing.

**AOSIS Publishing**
15 Oxford Street, Durbanville, 7550, Cape Town, South Africa
Postnet Suite 110, Private Bag X19, Durbanville, 7551, Cape Town, South Africa
Tel: +27 21 975 2602
Website: https://www.aosis.co.za



Published in 2022
Impression: 1

ISBN: 978-1-77995-239-4 (print)
ISBN: 978-1-77995-240-0 (epub)
ISBN: 978-1-77995-241-7 (pdf)

DOI: https://doi.org/10.4102/aosis.2022.BK319
How to cite this work: Buitendag, N 2022, *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town.

Printed and bound in South Africa.

Listed in OAPEN (http://www.oapen.org), DOAB (http://www.doabooks.org/) and indexed by Google Scholar.

# States of exclusion

## A critical systems theory reading of international law

Nicolaas Buitendag

## Peer-review declaration


The publisher (AOSIS) endorses the South African 'National Scholarly Book Publishers Forum Best Practice for Peer-Review of Scholarly Books'. The manuscript underwent an evaluation to compare the level of originality with other published works and was subjected to rigorous two-step peer-review before publication, with the identities of the reviewers not revealed to the editor(s) or author(s). The reviewers were independent of the publisher, editor(s) and author(s). The publisher shared feedback on the similarity report and the reviewers' inputs with the manuscript's editor(s) or author(s) to improve the manuscript. Where the reviewers recommended revision and improvements the editor(s) or author(s) responded adequately to such recommendations. The reviewers commented positively on the scholarly merits of the manuscript and recommended that the book be published.

## Research justification

The theoretical underpinnings of public international law have taken the sovereign status of the nation-state for granted, at least since the beginning of the modern era. After centuries of evolution in legal and political thought, the state's definition as a bounded territorial unit has been strictly codified. The legal development of the nation-state was an ideological project informed by extra-legal considerations: other social systems played a crucial role, most notably politics, science and economics. Additionally, the ever-narrowing scope of the juridical idea of sovereignty functioned as a boundary mechanism instrumental in colonising Africa and other world regions. While international law claims universal liberalism today, the current system based on sovereign nation-states represents social inclusion and fierce and dangerous exclusion.

The central thesis of this book is that the development of legal sovereignty was, rather than part of the modernist progress narrative, a historically contingent evolutionary regression. While other social systems, such as economics and science, became globalised, politics and law counterintuitively became more territorialised. It is argued that today's nation-state is anachronistic and dangerously ill-equipped to face international problems such as the climate crisis or global pandemics. Finally, it also leaves African states and many other formerly colonised territories at a particular disadvantage by regulating their political practices into a predefined mould.

The book's propositions are supported by innovative research approaches that have not been applied to studying the history of international law before. It is the first time an autopoietic social systems theory approach to international legal historiography has been made. In particular, such original research was made possible by a year-long research term at the Niklas Luhmann Archive hosted at Bielefeld University, Germany. This archive is not open to the public, and very few researchers have had direct access to the contents of this archive.

Another original contribution by the book to the field can be witnessed in its scope and methodology. While the connection of international law with politics has been considered, the case for the influence of modern science on the development of international law rules on sovereignty is made for the first time. It is shown how the evolution of international law was deeply rooted in contemporary advances in Western scientific thinking and how the law was (falsely) held up as a beacon of rationality and Enlightenment thinking.

The last chapter in the book shows how the social systems of law, politics and science were joint collaborators in colonisation (particularly in Africa) and how a 'legacy of excess' is left that of the nation-state. This ideological artefact is more of a hindrance than a benefit to global coordination.

The similarity report of an iThenticate analysis confirms that the work contains no plagiarism. This book assumes a specialist knowledge of international law, political theory, and history and relies heavily on autopoietic systems theory. It is specifically aimed at international law, international relations and political theory scholars, researchers and experts.

**Nicolaas Buitendag,** postdoctoral fellow, Faculty of Law, North-West University, Potchefstroom, South Africa.

## Declaration

This is the revised manuscript by Nicolaas Buitendag of the thesis 'States of Exclusion: A Critical System Theory Reading of International Law', handed in and defended in 2020 at the Graduate School of Law, University of Kyoto, Kyoto, Japan, towards the fulfilment of his Doctor of Laws degree.

The book is a suitable reworking of the original thesis to meet the standards of the publisher and the Department of Higher Education and Training (DHET). No part of the book has been plagiarised or published elsewhere. It is the author's own work in conception and execution and all the relevant sources he has used or quoted have been indicated and acknowledged by complete references.

# Contents

# Abbreviations and acronyms appearing in the text and notes

| | |
|---|---|
| BIA | Belgian International Association |
| DEIC | Dutch East India Companies |
| DHET | Department of Higher Education and Training |
| EIC | East India Companies |
| GIS | Geospatial Information Section |
| IAC | International Association of the Congo |
| ICJ | International Court of Justice |
| OAU | Organisation of African Unity |
| UN | United Nations |

# Biographical note

**Nicolaas Buitendag**
Faculty of Law,
North-West University,
Potchefstroom, South Africa
Email address: nbuitendag@gmail.com
ORCID: https://orcid.org/0000-0002-5698-8076

Considering that global questions demand broad structural responses, Nico Buitendag conducts transdisciplinary theoretical research integrating law, politics, sociology, history, and philosophy. This has led to publications connecting theory to practical cases, such as political hate-speech trials, sanctioned police violence at Marikana, the death of Steve Biko at the hands of the state, and border conflicts between Ethiopia and Eritrea. It has also resulted in translating several works of Niklas Luhmann, a late pioneer of autopoietic systems theory, from German to English. Buitendag obtained the degrees LLB and LLM (University of Pretoria, South Africa), LLM (Leiden University, The Netherlands) and LLD (Kyoto University, Japan) and was a visiting researcher at the Niklas Luhmann Archive at Bielefeld University, Germany. He is currently a postdoctoral fellow at the Faculty of Law, North-West University, South Africa.

Chapter 1

# The triad of international law, politics and science

## Background

Certainty is a part of the foundation of law and its rule. It supports the weight of the rule of law, and the general principles of the monolith are suspended atop this central pillar. Certainty branches into various aspects of the legal system: for society to conduct its affairs, desired predictability in the creation and applicability of norms; in the interpretation and application of them by judges, meaning which arguments lawyers can plausibly make in practice; and also, in the theoretical descriptions of law. This much is true for international law as much as for domestic systems.

Positivism has placed much of this certainty within the legal system itself. However, this work aims to show that the legal system, while independent, is at the same time contingent on many external social systems. Part of its certainty requires many other social and material extra-legal conditions to be assumed true. In this work, a significant example of this in international law is that the nation-state is taken as a given matter of fact, and its claim to represent people's will is theoretically implied. These social facts, though not solely, become part of the source of authority for international law and frame its modes of operations and of observing the future.

**How to cite:** Buitendag, N 2022, 'The triad of international law, politics and science', in *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town, pp. 1–21. https://doi.org/10.4102/aosis.2022.BK319.01

On the other hand, not all of these assumptions are purely social, but (many at least claim to be) rooted in pure scientific truth. The shape and size of our landmasses can be ascertained with perfect precision, and equally so for the borders, we draw by human hand or those natural features we designate. The deployment of ever-increasingly complex instruments allows us to determine the exact rate of climatic change on our planet or the year in which a certain specie will become extinct. These truths inform the legal system's assumptions, which helps it make further decisions.

The aforementioned is the case in practice, so it is only natural that the same certainty is expected in the theory of law. The law of man should be as immune to the principle of falsification as the law of nature. Theorists have busied themselves as geographers and geologists, mapping and charting the legal system's contours, contents and changes. For we understand this cartography is co-constitutive: not only does theory reflect the law, but the law also comes to reflect the theory. Praxis intertwines the philosopher and the practitioner. Maps do not simply tell one where she is but also how to plot the journey to her destination. This might be why theoretical accounts of international law abound.

One of the hopes of this project is to return to the first principles and identify some of the underlying structures of international law, especially those traditionally understood to fall outside of the positivism of the discipline but shape it. One of these first principles is that we can put our hope in states to address global crises. The mapmakers must be called in for questioning to justify the boundaries they have drawn, defend the topographies they have identified, and explain the course they have suggested. Here the confidence and swagger of certainty must be abandoned. We have piled too much upon it, and the pillar is buckling. We must instead (or more accurately, cannot help but!) observe the state of legal theory as not resting only upon said pillar but also on the thin air around it: complexity, contingency and indeterminacy. We must embrace the modest uncertainty of early explorers and recognise that our maps show imperfectly assumed coastlines and unexplored territories.

What is specifically of interest in this book is how the international law construct of the nation-state has taken the place of its primary subject. Of course, the role of international organisations and globalisation more broadly cannot simply be dismissed, but that falls beyond the scope of this work. Furthermore, not only is the state the primary subject, but it is also worth asking why and how it became universalised as the only acceptable political form in international law. As natural as it seems now, the homogenised structure of today was not the only one available.[1] In this regard, I show that international law was perhaps the cardinal discipline in

1. Spruyt, Hendrik. *The Sovereign State and Its Competitors: An Analysis of Systems Change*. Princeton: Princeton University Press, 1994.

this homogenising process. It would be a mistake to regard international law as a set of norms that arose between a prior family of nations. To a large extent, the opposite is true: international law was employed to give birth to its subjects. The caveat 'to a large extent' is important: linear causal arguments are too simplistic for matters of this high degree of complexity, and the emergence of law and states are naturally co-constitutive. This means that creating its subjects, the considerations and ambitions of the political system inform the legal system. These two systems have continuously operated with a very close awareness of one another.

However, a third social system played an integral part in state-formation, namely the scientific system. In its production of 'truth' or instead, theories and models with predictive power, law and politics were served with technologies that they could adopt within their assemblages.[2] The state today is the outcome of various technologies without which such a complex state of affairs would not have been possible. The scientific system is not nearly as value-free as popular imagination would have it be – to the contrary, such a depiction is a deeply politicised and rhetorical manoeuvre. Suppose we regard states, their populations and territory, and the law between them as a kind of social technology. In that case, it is made possible by a substratum of more concrete scientific knowledge and techniques.

In this work, two of these are paid special attention to: the border and the cartographic map. Focusing on these two objects, we can see practical examples of how colonialism had enacted through specific devices with legal, political and scientific communicative elements assembled into one. Attempted is a theoretical account with concrete examples of how this happens. Hopefully, this offers an entry point of critique into how legal doctrines are shaped, at least in some instances. It is through the help of cartographic techniques that legal borders can be accurately ascertained by law; this legal enclosure divides and creates a political community that *can govern* and *be governed*; the state's feedback into increasingly complex international law and fund nationalistic research programmes (including further cartographic projects). Thus, the state is not a purely political creation, and international law does not merely reflect such a reality. It is the outcome of a titanic effort in which the great men of politics, law and science were co-collaborators.[3]

Thus, international law is not a mere reflection of decisions taken but sets up a decision-making or sense-making structure that constructs the scaffolding for future decisions and possibilities. In this sense, 'construct' is meant in the sense of constructivism, meaning there are feedback loops between systems

2. Lenski, Gerhard E. *Power & Privilege: A Theory of Social Stratification*. Chapel Hill: University of North Carolina Press, 1984, 322.

3. The greatest omission from this triad is the economic system. This does not mean that its role is underestimated. However, the scope of such a project would be immense, and the literature on this, post-Marx, is naturally vast.

and their environments that all shape each other. The first implication is that other social systems must be studied alongside the law to see how other systems shape international law and how it shapes them. However, we do not want to regard international law as an outcome of purely social communications but recognise that it is also rooted in materiality.[4] This means that phenomena like geographic landscape, built environments, natural resources, and technological devices have shaped international law too.

The critique carried out by this work is aimed at two audiences. The first target audience is those who believe that international law has largely been a force for good in making all nations equal in front of the law, granting and enforcing human rights, and regulating the environment. The second target audience is those who believe that international law can be appropriated or turned towards more noble ends. One cannot simply dismiss the hard work of thousands of earnest individuals, and the aim is not to dismiss any real achievements. The argument proposed here is hopefully more subtle and nuanced. The aim is to convince the reader that states and international law have historically structural deficiencies that can prod us to think of how to address global problems and whether these structures are best suited to address the crises we face today. It is beyond the scope of a single work to suggest a replacement, but it can hopefully stimulate the imagination in the direction of other possibilities.

This work thus starts from the position that the assumption favouring states is unhelpful. International law played an integral part in colonialism; when this was legally abolished, it left traces in political structures that have been equal on paper more than they have been in practice. International law aided in the unequal ordering of resources, and it seems incredible that it is through the same law and the same states that we now hope to rectify this. As the adage goes, insanity is defined as repeating the same process and expecting a different result. To put it in the jargon of software, it does not reflect a mere 'bug' in the system of international law; we must face the fact that it is an inherent feature of the system. Through the historical and theoretical arguments made in this study, the hope is to make the case that we need a paradigm shift. It is tempting to ask for positive proposals, but unfortunately, that will take more time. International law and states took centuries and millennia to develop through the work of innumerable people. An alternative cannot be riddled out by one study or one person. The best we can hope for is the slow work of becoming aware of our shortcomings and having the ability to turn our gaze towards alternative horizons.

4. This is in line with a broader trend in philosophy and has influenced recent international law scholarship too. For example, see Hohmann, Jessie and Joyce, Daniel. *International Law's Objects*. Oxford: Oxford University Press, 2018.

## States through law, politics and science

The central research question of this study is to investigate to which extent states, through international law, gave expression to both the political and scientific discourses (understood to be systemic communication media) of their time during the era of colonisation. So, to answer this question, each chapter attempts to develop the argument by sequentially dealing with and answering one question at a time respectively, which are as follows:

1. Regarding methodology, how can we make the international law system comparable with other (very different) social systems and processes? A sufficiently abstract theory is required to compare significantly different social phenomena. An autopoietic systems theory is presented. However, it is also modified and updated to address the central research question adequately.
2. As the primary subject of international law and colonial power, it is taken that states are the principal actor where the different systems mentioned in the previous point converge. However, the modern state cannot be taken as is but must be understood as the outcome of a contingent historical process. Thus, the question becomes, how can we understand the underlying structures of the state historically that allowed for the close interlinking of law, politics and science?
3. The nation-state is the only political form today. How is this expressed legally in the sovereignty doctrine, and how did this doctrine allow the nation-state to become the universal model of political rule worldwide?
4. By looking at a specific case, the Berlin Conference of 1884, we will attempt to answer how political power influenced legal doctrine to create order and legitimacy over colonial territories.
5. Finally, the question is asked: To what extent does international law express, and is it legitimised through the scientific discourse of the day? Using the cartographic map as a second case study, we hope to show how scientific truth can inspire the legal imagination but that it also contributes to maintaining existing power structures.

## The current state of the art

The scope of the research aim is vast and belongs to the sphere of macro-analysis. The only way to grasp questions concerned with such a broad spectrum of social activity and disciplinary competencies over a timeframe stretching across all recorded history is with a grand theory. This is done even though such approaches are considered today as rather old-fashioned, in favour of more empirical research. However, in a work that attempts to investigate the working of different social systems, it would be a mistake to remain trapped within the logic of a single disciplinary approach. As argued in a later chapter, scientific truth claims are tied necessarily to political power.

Adopting a strict methodology has political implications, as much as an eclectic approach has. However, as Feyerabend argued, knowledge is not gained through carefully refining existing theories but by pitting incompatible theories and approaches against each other.[5] Thus, despite the eclectic approach taken in this study, it can be unified under perhaps the last attempt at grand theory in the social sciences, namely the autopoietic systems theory of Niklas Luhmann.

The methodological approach of this study follows a classical textual or literature review. The principal source will be the primary sources of Luhmann's published work, complemented by unpublished pieces from his literary estate. Further sources are primary texts by other theorists. For the analysis of specific legal problems, instruments and case law is taken as the final primary text. Only then is attention turned to commentaries and opinions contained in secondary sources to enrich the primary sources, namely Luhmann's theory and positive public international law.

The study is marked by the drawing or even pilfering from various disciplines, whether public international law; legal philosophy or theory; history (legal and otherwise); sociology; politics and even geography. This makes the methodology inter- or transdisciplinary, or even jokingly, *un*disciplined. The reasoning is inspired by the mode of 'world disclosure' as described by Martin Heidegger,[6] claiming that the meaning of something is disclosed by the ontological context or backdrop within which it is situated. This is how the object of investigation in this study has been found: international law, which is informed by and only makes sense within the context of politics; which assumes the backdrop of nations; which are set on the stage of territories that are changing from the facts of environmental crisis. There are thus ontological layers upon layers without which the law cannot operate (but which are, of course, not directly involved in those operations!). However, the normative component of the study is inspired by second-order or reflective world disclosure, as proposed by Kompridis.[7] This means that the structure or intelligibility of the ontological givens is questioned, allowing us to question the validity or assumptions of our institutions. This means that this study will concern itself with very fundamental, even basic, background assumptions of international law. Some lawyers might scoff at attacking such basic institutions; however, the point is that by re-educating ourselves about the background,

5. Feyerabend, Paul. *Against Method*. London: Verso, 2010, 14.

6. Heidegger, Martin. *Being and Time*. Translated by Joan Stambaugh. Albany: State University of New York Press, 2010.

7. Kompridis, Nikolas. *Critique and Disclosure: Critical Theory between Past and Future*. Cambridge: MIT Press, 2006. The point of second-order or reflective disclosure appears to be a relative of second-order observations in Luhmann's theory. This is essential for subsequent ideas in this study, and a thorough treatment of the topic by Luhmann is dealt with in the following chapter.

the legal object of our study can cast a new light. It is thus needed to pull out the foundation from under the law, to destabilise it so that we can reorient it in a new direction. Alternatively, to put it in Luhmannian terms, we must accept that our social reality is always contingent, meaning it can always be different.

Another inspiration comes from the methodological anarchism of Paul Feyerabend. In his classic work, he convincingly argues that not only are theories derived from facts but that specific facts emerge to dominance in light of theories.[8] This should especially hold for the social sciences, and international law reflects this. He argues that scientific inquiry starts when expectations have been disappointed.[9] Therefore the boundary between the descriptive and the prescriptive is never that clear.[10] Although Feyerabend is self-admittedly prone to controversial overstatements, he successfully makes us question traditional methodology. If international law and states have contributed to the problems we face today (as this work argues), 'why should we even consider the "facts" that gave rise to problems of this kind [...]?'.[11] Of course, this is meant to be provocative. Nonetheless, this study aims to present an alternative narrative as conscientious as possible to the historical fact while being open to inspection and criticism.

In the way that materiality, be it in the form of resources or scientific instruments such as maps, is investigated as an influence on the international legal system, methodological inspiration is drawn from actor-network theory, especially as proposed by Latour.[12] This seems at first a rather improbable choice. A young Latour was a vocal critic of Luhmann, particularly since the former insists on the agency of the material world in contrast with the (apparent) inattention the latter pays to it.[13] This advantage of Latour's approach means that the typical relations, hierarchies and causalities surrounding international law are flattened out and retraced. It means that assemblages of objects – for example, *this* government with *that* platinum mine and *this* language right here – cannot be understood as necessary but only as contingent. Gone are the days when notions of a divinely ordained

8. 'It is the *historico-physiological character of the evidence*, the fact that it does not merely describe some objective state of affairs *but also expresses subjective, mythical and long-forgotten views* concerning the state of affairs, that forces us to take a fresh look at methodology.' Feyerabend (n 5), 47. Emphasis in the original.

9. For a similar argument in the field of political philosophy, see the opening paragraph by Critchley, Simon. *Infinitely Demanding: Ethics of Commitment, Politics of Resistance*. London: Verso, 2012, 1.

10. Feyerabend (n 5), 151–54.

11. Feyerabend (n 5), 158.

12. Latour, Bruno. *Reassembling the Social*. Oxford: Oxford University Press, 2007.

13. A particularly exciting showdown between them occurred in Bielefeld during the joint conference of the *European Association for the Study of Science and Technology* and the *Society for Social Studies of Science* during October 1996. For a conference report that reads like something from the sports pages, see Wagner, Gerald. "Signaturen der Wissensgesellschaften – ein Konferenzbericht." *Soziale Welt* 47 (1996): 480–484.

order that must be can be accepted. Instead, we must understand that any group formation or relation between groups or categories is a constant process that can always change. Groupings are nothing more than particular distinctions being made or boundaries being drawn by someone around something. Another valuable element of this method is that agency belongs not only to human actors or groups but also extends to the material world. Agency becomes not a characteristic of human cognition but a kind of movement or relation between entities that changes their relationship or action. Anything that makes a difference is an actor. This reflects a current shift towards what has been described as object-oriented ontologies.[14] The methodological point of departure is that anything that changes social relations is relevant.

Thus, the methodological approach is an eclectic one. In its use of systems theory and actor-network theory for looking at the law, it is certainly a study in international legal sociology. It also dwells within the domain of international legal history by giving an account of the history of the state and by taking the Berlin Conference of 1884 as its central case study. Given its special attention to spatial constructs such as borders and cartography, it can also be said to contribute to the burgeoning field of legal geography. While I believe that some theoretical innovations are made, the value of this work lies perhaps most in its synthesis of various methods to make a broad argument, with the hope of appealing to positive lawyers to reconsider their discipline.

However, an overview of the existing literature relevant to our study must be examined before one can continue. Given our question's rather broad and classical nature, it is only natural that many excellent studies on similar topics have already appeared. However, all studies are bracketed by their specific research aims, which do not overlap precisely with the one presented here. Therefore, some of the most relevant classical international law works are discussed along with their merits. However, reasons are also given for what differentiates this work, and thus hopes to add to the existing corpus of knowledge. The overview will categorise works by theme and discuss them grouped under such a frame.

One of the primary works on the law of the state and sovereignty is *The Creation of States in International Law* by James Crawford. This classical work has long remained relevant for those who study the rise of states in international law and is naturally also an essential guide for this study. It remains invaluable as a source of positive legal doctrine on state creation. At the time of its publication, during the age of decolonisation, it was sensitive to the shifting winds blowing across the world and the newly emerging family of nations. In this regard, it also provides brief but helpful context to legal rules. However, it

14. Harman, Graham. *Object-Oriented Ontology: A New Theory of Everything*. London: Pelican Books, 2018.

should be clear that the aim of that monograph is not directly comparable to this project. Crawford's work remains a valuable guidebook of existing legal principles but probes little into the historical conditions from which they arose. In contrast, this study hopes to look at the legal creation of states from a meta-level, asking about the legal conditions and social and material ones.

Thus, it only makes sense that recourse should be taken to some of the classical works of international legal history. These exist in a plethora, and only a representative sample will be dealt with here. Particular preference was given to newer publications in the field of international legal history, but ones that have already established themselves in a short period. Perhaps the most similar study to this one is the excellent book of Grewe, *The Epochs of International Law*. This contribution by an eminent jurist gives a broad but comprehensive overview of the discipline's historiography. Its further benefits from being sensitive to the socio-cultural environment in which the development of the law is explained. For all its merits, however, there are important differences between that work and the one at hand. While its strength lies in its comprehensiveness, it does little to challenge the traditional narrative of international law. It essentially regards international law as a modern phenomenon and one that can be neatly divided into epochs. In this study, both these assumptions are rejected. We argue that the history of international law is worth studying over a more extended period and that its development is gradual evolution with a stable core rather than something that can neatly (and somewhat arbitrarily) be divided into distinct eras. Furthermore, while Grewe is most undoubtedly critical of many developments, one could still argue that his critique is launched very much from a position within the mainstream of international legal thought.

Other works on the legal history of sovereignty have also served as inspiration. Excellent titles by Pitts – *Boundaries of the International: Law and Empire* – and Benton – *A Search for Sovereignty* – attempt to cast new light on how sovereignty developed under conditions of imperialism. Both convincingly show how sovereignty was shaped in the colonies rather than in Europe and how it was essentially a tool to administer colonial extraction. Again, despite being greatly inspired by the scholarship mentioned above, this project has a different focus. While both works mentioned study a history tightly framed in terms of a period and geographical space and their very concrete effects on particular doctrines, this work aims to find large, structural patterns from as broad a viewpoint as possible.

One of the guiding lights in this study is the seminal *Imperialism, Sovereignty, and the Making of International Law* by Antony Anghie. This study hopes to expand and supplement the spirit and argument of that work with other theoretical approaches and different evidence. Where Anghie focuses particularly on the economic concerns of imperial powers, this study assumes that and leaves it in the background favouring other social systems, such as

the scientific. It takes the 'civilising mission' premise of the book seriously and hopes to analyse it from a systems theory perspective – namely that of the *longue durée* as well as analysing the material and structural substructure that shaped legal evolution in this particular direction – in the hope to add a deeper analysis of the phenomenon.

Given the recent renaissance of international legal history, newer and more challenging histories are appearing more than ever, as evidenced, for example, by the *Oxford Handbook of the History of International Law*. Many of the contributions are refreshingly welcome, and older narratives are being challenged, even though the book restricts itself to the last five centuries. As should be clear by now, this work intends to supplement such studies and invite us to think more broadly about international legal history, not only in terms of timeframes but what kind of historical objects or events are relevant to legal history. These are the strengths and potential contributions of a systems theory approach to historiography.

One could classify the second category of works under the intellectual histories of international law. A prominent recent example is Koskenniemi's *The Gentle Civilizer of Nations*. A work of marvellous scholarship, it is an admirable attempt at tracing the intellectual development of international law by looking at the writings of many prominent jurists throughout modernity. Such work is undoubtedly valuable in the study of international law. However, that project has certain shortcomings that distinguish it from ours. Despite the fact that the by-now-familiar charge of attention only paid to the modern era, the book is undoubtedly one vested deeply within the Eurocentric tradition of international law – and even more specifically, English, French and German. Although such works are valuable, it is a 'great men's' account of history and traces the development of the law purely on its terms. However, it proves that thinking within international law is not always easily compartmentalised and that different ideas are constantly swirling in all corners of the discipline, coming to the limelight at some stages or withdrawing to the shadows during others. Thus, the intellectual history of international law is dynamic and not linear development based on consensus. Unfortunately, one more criticism that could be aimed at the work is its lack of a critical voice, especially toward the conclusion. As valuable and admirable a study as it is, its substantial value remains in the realm of the encyclopaedic.

Since this work devotes an entire chapter to the Berlin Conference of 1884, one cannot avoid perhaps the most famous book in international law on the event, *The Nomos of the Earth*, by Carl Schmitt. Chapter 5 engages with the work extensively, and thorough criticism is launched. As a work of intellectual history, it is found to have several shortcomings, most of them influenced by the author's politics and their desire to see their native Germany remain relevant on the global stage. The work also sacrifices empirical accuracy in favour of rhetorical guile, and some of its ideas seem somewhat outdated to a modern reader.

The final category of literature that will be addressed is those that approach international law from a systems theory perspective. In the first instance, it has to be said that this body of literature is by no means large. Although literature exists for domestic legal theory and international relations, international law proper remains underdeveloped in this regard. One of the leading proponents of systems theory in international law is found in the figure of Teubner. While his commitment to developing legal systems theory is admirable, the focus has mainly been on private international law. Another writer, more concerned with international law and environmental law, in particular, is Andreas Philippopoulos-Mihalopoulos. His development of 'critical autopoiesis' is a welcome addition. However, while this work operates in the same spirit as his, the exact legal topics and doctrines addressed are sufficiently different.

Thus, while this work falls into a broader spectrum of scholarship that shares similar concerns or methods, no work offers a complete picture or solution to our research question. Therefore, this work attempts to take place within this larger network of scholarship to supplement the larger picture of which all form part.

## The relevance of systems theory for international law

While Luhmann wrote extensively on the legal system in general, his works are surprisingly silent on specifically international law. Nonetheless, his systems theory has enjoyed moderate success, most notably in the works of Gunther Teubner. However, it is perhaps worth taking a moment to make a case for studying international law through this methodological framework, primarily since this study draws little upon the work that has already been done in terrains such as global law.

There are several reasons for this choice. The first advantage of systems theory is that it is abstract enough to describe international law in the same terms as other systems, such as politics and science. This allows us to place the law and its internal working and assumptions on the same flat playing field as the workings and assumptions external to itself. We can compare them using the same conceptual vocabulary. It can give international law practitioners fresh insight into how external considerations impact law, for example, in the case of evidence. It also lets the lawyer see the law's influences and effects within a more exhaustive social process. It allows the legal theorist to describe the 'outside' of international law with the same clarity and expressive power as she can describe that which happens inside the legal system. It functions as a bridge over the boundary between purely introspective legal theory and a broader theory of law in society. A robust theoretical approach equips lawyers with an instrument for internal legal coherency. The advantage is double here: we can keep international law distinct as its entity (that means not subsuming

it into merely an instrument of political power) while maintaining its interdependence with other systems. International law can thus be studied as an integral component of world society, but only within a heterarchical framework with other systems. This also extends to its treatment of the sciences into a single unified system with the shared function of producing ever more truth claims to society. That means technologies such as agriculture, printing, and cartography can be understood conceptually as belonging to the same system, interacting with the law and comparable mechanisms. Thus, the triad of international law, politics and science, which form the essential core of this work, can be studied in a systemised fashion.

Second and in conjunction with the first, Luhmann's writings are vast and cover many topics. From law and its theory to other social systems like politics and science and their historical trajectories. He also discusses communicative media like power and truth and problems of risk and ecological issues. Like international law, he traversed a wide scope of the human social condition. By adopting this approach, our theoretical toolbox is thus very well equipped to engage with diverse problems. As society and international law become increasingly complex, robust and comprehensive theories become more critical to make sense. While it might be impossible for the international law practitioner to know the details of new scientific developments or the finest of political details between certain countries, systems theory can contribute to the lawyer's understanding of the type of information they are receiving and how it is communicated.

In a recent book, Roth-Isigkeit argues that theories of international law proliferate and that fragmentation of legal theories, each with an underlying political and normative claim to the future of international law, can be seen. He believes that this is harmful to the future development of international law. Therefore, a degree of consensus must be reached on the way forward.[15] I contend that a reading of Luhmann allows us to accommodate this fragmentation of theory in the guise of a single theory. Suppose we assume that Roth-Isigkeit's posited problem is a genuine one. In that case, this forms the third basis for which systems theory is supported as the best candidate for thinking through international law. Of course, this argument exacerbates the same problem: the multiplication of theories. However, systems theory already has this critique built-in, understanding that multiple or competing self-descriptions of systems exist and that complexity is always increasing. This self-reflexiveness of systems theory is already one of its great strengths and can accommodate the number of competing descriptions. It is hoped that through this work, the reader will be convinced of the merits of systems theory in analysing international law.

15. Roth-Isigkeit, David. *The Plurality Trilemma: A Geometry of Global Legal Thought*. Cham: Palgrave Macmillan, 2018.

This kind of abstraction and comfort with contradictions form the fourth strength of systems theory and allows us to constructively engage with international law's contradictions, such as the tension between sovereignty and universalism or that a system predicated on exclusion now attempts at total inclusion. For a good reason, Sloterdijk bestows the title of 'devil's advocate' on Luhmann.[16] His theory is undaunted by contingency, paradox, difference and complexity. It is an approach that does not offer room for relief[17] but forces us to look straight at the law and the social problems that it faces.

This space of negation has, by extension, another powerful effect. Descriptions are always based on observation; no observation can be complete or perfect. Thus, even as a grand theory, we must be humble. Humility allows us to question the certainties of law without claiming to be able to replace it with a more substantial pillar. It does not offer a utopia. It is not totalising. Instead, it offers 'a precise attentiveness to the positional differences between subjectivities',[18] stopping us from being dogmatic ideologues and retaining flexibility in our approach to international law. This is the fifth reason for preferring systems theory in our analysis.

The sixth and final reason for employing Luhmann, closely related to all of the above, is that it is the author's belief such a comprehensive application of Luhmann's oeuvre, with the admirable exception of the work of Philippopoulos-Mihalopoulos, is thus far not available in the field of international law. While some international lawyers have instrumentally taken up certain individual elements, the approach of this study attempts to take as much as possible from the corpus of Luhmann, not only that relating explicitly to law, and see where it can address the controversies in the domain of international law. A system that must deal with a wide range of human problems requires a comprehensive theoretical approach. We also anticipate that this constitutes one of the novelties of this research.

Moeller has written that 'social systems theory often provides the most advanced, adequate, and applicable models for understanding how things work in contemporary society'.[19] Therefore, it becomes all the more surprising that the application of these insights has not had the reception in international legal theory one would expect. In its scope, it provides a much broader framework than most other theories. This begs wherefore it has not moved outside of relatively small, specialist circles. There are several plausible

16. Sloterdijk, Peter. *Not Saved: Essays After Heidegger*. Cambridge: Polity, 2016.

17. Moeller, Hans-Georg. *The Radical Luhmann*. 1st ed. New York: Columbia University Press, 2012.

18. Sloterdijk (n 16).

19. Moeller (n 17).

explanations for this. Indeed one of the greatest ones is that the complexity and vocabulary of systems theory is very alien to lawyers and even legal theorists. It could prove challenging even for those versed in legal sociology's classics. Apart from the inherent complexity of the theory, the reasons for this labyrinthine writing done by Luhmann can only be guessed. It is well-known that few could keep up with his racing intellect, and peers often implored him to slow down or to reexplain his points in more elementary language. This is perhaps one reason why his writings are complex. However, some passages prove that he could be a skilled writer. Moeller also suggests that Luhmann merely adopted the typically inaccessible 'professorial German', which was incredibly prolific in the 1970s–1990s. However, this study attempts to remedy this problem, for it cannot assume much background knowledge of system theory on the reader's part. It hopes to do this in two ways. The first is by only employing the parts of the theory that are directly relevant to the arguments being proposed. Further, they are explained carefully and in the most straightforward language possible.

Moeller also asserts the radicality of systems theory to reject anthropocentricity, favouring communications, structures and processes. This provides a natural fit for this study, if not for the study of international law in general.

Finally, it is also worth noting that Luhmann's theory is based upon the evolution of society and its systems, but this evolution is distinctly not progressive or teleological. Instead, the keywords are 'contingent' and 'functional'. If we keep that in mind, it places a critical distance between us and the law. It means that we cannot project values onto social systems and that notions such as 'justice' or 'humanity' are only self-descriptions within the system with no external referent. Consequently, they also do not exist as goals for a system to aim for its evolution. Society is much too complex to predict, much less steer, the evolution of an entire system. Therefore, we can only agree with Teubner when he argues that our best hope is understanding evolution's mechanisms and functions.

This contribution will humbly attempt to heed this warning and not blindly apply Luhmann and others' system theory. An attempt will be made not to impose the theory as such but rather to extract from it a methodological approach to analyse the state of contemporary international law. In this respect, the 'critical autopoiesis' of Philippopoulos-Mihalopoulos is one shining example of this, both in its deferential irreverence of the source material of systems theory and its focus on the application directly to the legal system.[20]

20. See: Philippopoulos-Mihalopoulos, Andreas. "Critical Autopoiesis: The Environment of the Law." *Law's Environment: Critical Legal Perspectives* (University of Westminster School of Law Legal Studies Research Paper Series) 11–17 (2011): 45–62.

That begs the question of how a systems theory methodology would look if systems theory is not applied in its present condition. I suggest that such a method would be self-reflexively aware of the boundaries and distinctions it draws. Further, it does not take the distinctions made by others for granted but observes said distinctions with as much scrutiny as the person or entity that made them in the first place. Hopefully, this allows us to see international law in a new light. A systems theory analysis that draws original distinctions and observations can make new problems appear within the discipline, or it might even solve old ones.

## Chapter overview

As per our research aims, this study investigates how international law reflects political and scientific discourses during the age of colonisation and empire, culminating in the 'scramble for Africa'. These communications formed around the nation-state and its goals. The nation-state formed, as it continues to do today, the decision structure in which these discourses and goals made sense. Thus, an important question would be, how did the state come to be? The state is naturally a juridical-political creation and enjoys a central position in international law. However, the state is as much a product of international law as *vice versa*. More than that, the case presents the discourses and communications stemming from the scientific system that played an essential part in this evolution from the beginning. In practice, equality has never been present within international law. While this might be formally true within the legal system's self-description, in the doctrine of equality before the law, we know that the relations governed by law are skewed historically by power and knowledge.

The next chapter provides the theoretical framework that informs the entire study. Our research question poses the problem of how we can simultaneously speak meaningfully of very different systems like international law, politics and science. Autopoietic systems theory has been selected as a suitable candidate due to its breadth and sophistication. However, given that this work relies heavily on Luhmann's writings and theory and is not widely read within international law, no prior knowledge can be assumed. That is why Chapter 2 gives an overview of systems theoretical concepts. Naturally, it would be impossible to give a detailed account of such a vast and complex work. Therefore, an effort has been made to highlight only those theoretical tools directly relevant to the complete work. With careful reading, I hope it will provide an excellent introduction to systems theory and equip the reader with at least enough to follow the following arguments. However, a warning should also be issued at this point. A simple 1 : 1 transposing of Luhmann's writing onto present conditions is not the goal. If Luhmann was strictly interested in description, this work is at least partly concerned with diagnosis. That means that classic systems theory has to be slightly 'updated' for present conditions.

A critical shift in nuance is desired to highlight the sometimes-hidden effects of social processes. That means we must critically look at international law and its history and see where traditional accounts fall short in terms of temporal scope, interdisciplinary insights, and looking at the deeper social structures that drove legal processes. Therefore, the introduction of an epistemology of suspicion is the theory of observation and distinction. It requires us to re-evaluate all knowledge, including its source. It provides the most crucial foundation for what is to follow. It also means that other systems theory concepts are reconsidered. For example, a theory focusing on communication might create the impression that increased communication is always desirable, leading to more understanding and inclusion. However, communication can also be overwhelming and bear bad news; it can be used to shame, shun or exclude. International law, too, has a long history of communicating exclusion.

However, it is not alone. International law has always partnered with the state's political power and the truth claims of the sciences. It has always relied on the persuasive effect of power and truth to substantiate its claims. This is also apparent in the creation of the nation-state. The chapter hopes to show that these two symbolic media have an inherently asymmetrical effect. Political power has allowed the communication of coercion to be paraded as consent. This has made creating states possible, as well as the expansion and homogenisation of this political form globally, largely due to international law. On the other hand, scientific truths (almost always under the state's control) have allowed for new technologies that enabled states' expansion. I also argue that it lies at the bottom of the civilisation/barbarism argument and justified intervention into foreign territories.

After the theoretical foundation is laid, attention is directed to a historical account of the rise of a complex political society. As we argued before, the state is the main subject of international law and an important nexus where law, politics and science overlap. Thus, it is vital to understand the historical process that created the structural framework in which colonialism is made meaningful. Chapter 3 traces the origins of the modern nation-state and sovereignty. Rather than rooting it in traditional, modern sources, such as the *Peace of Westphalia*, it is argued that political power has assumed the same essential function for millennia, increasing only in sophistication if not the essence. Unusual for a work of international law, whose memory usually extends as far back as the Roman Empire, the origins of state sovereignty are traced to the first complex societies from the agricultural revolution. Admittedly this is rather incidentally related to international law. However, it tells us an incredible amount about states and sovereignty, and it is invaluable by detour.

Chapter 3 thus begins with a meditation on the nature and dangers of historiography. Given that specifically international legal history is becoming

a rapidly expanding subdiscipline, it is essential to reflect on what it means to write a history of international law or even sovereignty. In line with the theoretical tools of the previous chapter, historical knowledge is shown to be deeply political *per se*, and legal history has ideological consequences. While historiography cannot ever entirely escape this, the least it can do is be self-aware of the fact. It is from this that the chapter then progresses to trace the development of sovereignty. It is common sense that the rise of the state was always accompanied by scientific progress in the form of technologies of rule, such as ships, weapons and ammunition. However, the fact attempted here is more subtle: there also exist rhetorical or even invisible technologies, arguments that could persuade others to act according to the will of the state. The most important one to investigate sovereignty is that of the border and its accompanying rhetoric. Borders are not as simple as they might appear at first. Instead, they have been instrumental in consolidating political rule and evolved to ever-sophisticated forms, allowing the state to increase in complexity.

In light of this structural dependency, the state's evolution is studied in three phases: segmentary, stratified and functionally differentiated societies. In each phase, borders have been employed differently, and the idea of sovereignty manifested slightly differently. This naturally had concrete effects on international law and how it was understood: who the subjects could be, how jurisdictions could overlap or not, or who had what rights over which territories. Further, each phase quickly reached a ceiling in its expansion due to technological constraints. The beginning of each new phase aligns with sudden scientific advances that allowed an explosion of energy to be harnessed by sovereigns. Thus, several things arise from viewing such an extensive history of sovereignty: it points not to surface changes in society but to the underlying evolutive structures, how they remained nearly intact for millennia and could establish their autopoiesis repeatedly. This allows us to examine sovereignty today critically: the Leviathan is not a contract for protection but has its roots in exploitation, extraction and colonialism. In this light, the chapter concludes by reflecting on a system theory history that is not stuck in the past but breaks with it and radically opens itself towards a future orientation. That means that international law had to adapt in each case, too, and shifts in the balance of power quickly became reflected in the rise and fall of doctrines such as sovereignty.

Chapter 4 ends at the present day to investigate how we can understand sovereignty today, given the theory and history discussed before. In this chapter, international law also steps to the fore in full, as it has its sophisticated doctrine of sovereignty. It is asked how the sovereign nation-state has become today's universal political and legal model. This occurred through tight legal definitions of sovereignty, which despite its language, was rooted still in the

ideas of civilisation that allowed only certain types of policies to be accepted. Other forms, such as city-states and leagues, were slowly but surely squeezed out for not conforming to a territorial model. A part of the story of how this happened was strong states' dual-wielding of power and truth. Often international law must reflect this in a balancing act. For example, while ecologists can inform an environmental lawyer of the severity of climate change, it is not so simple to communicate this directly into legal norms.

Furthermore, the influence of political power, solidified in the nation-state, makes it nearly impossible to enact the necessary measures. It is structurally almost always against the short-term interests of a state to implement comprehensive steps against global warming. This chapter hopes to show that inter-systemic communication breaks down and cripples action rather than enabling it. We cannot continue to put our hopes on the law to address more significant social problems.

Further, given what we know about the evolution of states, some of its essential mechanisms have become severe structural hazards. The first of these is sovereignty. Sovereignty is a kind of social technology applied instrumentally or tactically in different ways. A reading by Carl Schmitt argues that sovereignty implies not merely an antagonistic relationship but necessarily an asymmetrical one. This makes the term 'international cooperation' oxymoronic. According to Luhmann, one of the causes of this problem is that the nation-state is already an anachronistic concept in a functionally differentiated world society. Directly because of political structures, international law is stuck in methodological nationalism, meaning that it cannot resolve global crises or even exacerbate them, which is illustrated clearly in the ineffectiveness of border regimes. When a system stops working, it must be fixed or abandoned.

The following two chapters use historical case studies to illustrate the inter-systemic relationship between international law and other systems, namely politics and science.

Therefore Chapter 5 takes a single event in the history of international law under closer scrutiny, namely the Berlin Conference of 1884–1885. In this famous event, colonial powers gathered to divide the African landmass into imperial possessions. The chapter looks at how systems theory can describe how the political system influenced international law and relied on the law to legitimise its projects. The chapter begins with an overview of the events during that German winter. The Berlin Conference clarifies the discussion in the preceding chapters. It shows how nation-states are fuelled towards ever-greater expansion; that they are forced constantly into a competition rather than cooperation which they claim; and that the creation and application of legal norms were primarily modulated through a rhetoric of power and truth.

States were driven unquestionably by the desire to extract more energy from an untapped landmass. Even those states that were not expressly interested in that did so as not to be 'left behind'. Further, because of a specific teleological understanding of history, it was easy to use their scientific development to justify colonialism as a humanitarian, civilising project. As such, it presented the challenge for international law of creating internally consistent norms that could satisfy the persuasive communications arising from politics and science. The first was a redeployment of the mentioned civilisation/barbarism distinction (a distinction still silently present in modern interventions). It had implications for the doctrine of sovereignty, and a concept that should logically function as a binary was presented in different shades on a spectrum. The other legal technology that was employed much more crudely was border regimes. The long-term effect this had was to homogenise colonised space aligned with imperial space, leaving us today with the problem of diverse places and peoples who are now homogenised into a single, formally equal political and legal form despite their differences, peculiarities and fundamental asymmetries. Argued that with decolonisation, nation-states were consolidated right when it became clear that world society was moving in a different direction.

Where the previous chapter looked carefully at power, our final substantive part, Chapter 6, pays closer attention to the influence of the scientific system's truth communications on international law. In previous chapters, we have discussed technology, territory, borders, colonialism, and the communication media of power and truth. A perfect centre where all these elements converge can be found in a particular scientific practice, namely that of cartography. Without maps, it would be hard even to imagine colonialism and the law as it is today. The question that the example hopes to answer is to what extent international law and politics relied on the scientific system to legitimise itself. It also illustrates how, in the case of the map, science can capture the legal and political imagination but also limit it. To illustrate this, an argument persists mainly to the material object of the map. While maps have an essential role and function within international law disputes, the net is expanded further in this chapter. The map is taken as an excellent representative nexus where international law, politics and science overlap into a single complex assemblage.

The chapter begins with a theoretical account of the map. Its materiality is an essential component of how and what it communicates. This appears slightly problematic from the perspective of system theory, which is primarily concerned with communication. The material world only serves as its precondition but is not theoretically necessarily very interesting. The first way this is overcome is through a novel reading of Luhmann's *Art as a Social System*, where the communicative power of artworks is theorised. We can insert the map within our existing theoretical framework by reading the map as a kind of artwork.

Further support is drawn from the theory of Latour, a much more expressly materialist sociology. Through this novel reading, we can frame international law and the map within our single theoretical paradigm. It allows us to speak of the map as an object within the same vocabulary throughout the study. It further contributes to international law by allowing a nuanced understanding of how evidence can be viewed and considered. We can more effectively trace the network in which evidence is presented to us and judge its weight accordingly.

It is argued that maps were essential in the creation of nation-states for a variety of reasons. Its appeal to scientific truth allowed sovereigns to bolster their claims over territorial power. From the accurate borders portrayed on the surface of a map, two different things become possible: *inwardly*, it allows for the consolidation of a nation into a single unity under a single sovereign, and *outwardly* it opens the sovereign imagination towards expansion. It was essential for the modern populational and territorial aspects of legal sovereignty. Maps have also become essential to international law. They have become a valuable part of legal claim-making in the modern era, and because of this, the law has an ever more complex relationship with the sciences. However, it has also had an ideological effect on international lawyers. By imagining the world as a map that can be cut up into sovereign slices, and through its selection of what it represents and does not represent, we are caught into a highly selective or distinctive image of what society looks like. This cannot help but influence the way international law is practised. Considering that, I join the burgeoning chorus of voices asking for a post-national way of practising international law. Rather than the map projecting old ideas onto us, it is time to look at the world and collectively think about how we can see it differently.

The study reaches its end in Chapter 7. It concludes that international law is locked into certain structural determinations because of its ties with the current expression of sovereignty in the form of the nation-state. While it has undoubtedly provided some benefits, this form has also reached the limits of its potential. The state and politics, lagging behind other social systems, have become a major structural impediment to resolving global problems, if not actively exacerbating them. Many answers seem to rely on intensifying or scaling up existing structures rather than offering innovative solutions. I argue that international law is finding itself in a crisis, meaning a decisive direction must be taken.

One possible proposal made is the possibility of systemic involution. International law and other social systems need to change their operations inwardly, or what Luhmann calls ‘openness through closure’. This proposal is, of course, modest and does not pretend to offer an instant fix. Instead, it calls for careful reconsideration, more research, and greater reflexivity. To some

extent, this will have to happen inevitably. The question is whether we can change course pre-emptively and preventatively or whether the environment will simply force change upon society. If we are to be successful in the former scenario, a careful understanding of the mechanisms of social evolution must be achieved by the legal profession, as was called for at the beginning of this chapter.

Chapter 2

# Theoretical foundations

## Introduction

As the title of this chapter suggests, the purpose at hand is to provide our study with the theoretical framework and assumptions within which we can proceed. The aims of this study are necessarily rather comprehensive and encompassing. It would be easy to be overwhelmed when speaking of vastly different social systems over a very long period. The complexity of particularity can easily overshadow stable universals.

Thus, to speak meaningfully of the research objects we are interested in, we need a theory that accounts both for universality and complexity. A theory that can describe the particularity of individual systems but speak of them in a shared lexicon that makes them comparable. As we know by now, this research places all its research objects within the frame of autopoietic systems theory. As an abstract theory, it allows us to speak meaningfully of all the phenomena we are concerned with in the same vocabulary.

However, apart from a few honourable exceptions, Luhmann's theory has not found broad resonance within the discipline of international law. This means that as a work of international law, we cannot assume prior knowledge from a reader. Therefore, one of the aims of this section is to highlight some of the most important theoretical tools that will be employed in subsequent chapters. These are explained from the ground up and are essential for

**How to cite:** Buitendag, N 2022, 'Theoretical foundations', in *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town, pp. 23–49. https://doi.org/10.4102/aosis.2022.BK319.02

answering the research questions in each chapter. Any other theory that is only important for a particular part is not dealt with here but is addressed as the need arises.

As the previous chapter stated, the aim is not to apply systems theory directly to international law. As we will see later, all observations have their blind spots. In critical work, focusing on these blind spots proves helpful. Therefore, while the concepts presented are almost as one finds them in Luhmann, our shift in emphasis changes their spirit. We focus our attention on the unwanted side effects of theoretical processes. The hope is that this allows us to see international law from a fresh perspective.

The chapter proceeds by tackling each concept one by one. The most important construction that allows us to compare different systems is communication, the subject of the next section. Systems can act in various ways and have different means to their disposable, making comparison difficult. However, comparison becomes sensible when we typify system actions as communications, a concept that encompasses not only action but a wider range of activities. Nevertheless, we cannot focus on the perfect case where communication occurs problem-free. We will see that this is the exception rather than the norm. In most cases, attempts at communication are hampered by miscommunication, misunderstanding, rejection and ignorance. By emphasising these blind spot cases, as we will do with every concept, we will hopefully arrive at a critical systems theory of international law.

Following the notion of communication, we look at observation as the fundamental operation for knowledge-creation and meaning-making. As essential as this is, we look at its side effects: the inherent biases and asymmetries that arise when distinctions are drawn. We also stop to look at what systems theory as a methodology implies for ontology and causation and that it requires some revision when we speak of inter-systemic communication. Simply put, causation is an observation or distinction made of highly complex circumstances and is thus subject to the same pitfalls as other knowledge-creation or decision-making procedures.

Since all systems interact with each other through their environment, this fundamental concept of systems theory needs to be explained. This border between the system and everything else that constitutes it makes it possible to distinguish between separate systems like law, politics and science. Because of this border, we can even speak of inter-systemic communication in the first place. The penultimate section looks at another one of our vital constructs, namely symbolic communication media. As will be shown in the subsequent chapter, these symbols make communications from one system convincing to another, which compels it to take other systems into account when making decisions. However, as we will see, persuasive communication by no means implies that it should be viewed positively, and inadequate communication can be equally persuasive.

The final section attempts to bring the rather abstract theorising and methods together practically as applied to international law. It illustrates how international law can be understood as an autopoietic social system, which is the launching point for all the research questions that follow this chapter.

## Ex-communication

International law is a system of communication that has evolved to fulfil a desired function in society.[21] This society is made up – in part – of humans, and its communications need human beings in no uncertain terms. However, in this study, I want to try and see what happens when we bring the non-human elements of society to the foreground to share the stage. That means looking at the communications themselves and treating them as objects in their own right. It quickly forces us to realise that communication is by no means the exclusive terrain of humans. Many objects suddenly show themselves to be capable of communication.[22] Since it becomes more difficult to distinguish between these objects, we are left with one option: return to the communication as entity. That means looking at media, channels and environments. So far, this is not exactly new. Already one can recognise autopoietic systems theory or actor-network theory in these rather vague claims. These theories take at their root the possibility of communications or effects between systems or objects.

However, what if we turn these presumptions upside-down? Luhmann was very aware of the unlikelihood of communication, hence his definition of contingency as 'unlikely but not impossible'.[23] It seems we are ignoring the rule by focusing on the exception.[24] Why should we assume communication in the face of contingency?[25] In an age of connectivity, the necessity of discourse is unquestioned. Why do we take for granted that it is not only always possible but even desirable? Is our age not typified, not by a lack, but rather an over-abundance of communication?[26]

21. Luhmann, Niklas. *Ausdifferenzierung des Rechts: Beitrage zur Rechtssoziologie und Rechtstheorie*. Frankfurt am Main: Suhrkamp Verlag, 1999, 35.

22. Luhmann, Niklas. "On the Scientific Context of the Concept of Communication." *Social Science Information* 35, no. 2 (1996): 257–267, 261.

23. On this ground – among many – I differ from Carl Schmitt, for whom '[*t*]he exception is more interesting than the rule. The rule proves nothing; the exception proves everything'. Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Chicago: The University of Chicago Press, 2005, 15.

24. Agamben, Giorgio. *The Highest Poverty: Monastic Rules and Form-of-Life.* Translated by Adam Kotsko. Stanford: Stanford University Press, 2013.

25. 'If the problem of improbability is taken as the starting point, there is an automatic tendency to ask if not the right questions, at least more fundamental ones which recognize that the issue of the connection between communication and society is not confined to the field of communications research but is, in fact, central to all social theory.' Luhmann, Niklas. "The Improbability of Communication." *International Social Science Journal* 33, no. 1 (1981): 122–132, 131.

26. Culp, Andrew. *Dark Deleuze*. Minneapolis: University of Minnesota Press, 2016, 5.

In this work, I want to show that international law, in its relationship with society, is a communication system that has functioned equally on what I call 'ex-communication'. Let us recognise that law is not made up only of inclusion/communion – that has its place – but it is co-constituted by exclusion and exploitation. While social systems consist of communication, it is at the same time only possible at a communication constraint. Everything cannot be about everything; for the differentiation of a legal communicative system, certain legally-formed constraints need to be implemented.[27] For every example of willingness to engage, one is sure to find cases of misunderstanding, the unutterable, or tears falling on deaf ears. It is not enough to say that in the absence of communication, nothing would happen; we have no reason to think that it is any less a mode of agency.

'Ex-communication' in this study assumes a double meaning. On the one hand, we can take it to mean communication failure. On the other hand, we should also retain the theological or ecclesiastical and legal meaning of exclusion from a community.[28] In the Christian tradition, this does not mean banishment nor exile; the expelled remains a Christian but is prohibited from religious rituals and sacraments with others.[29] It is, therefore, not a physical or geographical expulsion but one from a communicative community. It is a communication that carries its negation: 'there will be no more communication'.[30] What we hope to show is that the human condition today is one of ex-communication: from international law, its sister-system politics, objects technological and natural, and even the very environment itself. We also see this exclusion sentiment reflected in the recent interest in reviving the commons in current legal and political theory.

All are familiar with Hermes, the messenger of the gods who has lent his name to hermeneutics, that very core of lawyerly activity. Hermeneutics is the alchemy of transmuting texts that never engage in dialogue but communicates one way and repetitively into law. There is another reason he serves as an apt talisman[31] for international law: Hermes is also the god of borders.[32] Hermes could take a message from one and cross the boundary to deliver it to the other. But Hermes is also the god of tricksters; we should take this as a

27. Luhmann (n 21), 37.

28. The Latin roots are apparent: *ex-* as outside of a *communio*.

29. Galloway, Alexander R. "Love in the Middle." In *Excommunication: Three Inquiries in Media and Mediation*, edited by Alexander R. Galloway, Eugene Thacker and McKenzie Wark, 15. Chicago: The University of Chicago Press, 2013.

30. Galloway (n 29), 16.

31. From the Medieval Greek *telesma*, performing a religious rite.

32. Luhmann, Niklas. *Theory of Society*, Vol. 2. Stanford: Stanford University Press, 2013, 31. This is reflected in an alternative etymology of his name, which derives from the ancient Greek *herma*, literally meaning a carved stone often used as a boundary marker.

reminder that the message is somehow altered in crossing the boundary. The medium between the speaker and receiver is never smooth. The utterance is misheard, the representation alters it, or the receiver misinterprets it. The medium represents the distinction or difference between sender and receiver,[33] and no message crosses that boundary unscathed, or put differently, '[i]t produces victims'.[34] An even more visceral example of this movement can be found in the practices of ancient Rome. Their god of borders, Terminus, was honoured by an annual ritual procession in which groups marched along the border where it was sprinkled with the blood of a sacrificial animal.[35]

One of the aims of this project is to move legal communication from traditional hermeneutics, through the ontological, to the theoretical systems. We want to expand communication from texts exclusively and open up the possibility of any object (understood as a distinction) being capable of communication. Systems theory is suitable for this in that it addresses 'communication' powerfully by describing all of society as a communicative structure without reference to the humans from whom it derives. On the other hand, actor-network theory and its offspring, object-oriented ontology, address the communicators themselves and allow us to realise that humans are not privileged but that almost anything can communicate. However interesting or controversial this point is, the goal is to go one step further and investigate where these communications break down. We want to sit in the lacuna of ex-communication, in which the possibility of communication is acknowledged while simultaneously expressing its impossibility.[36]

An alert reader would probably by now wonder what the difference between ex-communication and exclusion is, the latter having formed part of the theoretical vocabulary for some time. In the case of international law, it has been argued that many states have good reason to regret being included in the fold of international law. The recognition accompanying inclusion often led to legal treaties that sanctioned their subjugation.[37] In my later analysis of the formation of the first states, we will see that the exclusion was more desirable for most. Being included is a curse if it only means inclusion into a hierarchy. Our diagnosis cannot rest wholly on exclusion, which would imply

33. Thacker, Eugene. "Dark Media." In *Excommunication: Three Inquiries in Media and Mediation*, edited by Alexander R. Galloway, Eugene Thacker and McKenzie Wark, 87. Chicago: The University of Chicago Press, 2013.

34. Luhmann, Niklas. "Speaking and Silence." *New German Critique* 61 (1994): 25–37, 28.

35. Nail, Thomas. *Theory of the Border*. Oxford: Oxford University Press, 2016, 37.

36. Thacker (n 33), 80.

37. 'The characteristic inclusion/exclusion mechanism for membership allows members' behaviour to be regulated with great precision and directed in very concrete terms, in other words, under the influence of communication – relatively independent of members' other obligations in the environment of the given organizational system and hence independently of their own, other roles'. Luhmann, Niklas. *Theory of Society*, Vol. 1. Stanford: Stanford University Press, 2012, 75.

that the panacea is simply inclusion, no matter the asymmetries festering beneath it.[38]

On the other hand, our contemporary society does not formally or explicitly describe itself in terms of hierarchy but instead uses the language of equality. If one were to question hierarchical asymmetries, we could very well ask, 'where is power most concentrated? Who is at the top of the pyramid?' Very few would still believe that national governments hold this position; most are too poor and shambolic for this. Unfortunately, corporations have become leviathans in their own right, but their too-wide reach is presently restricted to some systems and not (yet) total. The truth is that society is much too complex and differentiated to point to a single class of powerholders. Yet the suffering of most people remains a fact. Rather than expressly exploiting those at the bottom of a hierarchy, meaning the expansion of a class's productive capabilities to extract from it,[39] we cannot deny that for many, their subjugation and dehumanisation take the form of simply being excluded from functional systems.[40]

Law serves the function of ex-communication in several ways. The first has been mentioned, in the act of hermeneutics, when the law is communicated to us through a particular text. It is the form in which law draws boundaries for what it includes or excludes.[41] Furthermore, it is a communication that refuses to give an account of itself, a singular communication that marks the end of the communication.[42] Our only hope from here can be interpreted, but despite the accessibility of texts, their access remains a selection. The final phase is the most literal one: judgement. The ex-communication is complete. It is not exile nor banishment; the judged can remain but is excluded from ritual, from communication. Next to those included persons who can participate in the functions of society, there are the excluded who are present merely as bodies fighting to survive from one day to the next.[43]

38. Pitts, Jennifer. *Boundaries of the International: Law and Empire*. Cambridge: Harvard University Press, 2018. 9. We could argue that the form of this problem presents us with an unwinnable choice, which one can only get wrong. The moment one distinguishes between just and unjust, one runs the risk of already acting unjustly. See Luhmann, Niklas. "Are there still Indispensable Norms in Our Society?" *Soziale Systeme* 14, no. 1 (2008): 18–37. 19.

39. Culp (n 26), 18.

40. Luhmann, Niklas. "Globalization or World Society? How to Conceive of Modern Society." *International Review of Sociology* 7, no. 1 (1997): 67–79. This is also the spirit in which I read and understand the concept of 'Empire' of Hardt and Negri: 'The passage to Empire emerges from the twilight of modern sovereignty. In contrast to imperialism, Empire establishes no territorial center of power and does not rely on fixed boundaries or barriers. It is a *decentered* and *deterritorializing* apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers. Empire manages hybrid identities, flexible hierarchies, and plural exchanges through modulating networks of command'. Hardt, Michael and Negri, Antonio. *Empire*. Cambridge: Harvard University Press, 2001, xii. (Emphasis in the original.) See also Roth-Isigkeit (n 15), 129.

41. We can also turn this around: to include, we need a closed boundary. Luhmann (n 34), 33.

42. Although many tools are available to the interpreter, we are partial to Paul Ricoeur's 'hermeneutics of suspicion', questioning the politics behind a text while acknowledging that we can never return to the origin of the text.

43. Luhmann (n 40).

The logic of ex-communication recognises that power and agency are too distributed, too fractured, and too dispersed to speak simply of top-down exploitation.[44] Nor can we speak of simple exclusion in the sense of banishment or exile. We need ex-communication to name a complex phenomenon that is systematised and networked. We cannot interpret our situation from legal text alone, but we should grapple with entire systems. Ex-communication functions through the cracks in-between communication and inclusion. It is a communication that includes its non-communication, includes bodies in space but excludes persons from the ritual. It exists not as something we can point to but as the channels, media and relationships among them. This makes it formless, decentred and ungovernable. It is a machine made up of countless micromachines, each with its function. When that trickster Hermes crosses the boundary to hand us the law, he also unleashes a pack of wild dogs in our direction. While the text communicates to us in the binary of yes or no, the dogs unrelentingly bark at us, 'never, never, never!'[45]

Agency and power manifest through complex, decentred swarms, and it is no use for us to ascribe ex-communication to individuals. We must accept the claim, which has been open to controversy, that only (ex)communication can (ex)communicate.[46]

Communication becomes ex-communication because it is contingent, it is risky, and it is aimless. Other times it is wilfully silent, which also communicates *something*.[47] It is improbable and contingent because it is not a direct transmission from one consciousness to another.[48] Instead, one system observes and selects information from its environment (on the other side of

44. Culp, Andrew. *Dark Deleuze.* Minneapolis: University of Minnesota Press, 2016, 32.

45. Galloway (n 29), 56.

46. 'The social system as a structured system of meaningfully interrelated actions excludes, rather than includes, the concrete human being.' Luhmann, Niklas. *A Sociological Theory of Law*. London: Routledge, 1985, 104. See also Luhmann, Niklas. "What is Communication?". *Communication Theory* (n.d.), 252; Luhmann (n 22), 261. This has, for many, been a problematic or controversial feature of Luhmann's theory, usually due to a fundamental misunderstanding. In autopoietic systems theory, communication is perhaps the essential element of analysis, and as such, the bodies or consciousnesses that participate in them are not disposable but merely irrelevant. Just as carbon and neural oscillations are a prerequisite for communicating bodies but not the object of study of a sociologist. Gunther Teubner writes that human beings do play at least two critical roles in the legal system: in the first place, as a semantic construct within the legal system, such as a subject, and in the second place, as individual psychic systems in the environment of the legal system (it is unclear to us why Teubner would omit the biological autopoietic systems that humans embody in law's environment). See also: Teubner, Gunther. *Law as an Autopoietic System*. Translated by Anne Bankowska. Oxford: Blackwell Publishing, 1993, 26.

47. Luhmann (n 34), 27.

48. Luhmann, Niklas. *Social Systems*. Stanford: Stanford University Press, 1995, 140; Luhmann (n 25), 123; Luhmann (n 37), 37. When discussing the contingency of communication, Luhmann refers to it as 'doubly contingent', in that the first communication being made is contingent (defined by Luhmann as 'improbable but not impossible'), and successful reception, comprehension and acceptance are the second contingency.

the line is all that is not selected),[49] it decides to communicate it outward, and this communication is, in turn, (hopefully) observed by another system in its selective way.[50] Agency and causality become too dispersed to understand as a trivial process, and communication takes on an emergent shape. Communication relies on Hermes crossing several boundaries, and the sheer unlikeliness, the contingency of social communication, can only strike us.[51]

Communication is implicitly risky, and when this risk fails, we have ex-communication. If communication has passed through all the boundaries of contingency and finds a receiver who understands it well enough, it is in the receiver's power to reject it.[52] Two options for the future are created, one more desirable to the one who created the communication but open to dismissal by the receiver.[53] Projects are neither realised nor stillborn. When communications are rejected, a conflict arises, and it becomes possible to introduce the theme of law, which carries new risks for the parties. The ex-communication becomes crystallised, 'a much clearer acceptance of the possibility of a fight'.[54] Under the theme of law, a party essentially halts the current theme of communication, isolates himself from context, and calls on a distant authority to declare one party in the right and label the other as wrong. Legal communication invites conflict and struggle. This happens when parties make their inability to communicate the theme for further communication. An impasse or difference

49. Luhmann (n 48), 140.

50. Luhmann, Niklas. "Communication about Law in Interactions Systems." In *Advances in Social Theory and Methodology: Toward an Integration of Micro-and Macro-Sociologies*, edited by K. Knorr-Cetina and V. Cicourel, 238. London: Routledge & Kegan Paul, 1981; Luhmann (n 48), 158. Luhmann, Niklas. *Introduction to Systems Theory*. 1st ed. Cambridge: Polity Press, 2013, 53.

51. 'Seen in this context of evolutionary achievements, communicative success is exceedingly improbable. Communication presupposes beings that exist independently, with their own environments and their own information-processing apparatuses. Every being sifts and processes what he perceives for himself. Under such circumstances, how is communication, that is, coordinated selectivity, possible at all?' Luhmann (n 48), 157.

52. Luhmann (n 25), 123. Even in the best case, 'understanding normally includes more or less extensive misunderstanding; but these are always, as we shall see, misunderstandings that can be controlled and corrected'. Luhmann (n 48), 141. 'Every communication exposes itself to query, to doubt, acceptance or rejection *and anticipates this. Every* communication!' Luhmann (n 37), 81. Emphasis in the original. Luhmann (n 34), 34.

53. Luhmann (n 46), 255.

54. 'In making legal claims, one defines oneself – concerning one's own expectations – as being unwilling to learn and pretty much commits oneself to the position that if these expectations are not met, they will not be changed but, instead, appropriate action will be taken'. Luhmann (n 50), 241. See Luhmann (n 48), 155: 'Themes also regulate who can contribute what. They discriminate contributions and thereby contributors'. It appears that in medieval courts, this was literally the case, and that 'medieval men thought of litigation as merely a continuation of combat by other means' in Strayer, Joseph R. *On the Medieval Origins of the Modern State*. Princeton: Princeton University Press, 2005, 41.

has been reached, and once thematised in law, one binds oneself to future conflict.[55]

> When someone turns something into a legal issue, he thereby indicates that he is not dependent on the motive structure of the concrete interaction of which he is part. Whoever is, or claims to be, in the right in this fashion no longer needs to communicate, no longer needs to rely on a local suspension of doubt, no longer needs to present himself as being prepared to take up and respond to the other's communication; he is not even willing to argue.[56]

He has nothing left to communicate and instead lets legal norms speak for him.

This finds its logical conclusion in silence. Silence can tell us a lot, though the news is rarely good. It can mean that either the communication was not observed or not selected. It might have been critically misunderstood. Alternatively, perhaps it succeeded in reaching its destination, but the receiver has decided to respond with silence, refusing to communicate further (although being understood loudly and clearly).[57] We cannot speak of communication without also taking silence into account because we cannot dissolve this distinction. As we understand by now, every time we indicate communication, we constitutively reinforce the silence on the other side of the boundary. Every system communicates according to its function and expels the rest to its environment, those things it cannot or will not connect with, on which it will forever remain silent. Through ex-communication, others are made to be silent. Bodies can be thrown into prisons or can be killed.

Ex-communication is the necessary by-product of the indirectness of communication. Systems can project goals according to their functions, but fulfilling a goal or teleology would result in the system's death. The system cannot be constructed by consensus only through successful communication. Consensus would mean the end of communication and the end of the system: it is exactly through the dissent of ex-communication that the need for the system's function arises.[58] The need for social systems such as law form and all communication is predicated on normative premises because of ex-communication.[59] It attempts to take the vast improbability of communication

55. Luhmann, Niklas. "Kommunikation über Recht in Interaktionssystemen." *Alternative Rechtsformen und Alternativen zum Recht* 6 (1980): 99–112, 56–58.

56. Luhmann (n 50), 244.

57. Luhmann (n 34), 27.

58. Luhmann (n 46), 255; Luhmann (n 22), 262. Also see Luhmann: "A social system emerges when communication develops from communication." In *Introduction to Systems Theory*. Cambridge: Polity Press, 2013, 53. Read together with the fact that consensus would nullify the need for further communication, we can regard it as reasonable to assert that social systems emerge when communication is partly unsuccessful, hence ex-communication.

59. Luhmann (n 55), 53.

and, through systematisation, make it probable. A second way successful communication is made more probable is through persuasive symbolic media.[60] Examples of these that will be looked at closely in this work are power and truth. Concerning international law, we will argue that other systems attempt to influence law, namely politics through the medium of power and science through truth claims. This allows for the order to be created in society. However, as we continue to argue in Chapter 7, we cannot assume that this means progress for all.[61] If international law, as a system, can make its communications more successful, that does not equal progress or success outside of the system.

## Precious distinctions

Knowledge is not made for understanding; it is made for cutting.[62]

> [*T*]here is a knife moving here. A very deadly one; an intellectual scalpel so swift and so sharp you sometimes don't see it moving. You get the illusion that all those parts are just there and are being named as they exist. But they can be named quite differently and organised quite differently depending on how the knife moves.[63]

Our previous section made the case that communication is so contingent and selective that we are much more likely to encounter the case of what I have termed ex-communication. Information is not transmitted directly between sender and receiver but instead emerges from a series of incredible selections. These selections highlight a necessary and particular piece of information and leave out an almost infinite remainder. Any observation system, whether a human mind or a social system, operates on this distinction of what is included and what is excluded. The purpose of this section is thus to describe the epistemology behind the selection needed for communication.

When one walks along a garden and picks up a handful of sand, there are numerous ways to order the grains. Depending on who you are or your purpose,

60. Luhmann (n 25), 126. It is interesting to note that Luhmann regards the increased importance of these symbolically generalised media due to the invention of writing. Since communication could occur outside of face-to-face interaction, texts require additional persuasive value. These can take the form of an appeal to authority, whether the source of that authority is in hierarchical power or terms of greater knowledge, for example. This point is also argued in Luhmann (n 48), 160.

61. While order and chaos might be opposite, they are not exclusive: 'We have, therefore, a world in which order and chaos are at a maximum'. Von Foerster, Heinz. *The Beginning of Heaven and Earth Has No Name: Seven Days with Second-Order Cybernetics*. Edited by Albert Müller and Karl H. Müller, and translated by Elinor Rooks and Michael Kasenbacher. New York: Fordham University Press, 2014, 8. It is also worth noting that order is a matter of description or asking the question, 'Who sees this order?' (n 61), 35.

62. Foucault, Michel. "Nietzsche, Genealogy, History." In *Language, Counter-Memory, Practice: Selected Essays and Interviews*. Edited by Donald F. Bouchard. Translated by Sherry Simon. Cornell University Press, 1980, 76; See also Culp (n 26), 63.

63. Pirsig, Robert M. *Zen and the Art of Motorcycle Maintenance: An Inquiry into Values*. New York: HarperTorch, 2006, 68.

one can differentiate them by colour, shape, weight … Any criteria that could come to mind. The selection one makes is by no means necessary, and another observer who looks at the sand might do it differently. How knowledge is created is how things in this world are selected, named and distinguished from all other things.

In the same way, the law distinguishes between what is legally relevant for selection and what can be cast aside. It draws a boundary and marks some information to be let inside while the vast, unmarked remainder is excluded.[64] The criterion for this selection, how this boundary is drawn, is what exactly constitutes the legal system. The system is *not* a unity but the *difference* between the system and the environment. It begins with a difference.[65] This is reflected in the ancient Near-Eastern creation myth, where the universe is created through increasingly more specific distinctions: light and dark, land and sea, humanity and animal.[66] It is thus possible for us to say: knowledge is the difference.

One influential source for this is the operational calculus of Spencer-Brown.[67] It starts with the drawing of a distinction, for:

> [*a*] universe comes into being when a space is severed or taken apart. […] [we] can begin to see how the familiar laws of our own experience follow inexorably from the original act of severance.[68]

He held that we could not know anything without cutting and separating it from the remainder. Thus, the cut or distinction *is* the thing. A boundary always needs to be drawn to create something; wherever that happens, there is always a motive.[69] Thus the law *is* the boundary or the difference between the law and its environment. At the same time, a boundary has two sides: system and environment.[70] There is a constructivist relationship here, for a system cannot be defined context-free. It is always a law *with* an environment. In this sense, social systems depend on communication: two parties are needed, one

64. '[W]hat occurs is a perpetual including and excluding.' Luhmann (n 34), 33; Luhmann (n 22), 257.

65. 'A communication does not communicate the world, it divides it.' Luhmann (n 34), 25; Luhmann (n 50), 44.

66. Luhmann (n 50), 49. Another example from antiquity is Aristophanes' speech in Plato's Symposium. He tells the story of the original humans, with two heads, four arms and four legs, who were too powerful and meddled with the affairs of the gods. In reaction, Zeus cut them in half, creating the distinction between men and women. Aristophanes explains why each person has a 'better half' or 'soulmate', the Greek word for which is *sýmbolon*, meaning 'thrown together'. See Thomä, Dieter. "Symbolisches und Diabolisches: Eine neue Deutung der Krisen moderner Gesellschaften in sozial- und sprachtheoretischer Perspektive." *Leviathan* 34, no. 3 (September 2006): 419–439, 420. These references are made with Andrew Culp's quote in the introduction held firmly in mind.

67. It is sometimes referred to as logic, but it is important to us, as it was for Spencer-Brown, to avoid this term. Logic can fulfil truth conditions which these operations do not claim to do. See Luhmann (n 50), 47.

68. Spencer-Brown, George. *Laws of Form*. Leipzig: Bohmeier Verlag, 2010, xxii.

69. Spencer-Brown (n 68), 1.

70. Luhmann (n 50), 51.

on each side of the boundary. Through the very medium of (ex)communication, the system comes into being and can persist over time with subsequent communications. There is no law without non-law, and there can be no inclusion without exclusion and no legal without illegal.[71] It is to this difference that the entire international legal system owes its identity and orientation.

This also leads us to the next point, what distinguishes the system and environment? It is, in fact, the system itself.[72] This means that the definition or description of a system is necessarily a self-description. It also means that self-definition, value or ideological selections are at play in this reflex. For example, this would be the case when legal writings begin to consider the law as 'positivist'. It also does not mean that we, as observers, cannot stand outside the legal system and communicate our descriptions of it. Instead, these abound, for distinctions tend to break consensus at least as often as facilitating it.[73] It is only up to the legal system whether it incorporates these descriptions for its future evolution. Remember that communication is never a direct transmission or a copy and paste but emerges selectively.[74] The reverse implication also holds the truth: systems cannot interact directly with their environments. They can only operate technically within their boundary (which may or may not change their environment),[75] although it is possible to refer to environmental factors for meaning.[76]

So far, we can see a kind of algorithm emerging. Separate entities want to communicate, but because of the unlikelihood of communication, an ex-communication occurs with a resultant conflict, so to resolve this conflict, communication is repeated. If a specific type of conflict repeats, reference is made to past decisions that were used to resolve it successfully. This resolution, of course, could lead to other conflicts in the future – total consensus is always elusive. Once enough of these backwards-referring communications have been made, they aggregate under a theme that fulfils a particular function. These communications can then be called upon more easily and frequently, increasing the complexity of references. As self-reference grows, it increasingly understands which communications are relevant to it and which are not. At this moment, a boundary is drawn, the inside is marked as a system, with the

71. Luhmann (n 50), 54; Luhmann (n 32), 17; Luhmann (n 21), 35.

72. In systems theory, this is known as 'operational closure'.

73. Culp (n 26), 10.

74. 'And with this, there are new insights to observe; something has "emerged". But no, there – no, here, inside of *me*, something is newly configured, and *I* see it as a new understanding. Emergence is *my* ability to see newly.' Von Foerster (n 61), 17. Emphasis in the original. Also: 'But "emergence" is more a narrative component than an explanatory concept'. Luhmann (n 37), 77.

75. Luhmann (n 50), 64.

76. Luhmann (n 50), 66.

outside left as the environment. Every time this algorithm repeats, the boundary is drawn clearer, the more complex inside becomes, and the difference between the system and the environment widens.[77] The system is the unity of the differences with the environment.

Thus far, the above explanation would not be too controversial to most readers of systems theory. However, with a shift in emphasis, I wish to highlight the excommunicative nature of social systems such as law. If one looks closely, the exclusions, the locked gates, the conflicts and the full stops marking the end of communication are numerous. Social entities are constantly in conflict and attempt to resolve this through communication, but the barrier proves so great that it is usually unsuccessful. If one is not ignored, one is almost sure to be misunderstood; if one is understood, one is very likely to be rejected. Rather than communication resolving conflict, it seems ex-communication only justifies further conflict. Once this has reached an unbearable level, parties appeal to the law. As we have said, this means an end to communication and initiates a judgement of worth based on a body of norms. The loser of a case is marked as in contravention of society. These norms appealed to, in turn, come from the sum of all past conflicts that have come to a head, which has drawn a boundary between itself and all other social contexts. Of course, this is the reason why the law is efficient in solving disputes. However, it forces us to be honest about what international law can be. It is not inclusive nor equal. It is a system built on boundaries, differences, and disparity. It has been said that Vitoria's function of sovereignty was to bridge cultural differences.[78] It proves to be a telling point. International law is precipitated on difference, and sovereignty or equality before the law means an equal chance to be misunderstood, judged to be in the wrong, sanctioned, or ex-communicated from the shared rituals of the rest of society.

It is to unite and illuminate various properties that I want to discuss our *precious* distinctions. In its everyday use and etymological nuances, the word shares many aspects with distinctions we would do well to keep in mind. In its most ordinary sense, distinctions are precious, as we have seen, for it is through them that we can order and know anything about the world – including our individuality. It is indeed valuable in this sense. But from here, it also takes a more sinister turn. We know that any distinction – no matter how obvious or how many share it with us – always originates from the observer. The observer makes his selections based on his motivations and limited knowledge.[79] The distinction tells us as much about the indicated distinction as it does the

77. Luhmann (n 32), 2; Luhmann (n 34), 25.

78. Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press, 2007, 16.

79. Von Foerster (n 61), 28.

person, even when (especially when!) he does not even realise that he is drawing it.[80] In this sense, distinctions are precious, for they can be arbitrary and brutal for an observer to disavow despite this. Our precious distinctions are thus because they are affected yet demand our devotion, even opening us to ridicule. They trap us in ways of thinking and resist escape; like Kafka's Prague, they are a 'dear little mother' with 'sharp claws'.

Following this distinction are precious in a third way. The root of precious, the Latin *pretium*, not only means price or reward but also carries the connotation of a cost, a fine or a punishment. Distinctions have value because they order our world, but we pay the price for them. In some cases, it might be a steal; in others, it can visit ruin upon us. Every distinction we make excludes something, banishes something, or dooms someone to silence.[81] It even excludes us from drawing a different distinction. For every distinction we draw and use as our starting point, we pay the price of other, perhaps better, distinctions we could have made. Thus, when I speak of precious distinctions, we have to keep at least three things in the back of our minds: they are undoubtedly valuable and rewarding, but at the same time, once drawn, challenging to let go. Furthermore, we must be careful not to hold on to them too stubbornly, for we may come to a point where their price is too much for us to pay. *Tanti ponderis est peccatum*.[82]

## Object, ontology and causation

If we regard our (precious) distinctions as creating categories that share a relationship through (ex)communication, we are undoubtedly roaming in the realm of ontology. As we have seen, when a distinction is drawn, we always refer to or indicate one side of the boundary and forget about the rest. However, it does not mean that the remainder goes away. Instead, it has to be there to co-construct the boundary. Furthermore, it is only a reminder from the observer's point of view, who disregards it based on his motivations. If we wish to make the original ontological distinction, it will rest on the binary of being or non-being.[83] Thus, we can determine whether something exists and find unity in all things that do. If we imagine the border of distinction, we have something, everything on one side and nothing on the remaining side. This distinction leaves us with a problem: *What* is upholding the border on this side? It consists of nothing, only functioning conceptually to hold up what

80. Luhmann refers to the unknown assumptions of an observer as its 'blind spot'. Luhmann (n 37), 35. See also Von Foerster (n 61), 9.

81. What is excluded to silence can be included in society, but only under a new re-observation and re-distinction. These only silence new victims. See Luhmann (n 34), 36.

82. 'Such is the great weight (or price) of sin.'

83. Luhmann (n 32), 185.

exists. It produces an asymmetrical opposition, where even the observer has to place himself on the side of being of the distinction. From this side, something can be done, and communication can continue. This is the nature of all asymmetrical oppositions.[84]

Thus, it is on the side of being that all other distinctions can follow. Everything can be distinguished into categories (taken from the Greek *katēgoria*, meaning a charge in the legal sense).[85] It allows us to create order.[86] But Luhmann diagnoses the problem of ontology precisely in that it takes its starting point on the side of being, not from the observer's side.[87] We cannot approach the world from the original ontological premise of being; for the observer, it is already before the distinction.[88] The primary distinction we have to start with is the self and not-self, or to put it differently, system and environment, inside and outside. Everything subject to observation and distinction creates a difference, and it makes little sense to talk of differences as 'things'. Nor can we regard distinctions as ontological facts independent of their observer.[89] Things-in-themselves notwithstanding, it seems that objects acquire their qualities relationally. Objects take the form that a particular system attributes to them, creating complexity and information entirely independent of their materiality.[90] Authoritative descriptions and commands to order communicatively prevail first because they must at least be plausible (which is stabilised through enough second-order observations) but second because they are handed down from a position of power. However, if power is dispersed, whether anarchically or omniarchically – as is the case with functional differentiation – the notion of an authoritative ontology (if not the very concept itself) withers away.[91] The world is not filled with furniture;

84. Luhmann (n 32), 188.

85. Luhmann (n 32), 190.

86. In this regard, Von Foerster quotes Ludwig Boltzmann approvingly, who 'rightly regarded order as the difference between two objects' (n 61), 31. In the end, what we call order appears to be nothing more than a description, and we are justified in saying that 'order is in the eye of the beholder'. This is an insight that many teenagers intuitively grasp when ordered to clean their bedrooms. It also reflects how the order is often marshalled through a command to subjects and objects from a position of power.

87. Luhmann (n 32), 190. This, of course, was also famously the starting point of Rene Descartes. The first distinction is necessarily the *I* of the individual or the system, the first cleaving of identity from the rest of the world. See also Hui, Yuk. *Recursivity and Contingency*. London: Rowman & Littlefield International, 2019, 52.

88. One could go with Von Foerster on that the world contains no information – 'the world is as it is' – and the observer purely constitutes that information. (n 61), 2.

89. Luhmann (n 48), 177; Luhmann (n 22), 259.

90. Luhmann (n 48), 21.

91. 'There is no privileged point of view, and the critic of ideology is no better off than the ideologue.' Luhmann (n 34), 28.

everything belongs in a system.[92] We are then only left with observers and their distinctions.

This formula holds not only for objects or things but also the relationship between them over time. What I am specifically referring to here is causality. It might be no surprise that we can also understand this as an observation and selection.[93] In reality, the causes of an effect are nearly infinitely complex. Like a child who never stops asking 'why?' we can always take another step back. Therefore, we can only make order out of complexity by drawing the boundary somewhere to attribute causality. These attributions are just like any precious distinction. They can help us build theories or machines with great predictive value, but they remain a selection made by an observer with motivation. In one sentence: causality is a narrative created and attributed by an observer.[94]

There is another more subtle implication to understanding causality as selection. Like the selectivity of communication, a system has to somehow identify information as relevant to itself, after which it reacts. It takes an external stimulus and internalises it. This means, perhaps slightly counterintuitively at first, that the system acted upon creates causality. Because of the feedback loop between the system and the environment, we must acknowledge that systems produce some, but not all, of the causal effects it experiences.[95] We could say that the system observes not simply through a window to its environment but through a mirror pointed at itself.[96] It also means that objects do not exist purely as things-in-themselves that transmit meaning but exist through (ex)communication with others. Of course, it is not valid in the case of duress, but on the other hand, one could argue that the agency of the system (or person) disappears and is entirely substituted by that of the brute.[97]

92. Luhmann (n 48), 177.

93. Luhmann (n 50), 65.

94. Teubner (n 46), 43.

95. Luhmann (n 48), 20. This is not to deny scientific theories of causation, but it is apparent that those are inadequate in explaining causation in systems. The framework of selection is, in this case, more productive. Feedback loops should not be understood as mere repetition; it is 'the looping movement of returning to itself to determine itself, while every movement is open to contingency'. Hui (n 87), 123. Every loop brings more information than the previous one and is sensitive to the new temporality or context in which it occurs. He writes further, 'simple mechanical relations of cause and effect are no longer sufficient to serve as the ground of explanation, either in science or philosophy' (n 87), 9.

96. Hui (n 87), 6.

97. Luhmann, Niklas. *Trust and Power.* Cambridge: Polity, 2017.

## System and environment

The above section led us to the conclusion that it makes little sense to speak simply of objects. Within the binary of being or non-being, only the former can be spoken of meaningfully. How things are ordered on the side of being relies on an observer and his precious distinctions.[98] This observer starts by first indicating himself on the side of being and then distinguishing himself from all other things in existence with him. It is a self-reference and an outside reference, or what, from now we will call system and environment. Every boundary we draw is to indicate or focus on one side, but the other side remains indispensable.[99] Even though we completely lose sight of the other side in drawing the distinction, it remains crucial. The boundary can only exist because of the difference between each side.[100] We can discuss the relationship between the system and the environment from this starting point.

The primary system of concern for us is the international legal system. This exists as a system of communications that has become sufficiently complex and specialised so that it has developed a self-reflexive identity. It can recognise and distinguish the difference between itself and everything else, its environment.[101] Once this constituting distinction can be drawn, the system can keep drawing it repeatedly, reinforcing its identity and separateness from its environment. These distinctions are necessarily drawn from within the system itself, using its observations and operations. In this sense, we can describe a system like international law as autopoietic or self-creating.[102] This means that the law exists because the law itself says so, and it reproduces itself using its own elements through communication. In other words, a system is little more than a bundle of self-affirming precious distinctions.

A legal system described as such is thus both independent and dependent on its environment. Independent because it can distinguish its difference and reproduce it constantly through its communications; dependent because, as we know, the other side of the boundary must always be there.[103] More concretely, the law is causally dependent on its environment; but independent in that it reproduces itself circularly. This means that we should not look at the

98. Luhmann (n 37), 28.

99. The relationship with the environment is constitutive of the system. See Luhmann (n 48), 176.

100. Luhmann (n 48), 176.

101. It is essential to understand that environments are system specific. When we speak of the environment, we do not mean a single environment populated with various systems. Each system has its own environment as the difference or remainder of itself. As many systems as we have, as many environments we have. Luhmann (n 48), 181.

102. Luhmann (n 37), 32; Luhmann (n 48), 189; Luhmann (n 22), 261.

103. Teubner (n 46), 26.

environment–law relationship as cause and effect but change rather be understood as 'perturbation'. The system also requires its environment for new information in the form of communication, as discussed earlier. There are observations the system can make in its environment, distinguish which are of interest to itself, and select them. This is then processed within the system's logic, much like a human being's mind would interpret a communication they selected. In this sense, we can claim that international law is independent of politics or economics, but we can acknowledge their effects on it.

Let us digress from the theme at hand, which will be relevant later in this study. When discussing international law as an autopoietic social system, we must never forget that information enters the system through the double contingency of ex-communication. The environment exists in the legal system as noise from which it selects communications to pay attention and (mis) understand in its way. Again, it is not transmitted nor copied and pasted from environment to system. It can also not work on a standard input and output model.[104] Despite what many believe, the law is not a trivial machine in which every time you input information *A*, it runs procedure *X*, and outputs result in *B*. We cannot even assume that the one inputting and the output receiver are the same people! All social systems are non-trivial in that their outcomes cannot be predicted.[105] Any information that the system selects subsequently changes it internally. The inside of the system is too complex and dynamic to be explored fully, creating a kind of black box.[106] Systems are guided towards a functional end and are thus flexible. It is 'our deepest superstition' that we can trivialise the world into simple objects, and '[*i*]f a salesperson says to you, "Guaranteed trivial," he or she is a scoundrel, an idiot, or both'.[107]

Keeping that in mind, we return to the legal system and its environment. As we have said, the system is independent but also dependent. That means the system creates itself, insists on this difference, and selects relevant communications, but it is not causally cut off from its environment. Information crosses the border between law and environment almost every moment, changing both the system and environment almost second-by-second in a feedback loop.[108] In such a case of complex change, how can we attribute what is cause and effect, prior and later? This privilege falls to any- and

104. Luhmann (n 37), 33; Luhmann (n 48), 201; Teubner (n 46), 2; Jessop, Bob. *The State: Past, Present, Future*. Cambridge: Polity, 2016, 67.

105. Nor, in fact, their input. What a system can regard as relevant facts today might be disregarded entirely tomorrow. It is not difficult to imagine such cases in law.

106. Luhmann (n 48), 14; Hui (n 87), 38.

107. Von Foerster (n 61), 19.

108. 'The concept of system emphasizes more strongly the irrevocable simultaneity of system and environment than the concept of discourse does. (Reversing matters, one could also say that the difference between system and environment defines what can be understood by simultaneity).' Luhmann (n 34), 30.

everyone who observes and makes their precious distinctions within the facts they deem relevant.

The function of a system is to collect communications about a specifically practical social need and make the rules around such communications more uncomplicated and efficient. Because of this, a system is always less complex than its environment. Let us think about the legal system to illustrate this. If two nations are in dispute, we hardly want them to settle it by war. The law allows the parties to approach a forum and resolve matters peacefully and more efficiently. The legal proceedings can do this by only taking time with the facts that it deems relevant: considering everything, such as the personalities of their heads of state, their national costume or which one was victorious in their last test match, can be discarded as legally meaningless. Through this complexity reduction and sticking to only the most necessary facts, systems can stabilise society and our future expectations, and we do not need to resort to war. The price we pay for this efficiency is that systems have to select what is relevant or not, at the risk of discarding what might be relevant to other observers, including the parties themselves. The reverse is also true: if the law observes communications as relevant, it becomes juridified whether the parties would like it or not.[109]

So far, we understand that communication is possible through a series of precious distinctions. Add enough similar communications, which fulfil a social function, and they begin to swarm around a system. This system gains self-reflexivity and distinguishes itself, drawing a boundary between itself and its environment. We know it makes little sense to speak of these boundaries as things or objects and, in our functionally differentiated society, to regard them as territorial.[110] It would be beyond imagination (at least mine) to represent it visually on a map of sorts, even if one could disregard the constant shifting of boundaries over time. Boundaries are renegotiated with every communication it allows inside. Also, who is allowed to negotiate is selective and controlled preciously by the system: it is one manifestation of ex-communication.

Furthermore, thus, our world is made up of systems that make precious distinctions and ex-communications. Each cordon itself off from its environment every moment. It is essential to clarify that the world is not an environment populated with various systems. An environment is always related to a specific system, with each having its environment – as many systems as we have equals as many environments. Thus, a single event takes place poly-contextually.[111] It can differentiate its environment in many ways, like friend and enemy or near and far. It can even recognise other systems, especially if they are similar:

109. Luhmann (n 55), 64.

110. Luhmann (n 48), 195.

111. Luhmann (n 38), 21.

humans and humans, states and states.[112] Our world can thus be described as a collection of systems and their environments.[113] There is no centre, only precious differences.

## Symbolic and diabolic communication media

In this project, one of our main points of interest is how the international legal system interacts with other social systems, most prominently that of politics and science. Since each system has a different function to fulfil in society, communications between them (when it does succeed) are very likely to go awry. That is why symbolic media are vital to us: it becomes the undeniable factor that allows communications to cross the boundary successfully. The political system usually references power to be heard; the scientific system claims the truth. These particularities will be dealt with in subsequent chapters, but now, discussing the genus of symbolically generalised media is essential.

To reiterate, as we have seen, communication is so vastly unlikely that we are justified in calling it ex-communication. The odds of rejection are much higher than acceptance. Of course, it is always in the interest of the one initiating party that their communication is accepted. Society has several symbols that the party can invoke to be more persuasive. For example, they could pay money, threaten to enforce power, or claim the universal truth of their statements.[114] They are not part of the communication as such, but operate in the background, often as a tacit understanding, as a secondary communication about the primary one. We will call them generalised symbolic media as they are available to different parties and in different situations. This symbolism can be understood in its original etymological context of two halves thrown together, two different parties and perspectives that a common communication framework can unify.[115] However – for unity is always the unity of difference – it also has a diabolic character. An asymmetry is cleaved into the communication, and it becomes 'ultimately a question of combat'[116]: one party is more affluent, stronger or more correct than the other, allowing some communications to trump others and, more broadly, becomes the basis of

112. Luhmann (n 48), 188; Luhmann (n 34), 31.

113. Luhmann (n 48), 208; Luhmann, Niklas. *Ecological Communication.* Chicago: The University of Chicago Press, 1989, 108; Luhmann (n 48), 18. In this regard, Luhmann speaks of an *unitas multiplex*. The only unifying factor in totality is the difference.

114. Luhmann (n 34), 30.

115. 'Beide Phänomene sind deshalb direkt und unauflöslich aufeinander bezogen, weil jede *Verbindung* im Sinne des Symbols unweigerlich eine *Trennung* (Ausschließung, Entfernung) mit sich bringt. In dieser Hinsicht ist jedes *sýmbolon* – auch – diabolisch.' Thomä (n 66), 422. Emphasis in the original.

116. Culp (n 26), 35.

social order.[117] It does not mean that the more powerful or wise always have their communications accepted.

The odds are merely increased, often structuring a conversation around the symbolic theme. What is thematised in communication limits the exchange complexity, the positions that can be taken and on what ground a party can dissent. It crystallises the negotiation but also opens the opportunity for conflict; in this sense, choosing a theme carries inherent risk.[118] Suppose someone expresses interest in acquiring my property. In that case, the medium they invoke changes everything: in the case of money, I can negotiate how much of it is enough for me to be convinced. With power, I would likely resist and regard the transfer as unjust. In the case of love, I might be very willing to hand it over for nothing in return.

It is symbolic precisely in its ability to bridge the difference between individuals to something mutually understood better than everyday language does. In this sense, even though we have different media, their function is the same. However, these media are also diabolic in that, as we said, they rely on new identities, differences and asymmetries.[119] As with all distinctions, having one without the other is impossible. Two parties are symbolically tied together by communicating in a mutually agreed medium, but this only works if they are different. It would make little sense to thematise power if two parties were truly equal, or truth where both are making the same claim, or money where both have access to the same resources. One person is powerful, wealthy or correct, while the other is weak, poor or ignorant. It is also worth noting that most of these media require complex, functionally differentiated societies. It needs powerful authorities, money economies and systems of knowledge production, things that are impossible without writing and printing.[120] These media are often accompanied by organisations such as governments (with police and military forces), banks, or research institutes and universities.[121] In many cases, it would require a large and complex society where material inequality is wide enough to mobilise the asymmetry between haves and have-nots.

117. Luhmann (n 37), 190.

118. Luhmann (n 55), 54. See also Buitendag, Nico and Van Marle, Karin. "*Afriforum v Malema*: The Limits of Law and Complexity." *Potchefstroom Electronic Law Journal* 17, no. 6 (2014): 2893–2914.

119. Luhmann (n 37), 192.

120. Luhmann (n 37), 195.

121. Luhmann (n 37), 229. Apart from forming organisations, an external, material reference is required. The rich person must possess property, and the government requires a police force to coerce its subjects into obedience. However, these do not need to be mobilised in every case – that would instead point to a weakness or a more symmetrical relationship. I do not need an armed officer around me all the time to make sure I obey the nation's laws, nor do I need to be convinced anew by an aeronautical engineer before every flight I get on that it is safe.

## International law as a social system

As we have seen, we can describe the world as containing similar social systems and communications that aggregate around an active nucleus and spin around immensely (in what has been dubbed as a 'hypercycle')[122] to the point of critical mass gaining a measure of identity and self-reference. It leads them to become both independent and dependent on their environments.[123] This is no different for international law. It indeed distinguishes itself from the rest of society and creates its communications self-referentially. This reflexivity is achieved through self-observation, self-constitution and self-reproduction. Law becomes described within its lexicon, creating norms for creating norms and legal processes for legal processes.

This leads us to the question: what is the function of international law that draws all these communications together? Could it be to prevent war, conserve the environment, punish humanity's enemies, or facilitate international cooperation? Of course, all these answers are legitimate, but each only paints a part of the picture. It is clear that to define a function for international law, and we need to shift to a higher level of abstraction.

At its most general, we can claim that the function of international law is to stabilise the future by communicating social expectations.[124] This means that the future is much too variable and complex if left entirely open. If nothing were sure, individuals would be crushed by complexity, not even to speak of a complex society. It is thus necessary that the possible paths the future can take are limited, that expectations can be formed, and that projects can be planned. Some predictability and conformity are required, which is the law's role. International law restricts the future freedom of its subjects, and these norms have to be abstract and non-arbitrary enough because we cannot anticipate who will be right or wrong in times to come.[125] This means that a factual description of law is not possible – because facts change over time – and that this abstract definition of law is the best we can do.

This abstraction is needed for society to become more complex. In simple interactions, we can regulate our expectations based on the trust that comes from familiarity. In dealing with strangers, those outside the border, trust needs to be symbolised in the form of law. Like everything else we have discussed so far, norms rest on a distinction: the fulfilment or disappointment

122. Teubner (n 46), 33.

123. Luhmann (n 21), 39.

124. Luhmann, Niklas. *Law as a Social System*. Oxford: Oxford University Press, 2004, 142; Luhmann (n 46), 25; Luhmann (n 55), 53.

125. 'Law discriminates. It decides for someone and against someone else – and all this regarding a future that is unknown.' Luhmann (n 124), 146.

of an expectation.[126] This can be achieved in two ways: the parties' behaviour can be controlled and made predictable, but this cannot always guarantee fulfilment. Thus the other option is that in the case of disappointment, the least that can be done is to protect those that expected compliance when disappointment occurs.[127] Both these mechanisms have the function of stabilising the future.[128] And while each person has expectations of society, he is also aware that others have expectations of him, and he can adjust his behaviour accordingly.[129] Therefore, it does not suffice to claim that the law's function is to resolve conflict (this can often be better achieved outside of the legal system, at least), and law can very well be the source of conflict. Nor can we say that it is to protect interests, for unlawful interests exist too.[130] It seems that law is described best when discussing it as a guarantee for certain effects. While it cannot guarantee actions or behaviours, it can assure us of outcomes and immunise subjects against disappointment.[131] For now, we must stand with the law's function as the stabilisation of expectations.[132]

We can also speak of two types of expectations that will become relevant to our study in the following chapters. This distinction is between cognitive and normative expectations, and the difference is quite simple. Cognitive expectations can accept disappointment and evaporate in such a case, while normative expectations stand firm despite being disappointed. A simple example: when one orders an appliance online, but when it finally arrives, it is a different colour from what one imagined. The colour could have been a cognitive expectation depending on the personality involved. Rather than demand an exchange, the person adapts to a different colour and continues to use it regardless. A normative expectation would be that the appliance works properly, and when it does not, the buyer demands a refund. Norms are, in this sense, expectations against the facts that cannot be abandoned. Additionally, we can say that such a normative expectation attributes blame

126. Luhmann (n 38), 20.

127. 'Because certainty in the expectation of expectations, whether it be by aid of purely psychological strategies or by aid of social norms, constitutes the essential basis of all interaction and is much more meaningful than the certainty of fulfilling expectations.' Luhmann (n 46), 30. See also Luhmann (n 124), 150; Luhmann, Niklas. "Die Funktion des Rechts: Erwartungssicherung oder Verhaltenssteuerung?" In *Ausdifferenzierung des Rechts*, edited by Niklas Luhmann, 73–91. Frankfurt: Suhrkamp, 1999, 73.

128. Luhmann (n 21), 74.

129. Luhmann (n 36), 26. It is useful to see the distinction between an individual subject and society at large. Legal structure functions as a generalised boundary on what behaviour (in the form of a selection, as always) is expected and acceptable.

130. Luhmann (n 32), 94.

131. Luhmann (n 127), 74.

132. Another possibility, and I don't regard it as exclusive, is to follow Hui's suggestion that in the case of cybernetic systems, 'The end [...] is determined by a purposiveness devoid of purpose'. Hui (n 87), 9.

for the disappointment not on the expectant party (for being naïve, etc.) but on the party that was the object of expectation. States or organisations institutionalise expectations. These expectations will oscillate between two modes depending on their priority lies, namely, in adaptivity in the case of the former or security in the case of the latter.[133]

The distinction of the norm form also differentiates politics and law. Politics communicate through the asymmetric medium of power, but in the legal system, the party relying on fulfilling his expectation does not need superior power and can find himself on the 'wrong side' of the power asymmetry. International law and international politics simply communicate different things in different forms.[134] As stated earlier, social systems lead to organisations when they become complex enough. This is also readily apparent in international law. It has its organisations, of which the United Nations (UN) is the most iconic. It regulates inclusion/exclusion through membership, and there are baseline agreements on how to identify the law and how it can be changed.

One common area where international law suffers criticism is its ability to be enforced, with the conclusion hastily drawn that it is nothing but politics. Of course, one can sympathise with this view, but careful consideration shows that it muddies the distinct functions of the two systems. Suppose we define international law's function as reliant on enforcement. In that case, it will become nothing more than a vehicle for exerting pure political power (of course, in this regard, one cannot deny the valuable work done by critical scholars. However, following this line of reasoning to a totalising conclusion is simply contrary to empirical facts and common sense). If this were truly the case, the distinction between legal and illegal would not even be necessary.[135] Law and politics naturally have some overlap, but only insofar as it serves each in their function. No, we must acknowledge that, despite international law's often frustrating deficiencies in enforcement, the function of law remains in stabilising expectations.

We understand that the law is thus autonomous yet influenced by its environment, or in more technical terms, operationally closed but cognitively open. The law can extend its boundaries – and constantly does – but it can never operate outside them.[136] So how can international law fulfil its function

133. Luhmann (n 46), 34.

134. 'However futile it may seem to pit law against power and however advisable it may be to say nothing and lift one's eyes to heaven, law and power are different forms of the communication of expectations in relation to the conduct of others.' Luhmann (n 124), 163.

135. Luhmann (n 124), 164.

136. Luhmann, Niklas. 'The Closure of the Legal System'. Public lecture at the International Institute for the Sociology of Law, Oñati, Spain on 19–26 July 1990.

of regulating social expectations of the future? This problem becomes even more difficult if we remember that through selective ex-communication, we cannot speak of input-output models nor cause-and-effect causalities but rather modulating irritations or feedback. To international law, its environment appears as a sea of noise, and to any observing system outside of it, legal decisions would look similar in most cases. This means that we have to abandon the idea that legal regulation has a direct effect on social change. Rather, such an effect has to be regarded as indirect or as 'finely-regulated coincidences'.[137] Especially in the sphere of international law, we can see that states might observe (in the sense we have used thus far) legal norms. However, we will choose to abide by or ignore them based on political considerations or economically regarding the penalty as smaller than the profits to be made. Different social systems are thus making reciprocal observations of the communications each is making and internally process it accordingly. As is often the case, when international law observes non-compliance for such reasons, it will internally regulate and adapt itself to address these problems.[138]

These kinds of problems are one of the reasons why international law tends to the expansion of its boundaries. While future expectations can be disappointing sometimes, the law loses legitimacy if they are disappointed too much. Therefore, international law has developed several sub-regimes to improve its self-regulation that corresponds to the needs of its environment. This internal differentiation or fragmentation is a legal-internal reaction to improve the law's responsiveness to its environment. Teubner suggests that international law should move away from conflicts between jurisdictions and focus on inter-system conflicts.[139] This would mean further fragmentation and perhaps taking functional differentiation to its next logical development.[140] The result would be a global law that embraces polycentrism rather than constitutionalist tendencies, taking difference as the only unifying principle. As the law expands its boundary to order new conflicts, with each decision, as with every communication, it creates the potential for new disagreements and conflicts. It forms the basis for further communication and the further expansion of international law. This process has been dubbed the 'addiction' of law.[141]

137. Luhmann (n 55), 66; Teubner (n 46), 74.

138. Of course, these problems are only problems for the law. In this example, the political or economic systems are probably quite at peace with the situation unless perhaps unforeseen political or economic pressure is subsequently placed on the state due to its non-compliance.

139. Teubner (n 46), 108.

140. Teubner identifies several issue-specific regimes, such as the *lex mercatoria*, *lex sportiva*, *lex humanis* and *lex digitalis*. What unifies these different regimes is their application of a legal/illegal code rather than a constitution or *Grundnorm*.

141. Roth-Isigkeit (n 15), 136.

A clear conflict arises for those who adhere to systems theory as a convincing description of world society. While communications of all kinds have stretched themselves across the globe, and despite the developments in international law and politics, society is still anachronistically anchored to the form of the nation-state.[142] Systems theory orders the world and resolves its conflicts heterarchically (or omniarchically) through functional self-organisation rather than hierarchical state-forms. This is significant in the operative logic of international or global law. States, at worst, although necessary, act purely in their provincial interest or their function. At best, they project some vague, imaginary general interest of humanity. Sub-regimes of global law act only according to their social function and should be very sensitive to adapting to their environment. While advocates of global law argue that this is in itself more just, there is no proof to suggest that such a 'privatisation' of international law is any more just or less prone to exploit. One can argue that this differentiation lies at the heart of the decentred and deterritorialised notion of empire.[143]

It seems that international law continues to evolve as an autopoietic social system despite being anchored in the anachronism of the nation-state. Older projects of unifying legal regimes are futile, and we must bend the knee to increasing differentiation. Even legal norms that appear to cross sub-regimes change their meaning in new contexts.[144] The pace of social evolution has left the law in an adaptive crisis, where it cannot unify international law in one place.[145] What we understand as international law can no longer be captured in substantive norms. Instead, the best hope is a grasp of the 'form' of law and rely on meta-, second-order or interface norms regulating the differences between sub-regimes rather than unifying them. Such a patchwork of legal sub-regimes reminds us of pre-Westphalian Europe, where a single subject could find himself standing within the jurisdiction of several legal regimes depending on which stratus of society his actions fell. Thinkers in this vein suggest that universal rights become a robust defence for individuals to enforce equality against other public or private actors beyond the state and within these sub-regimes. I wonder but can only speculate about the effect this could have on the law's ability to stabilise expectations. After all, our claims always risk being rejected and reducing subjects to smaller and smaller units necessarily reduces the symbolic power they can attach to their communications. One cannot but feel that the wheel of time has made a complete revolution in these re-inventions.

142. Roth-Isigkeit (n 15), 132; Luhmann (n 32) and (n 37).

143. Hart and Negri (n 40); Roth-Isigkeit (n 15), 153.

144. Roth-Isigkeit (n 15), 140.

145. Luhmann (n 127), 90.

## Conclusion

This chapter's purpose was to declare this project's theoretical and methodological starting point. We were faced with the problem of comparing very different social phenomena coherently. The case has been made for autopoietic systems theory, though it has been modified and updated to help us gain a more critical perspective on international law. In detailing the work's theoretical foundation, it should be clear by now that we are not departing from an affirming or joyous starting point. We will travel through international law, not assuming the possibility of communication but the overwhelming probability of ex-communication. Every time we encounter a new concept, object or description, we realise that it causes more dissensus and conflict. The symbols we use do not bring us together but drive wedges between us, and rather than include it, and they are used as a shibboleth for exclusion. For long international law has been self-described as a system of unity and equality. For the moment, our method will instead start from difference and asymmetry.

The figure of the barbarian has always been featured in international law. The name originates from the ancient Greeks as an onomatopoeia for the indecipherable language of those outside the border. Thus, the barbarian is literally the one who cannot (or refuses to) communicate.[146] This figure will keep recurring in the following chapters. The border distinction between the inside and outside should always be kept in our minds. We are not attempting to look at international law from the inside but rather from the exterior – from the perspective of the barbarian.

Keeping this position of exteriority in mind, it becomes worthwhile asking how the city, *polis* or state came to be. How and when was the border drawn, constituting the inside, and how did it gain the nation-state complexity found in international law today? This will be the subject of the next chapter.

146. Culp (n 26), 54. This should be read together with Aristotle, who argued that compared with Greeks, barbarians made natural slaves and were only fit to be ruled by the former. See Koselleck, Reinhart. *Futures Past: On the Semantics of Historical Time*. Colombia: Colombia University Press, 2004, 162.

Chapter 3

# The origins of the state

## Introduction

In the autumn of 2001, Jacques Derrida spent several of the opening lectures of his seminar, titled 'The Beast and the Sovereign', comparing sovereignty, particularly to the menacing figure of the wolf.[147] In a meticulous drawing of comparisons ranging from Hobbes's *homo homini lupus* to the black velvet mask known in his native French as a *loup*, the purpose was to impress on his students the perilous terrain that they were about to enter, for the sly and cunning sovereign does not allow itself to be so easily captured by definition. Another commonality was that both found themselves outside the law.[148] As we will see, the latter is only half-true. Like many other objects, there is always a circulation across the legal border, a simultaneous state of inclusion/exclusion.

The previous chapter has armed us with the theoretical tools we will use to study international law and how it came to be. From here on, it is time to turn our gaze more directly to the object of our study and try to capture the wolf, so to speak, as difficult as that may be. In Chapter 1, we asked how the state developed in a way where the law, politics and science underlie its structure. This concentration is undoubtedly the result of a contingent historical process. In this chapter, our first attempt at defining the state will look at the past, and

147. Derrida, Jacques. *The Beast & The Sovereign*. Vol. I. Chicago: The University of Chicago Press, 2011.

148. Derrida (n 147), 17.

**How to cite:** Buitendag, N 2022, 'The origins of the state', in *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town, pp. 51–87. https://doi.org/10.4102/aosis.2022.BK319.03

the historiography of the process will be traced. While we will only look at modern sovereignty in the next chapter, it is difficult to say which one should be conceptually prior. There is debate over when exactly one can speak of states, and the legal doctrine of sovereignty is naturally not static either. The cunning wolf called the sovereign nation-state refuses to be so easily ensnared. However, since in this chapter we will take states to mean even the very first complex societies, consisting of various levels of hierarchy, we begin our investigation with the political form of the state first, if only for the sake of a chronological narrative.

Thus, even before discussing the external relations represented by international law (the environment), we must start with the state (the indication or mark). As we have said, there cannot be a single theory of the state – as a complex system, it allows for many descriptions influenced by observers and their blind spots. Jessop points out the problem of even referring to the 'it' that is the state.[149] However, that does not mean that we can simply leave it be. One reason for attempting to give a version of the state is to highlight its origin and structure, and contingency and to show that it does not always exist.

From these many ways to define and study a state, international law has its definitions, as taken up in the *Montevideo Convention on the Rights and Duties of States*. Compared to other academic traditions, international law is unique in at least one sense: defining statehood not only by internal criteria but also as an externally granted status.[150] As we will see in subsequent chapters, however, this unique feature of international law also has its dark side.

In this chapter, we will discuss the transformation of state sovereignty through the three phases employed by Luhmann.[151] From pre-history, we will discuss the violent shift from egalitarian, segmented societies towards hierarchically stratified societies, and the period spanning the medieval to the early modern, the transformation from the second to the third phase came, namely to that of a functionally differentiated society. In conjunction with that, we will trace the parallel evolution of the border with that of the state. This is for us to lay the foundation for the later discussion of borders in Chapters 5 and 6. Like the state, borders are socially constructed and, therefore, equally subject to social evolution. They have increased in complexity together with the rest of society. The purpose of borders is essentially to control movement and has developed increasingly sophisticated ways to do so.[152] Another reason that it should be observed in parallel is that one of the

149. Jessop (n 104), 15.

150. Jessop (n 104), 27.

151. Luhmann (n 37); Jessop (n 104), 127.

152. Nail (n 35).

central premises that we are operating on is that the state does not create the border but that the border creates the state from the outside in. Therefore, their constructivist development goes together in this chapter.

Finally, two other objects of analysis will be incorporated into our study of the rise of the state, one rather traditional and another a newer development in political theory. The traditional object at hand is that of territory. If borders are a defining notion of the state, the territory constitutes it. While it might have always been physically present as the backdrop for political and legal action, its social conception has also changed throughout history. The other object for observation will be energy. The power of energy has always been intertwined with political power.[153] In our object-oriented approach to legal phenomena, it is worth remembering that all matter is merely energy at rest.[154] States have continuously sought more power over and through energy, and borders have regulated their flow since the beginning of society. We cannot separate the evolution of social systems from its feedback loop with energy.

## A critical legal historiography

Before we begin delving into the long history of the state-form and start to draw our precious distinctions, it is worth our time to stop for a moment and make a second-order observation on the methodology of distinguishing. More simply, we must question what we are doing by speaking of international law historically. We are speaking here of history not simply as past events, but as an academic discipline, in other words, a scientific discourse that occurs externally, within the environment of the legal system and which has potential effects on it through diabolic media. Since historical research in international law is becoming more popular, it is important to consider what exactly has been done.[155]

The relationship between international law and historiography, as with all other scientific communication, is all but straightforward. Even though international law became reflexively historically aware during early modernity,[156] it is not so simple to distinguish what qualifies as history, nor what can be

153. Malm, Andreas. *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming*. London: Verso, 2016, 18.

154. Smil, Vaclav. *Energy and Civilization: A History*. Cambridge: The MIT Press, 2018, 3.

155. Craven, Matthew. "Theorizing the Turn to History in International Law." In *The Oxford Handbook on the Theory of International Law*, edited by Anne Orford, Florian Hoffmann and Martin Clarke, 1, 21–37. Oxford: Oxford University Press, 2016.

156. Along with a more general historicising shift within society and the rise of a positivistic historiographic discipline. Luhmann, Niklas. "World-Time and System History." In *The Differentiation of Society*, edited by Niklas Luhmann, and translated by Stephen Holmes and Charles Larmore, 308. New York: Columbia University Press, 1982; Craven (n 155), 3; Koselleck, Reinhard. *Sediments of Time: On Possible Histories*. Translated by Sean Franzel and Stefan-Ludwig Hoffman. Stanford: Stanford University Press, 2018, 117.

understood as international law. After all, history and law share a common aim: to determine the truth of the past to judge it.[157] Given this normative imperative, the motivations of the legal historian also come under scrutiny: is the purpose of the historical inquiry to enrich the law or to criticise it?[158] Initially, lawyer's first instincts tended to be the former.[159] When older notions of cyclical time or even one of humanity in decline were replaced with the Enlightenment's excitement of progress, international law (together with the rest of society) came to regard the future as something to strive towards, with the past functioning as a guide as to what, or more precisely as to what not to do ('he who forgets the past is doomed to repeat it'). Therefore, the turn to historiography can be understood better as a turn to the future. Under the mental framework of the gradually climbing line, the difference between societies could be temporalised, creating an opening for humane and patronising distinctions of civilisation/barbarian to order international society.[160]

During the later 20th century, history was deployed as a critique against international law as the exclusionary facets of the discipline were laid bare. The past itself was put on trial.[161] What underlies this critique is that the law is trapped by its history, from which it would do better to turn away.[162] From this point of view, the development of the law cannot be understood as progress but rather as conforming with older cyclical temporal notions of repetition, where old ideas reappear only in new guises (or that what was important were not novel events but rather permanent structures).[163] While considering that intellectual history recognises that concepts necessarily change their social understanding, such critical histories remain important and valuable. Depending on whether one tries to conserve or change the state of current law, it is inevitable that one instrumentalises historical knowledge to one's end.

The purpose of this chapter is not so much a traditional history of international law, nor is it an account of 'international law in history'.[164] Instead, historiography will be employed to attempt to illuminate which structural conditions evolved in the environment that made it possible for the international

157. Koselleck (n 156), 119.

158. Craven (n 155), 7.

159. Craven, Matthew. "Introduction: International Law and Its Histories." In *Time, History and International Law*, edited by Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi, 1. Leiden: Martinus Nijhoff, 2007.

160. Craven (n 155), 12.

161. Koselleck (n 156), 125.

162. Craven (n 159), 6–12.

163. Karatani, Kojin. *History and Repetition*. Edited by Seiji M. Lippit. New York: Columbia University Press, 2012, 2.

164. Craven (n 159), 26.

law system to emerge as a response to the need for a particular social function. Observed from the vantage point of the law, different interpretations of time and history appear relevant.[165] A systems theoretical approach to history also takes evolutionary contingency seriously – actors always face environmental changes that demand choices.[166] Nothing is thus given or predestined. History is made through selections, predicated on conditions of possibility or system structures, and even the understanding of the history of those making selections. Cybernetics has introduced a new temporal structure because of changes in seeing causality, not linear but spiral-like.[167] This means that we must study history differently. This chapter attempts to give alternative historiography of state-formation. Its tone is perhaps not that different from conservative accounts in that it has a ring of inevitability. What distinguishes it, however, is lamenting this development and not succumbing to its triumphant teleology.

Keeping the above in mind, we nevertheless attempt a systems theoretical historiography of the law. In doing this, it is only natural that we access history from the present, which we can define as 'the difference between past and future'.[168] The future is open, varied and novel; the past is fixed, unchangeable and filled with already-known redundancies. Suppose the present is this difference between the manner in relating information, a kind of ever-moving boundary, then according to our theory. In that case, the precious distinction is the product of a decision.[169] It means that the past is recalled selectively and that an observer selectively projects the future.[170] What should become apparent is that speaking of the past always comes at a cost. Due to history's vast complexity and the finitude of any system, it is naturally impossible to observe or communicate all of it. Due to the situatedness of specific observers, however, the devil is in *which* details get lost.[171]

What is precisely at stake here is the observation of history as historiography, an academic discipline which presents itself as scientific or public communication. It is a social discourse which thematises the past, intending to persuade by appealing to the medium of truth (as all sciences do).[172]

165. Luhmann (n 156), 291.

166. Historical actors meaning to range from humans who make ordinarily understood decisions up to the selections of social systems.

167. Hui (n 87), 238.

168. Luhmann (n 32), 256.

169. Davies, Martin L. *Historics: Why History Dominates Contemporary Society*. London: Routledge, 2006, 28.

170. Luhmann (n 32), 259.

171. 'Containing everything, history can be anything.' Davies (n 169), 3.

172. Craven (n 159), 17.

The goal of such persuasion is to make sense of, to order, the future towards stable and predictable expectations. Academic historiography has, perhaps in some cases, unwittingly, collaborated with the state in painting a picture of the past that affirms the status quo of current institutions and power relations.[173] It is not a simple or value-free representation of facts about how things used to be. To be scientifically plausible, it has to convince other historians of its realism, truthfulness, or accuracy. These designations are rhetorical, not factual, and accounts of the continuity of international law all betray what Grewe calls a 'psychological' component.[174] Its self-referential coherence mirrors what is known and acceptable inside the boundary of the present more than it reflects the past.[175] As Craven puts it: '[t]he past, it might be said, only answers the questions we pose of it'.[176] Historiography is not an account of the past; it is an account of the present, conservatively employing facts from the past.

In this sense, history as a scientific method is employed as a technology of rule. In its efforts to persuade, it harnesses not only the diabolic medium of truth but also that of power. As we will see in the coming sections, history has been cynically employed to create national identities and justify forms of rule such as the nation-state. It tends to select the 'same things' and look for patterns that make our present seem inevitable[177] and portrays violence as natural. It is a technique for ordering information that has the function for society as a way of instrumentally describing itself, to order and orient itself meaningfully. When we accept a historical account, we must also accept that its diabolic media convince us, not because of direct access to any past reality.

Interestingly, Luhmann convincingly argues that even though society might become more complex, its relationship with history can accordingly decrease in complexity, neutralise it, use it selectively, or discard it altogether.[178] In a functionally differentiated society, oriented towards the future, the weight of history becomes too heavy and increasingly abstract. Laws do not rely on them being ancient to have legitimacy (a consequence of modern positivism), nor do political rulers have to prove their lineage. When money is spent, where it came from is not asked, and property ownership is proved by contract. Instead, the law gains validity by being compatible with our projections for the future. Rather than being timeless, we require that the law be flexible and

173. Davies (n 169), 5.

174. Grewe, Wilhelm G. *The Epochs of International Law*. Translated by Michael Byers. Berlin: Walter de Gruyter, 2000, 9.

175. Hui (n 87), 89.

176. Craven (n 155), 20.

177. Davies (n 169), 31.

178. Luhmann (n 156), 299.

changeable, and when it fails, it loses perceived legitimacy. Constraints to change can be inherent within the legal system itself or found in its environment: organisational or political structures can also make legal change impossible.[179] Part of the purpose of the following history is to show exactly how international law cannot effectively respond to what society demands of it today. This is thus a call, through history, to let it go and let the 'future horizon dominate'.[180]

Traditional historiography has also had other shortcomings. The historian Reinhart Koselleck has pointed to the lack of a conceptual history of space (although subsequent authors like Elden have attempted to fill this gap).[181] In this study, space is placed on an equal footing with time as a condition for history,[182] as many of the state structures that we study (e.g. borders) have an essentially spatial dynamic. For this reason, what is presented here as a legal history is necessarily also legal geography. This opens history to a richer network of variables, including natural landscapes and features, resources and climate patterns. These cannot be separated from human action and social processes and structures. This does not mean falling into the determinism trap of the dubious discipline of geopolitics.[183]

We are also posed with a self-reflective problem for the work at hand. The following historical narrative is no less an exercise in creating distinctions (the state-form), thus generating facts out of the past and giving them normative implications for the present. What, after all, does the invention of brickmaking in ancient Mesopotamia have to do with the United Nations (UN)? These only cohere within the structure of 'state-form' that I have psychically observed, thanks to my particular concerns.[184] How, then, can the following historiography be free from all the pitfalls I have described above? It cannot. What it can do, at best, is to provide a counter-narrative, shedding light on our present situation through a different retelling of the past. It hopefully compels us to look at states, sovereignty and international law differently and to ask different questions about it. What has happened cannot change, but the position we observe might shift a bit, the mist might clear some of our blind spots, and hopefully, some of our (still precious) distinctions can be redrawn.

179. Luhmann (n 156), 319.

180. Luhmann (n 156), 321.

181. Koselleck (n 156), 27; Elden, Stuart. *The Birth of Territory*. Chicago: The University of Chicago Press, 2013.

182. Soja, Edward W. *Postmodern Geographies: The Reassertion of Space in Critical Social Theory*. London: Verso, 1989, 11.

183. Maier, Charles S. *Once Within Borders: Territories of Power, Wealth and Belonging since 1500*. Cambridge: Harvard University Press, 2016, 247.

184. 'Observed' even in its most technical sense, for I have never 'seen' the UN, nor a nation-state, and much less have I experienced ancient Mesopotamia.

## Repetitive structures in legal history

Once every year during the festival of *Terminalia*, ancient Romans ritualistically marched along the lines of their borders to consecrate them.[185] This consecration usually went in hand with the sacrifice of animals, and the border was marked with blood. As Deleuze points out, festivals or rituals are always a repetition of an unrepeatable. It is not the retention of the past but a representation of the past. We could see this in the previous section, in how history belongs to the present for current political goals.[186] Alternatively, in the case of law, when it draws on treaties or past decisions, it instrumentally employs the past to solve a present problem. The law is invoked in its original idea but as a variation of it.

The reason for reaching as far back as the first complex societies is not without justification.[187] We see in the *Terminalia* an event which was, and perhaps still is, repeating both temporally and spatially. What I hope to show is that the logic underlying political power today, although now much more sophisticated, has always remained fundamentally the same. Koselleck identifies three sets of distinctions that make human action possible and meaningful and have an inherent repetitive structure. These he identifies as the inside and outside of the territory, the above and below of hierarchy, and the earlier and later found in time. They are ordering structures that remain stable themselves while allowing for variation in events to occur.[188] After the advent of agriculture, these distinctions became radicalised, vast asymmetries between people became possible, and the basic set of instructions for maintaining that was developed soon after.

Today we could call such a set of instructions an algorithm, a procedure that can be applied in different places and times to deliver the same result.[189] Ancient civilisations already performed complex operations that we could describe as algorithms today.[190] These included rituals that marked social abstractions such as group identity and territory. Hui also recognises this possibility when he writes that cybernetics, the intellectual tradition which systems theory draws upon, is 'a mechanical being implemented in an

185. Nail (n 35), 37.

186. Deleuze, Gilles. *Difference and Repetition*. Translated by Paul Patton. London: Bloomsbury Academic, 1994, 95.

187. Grewe points out that recent studies keep pushing the starting point of international law further and further back, and that early forms can indeed be found in antiquity. Grewe (n 174), 163.

188. Koselleck (n 156), 164.

189. Hui (n 87); Erwig, Martin. *Once Upon an Algorithm: How Stories Explain Computing*. Cambridge: MIT Press, 2017, 18.

190. Pasquinelli, Matteo. "Three Thousand Years of Algorithmic Rituals: The Emergence of AI from the Computation of Space." *e-flux* 101 (2019): 1–12, 8.

organic form'.[191] The function of algorithms is to solve problems by ordering time, space and labour. They are always also precious: they cost time and resources to enact.[192] This is also why the need for censuses arose early on: state statistics were understood to be essential in decision-making. Thus, states have always weaponised scientific knowledge and truth, even from the first days of complex societies.[193]

These algorithms of power were employed to address the problem of scarcity, one of the most ancient drivers of history.[194] It structures decisions on a choice between taking one benefit at the cost of something else.[195] We could adapt this also to say benefit at the cost of *someone* else. The steps that could be followed to address this problem could include capturing a large enough population and territory through the use of bordering techniques. Coerce them into making the land productive. The cost is to give them the bare amount of resources required to keep the machine rambling along and placate enough in 'managerial' positions to keep the process going. All remaining surplus solves the problem of scarcity. Whether this is an elegant – or even real – solution to the problem is relative; even solutions are always in the eye of the observer.[196]

This algorithm is successful because scarcity, even if just imagined, is an eternal and universal problem. It has been discovered and applied in every corner of the globe at some point in history despite local variances. However, this also lies at the root of one of its most prominent defects: like many badly-designed algorithms, it has a halting problem, meaning that because scarcity will always be present (even if only imagined), the algorithm is stuck in a loop.[197] An infinitely recurring loop would be problematic even if we only look at asymmetry caused and perpetuated by the power algorithm. However, it has another worrying consequence if we remember that algorithms require resources to operate[198]: the natural world becomes depleted, operating space runs out, and the machine itself can break down. The feedback loops are amplifying financial crashes, ecological crises, and virological calamities

191. Hui (n 87), 145.

192. Erwig (n 189), 2.

193. Pasquinelli, Matteo. "Arcana Mathematica Imperii: The Evolution of Western Computational Norms." In *Former West*, edited by Maria Hlavajova et al., 281–293, 282, Cambridge: MIT Press, 2017.

194. We can take the fear of scarcity even a level higher and speak of the resistance against the general tendency towards entropy.

195. Luhmann (n 156), 313.

196. Erwig (n 189), 23.

197. 'The end, should it be beautiful or sublime, driven by the imagination, is determined by a purposiveness devoid of purpose.' Hui (n 87), 9; Erwig (n 189), 7.

198. Hui (n 87), 113.

are the new normal. We live in an age of 'algorithmic catastrophe'.[199] This chapter hopes to show how this recursion has been on a loop from the beginning to now.

If we understand power as an algorithm, it means that it is something that repeats. But because nothing can cross the boundary between system and environment unscathed, because any change in the environment changes the system and *vice versa*, the repetition continually loops back with a difference, a variation on the original idea of that which is repeated.[200] Repetition confirms the status quo, what is known as current relations, but slightly reorders and reorients it. It is not so much the domain of judgement or decision as much as it is that of command.[201] It is also the condition under which new action can be produced. This is vital for the reproduction or autopoiesis of complex systems and structures and is the condition for even evolution itself.[202] The structure of law makes this apparent: it depends on repeatability, which only sometimes is open for slight change and adjustment, after which it can continue its cycle again.

In the same way, the power relations of the state are the conditions for the future power relations of the state. However, the actors themselves become irrelevant to the established structures, the latter always ready to be filled by new actors.[203] In social terms, we see this in the shift from power lying in individuals to it being vested in positions[204] or in the idea of the timeless nation-state. Legal norms reflect repeatable procedures more than they do values. The legal and political systems are always oriented to the future but

199. Hui (n 87), 234. In one of his discarded drafts for what would become *Theory of Society*, Luhmann wrote: 'If our society had to agree on a symbol, it probably wouldn't be the circle, nor the cross, nor the line, but the spiralling exponential curve. Exponential curves, which increasingly express accelerating increases in whatever, currently symbolize the unity of desire and the expectation of crisis. Since evolution has to date also developed as a movement towards complexity, it is obvious to extrapolate it as an exponential curve and to interpret the signs of the times as symptoms of overwhelming complexity'. Freely translated from German from Luhmann, Karl. *Systemtheorie der Gesellschaft.* Edited by Johannes F.K. Schmidt and André Kieserling. Berlin: Suhrkamp Verlag, 2017, 300. Johannes Schmidt argues that 'crisis' was never a significant concern for Luhmann, and the word hardly appears in his famous Zettelkasten. Instead, he understood it as the disruptions bought about by system structural changes. Schmidt, Johannes. "Krisen und Katastrophen – kein Thema für Niklas Luhmann?" *Sozusagen* (2012/2013): 25–27.

200. Deleuze (n 186), 94; Hui (n 87), 4; Karatani (n 163); Reinhart Koselleck (n 156), 159.

201. Hui (n 87), 9.

202. It is interesting to note that ancient Greek *poiesis* and *techne* are synonyms for 'to produce'. If systems theory takes communication as creating social systems, one could extend this line to argue that technology is the external manifestation of communicative infrastructure, such as maps. Hui (n 87) 127, 163.

203. 'the production of something new entails a dramatic repetition which excludes even the hero.' Deleuze (n 186), 119.

204. Luhmann (n 156), 317.

draw on the past, subsuming humans into their machinic temporalities, leaving society under algorithmic governmentality.[205]

Thus, with these considerations in mind, we turn to the history of the sovereign state, the prime subject of international law. We know that historiography is a scientific discourse outside of the legal system, which appeals to the truth to sway the selections of the legal system. Events are simply too unique and 'thin' to hold much persuasive value. A systems theoretical history would better look for structures and patterns that repeat. We can see that modern society is the long outcome of simple processes that started humbly but were so successful that their resonance increased exponentially in complexity, but not in their fundamental nature. Now that we know how we are looking at history and what we are looking for let us commence.

## The segmentary state

For our purpose of studying the modern nation-state and its function, it is advisable to look at its formation. I am operating under the conviction that traces of the first complex societies remain inherently in the genetic code of the state today. Looking at early state-formation allows us to see several important things. Just like the system of law, politics also has a specific function as its *raison d'être* or even *raison d'état*. Going back to the origin and evolution of the state-form can bring this function into sharper relief. The second reason is to show that the development of the state has been far from inevitable and has been contingent, perhaps one of the significant contingencies of human society. Finally, it is vital because it shows us that the state-form's contingency relied on human interaction with many non-human species and objects. It could develop thanks to a tight network of bodies and movements, leading us to the crisis we find ourselves in today. In Chapters 5 and 6, we will discuss the relations between law, politics and objects more closely, but for now, it is vital to explicate and keep in mind its history.

It is difficult to pinpoint the exact beginning of the state-form, and much of it depends on the definition. This is like current debates on when to date the Anthropocene, for example, from the First Industrial Revolution or 1945. James C. Scott suggests that these two questions could go together, for a drastic human alteration of the environment started with the employment of two objects: fire and the state. The most current research suggests that the first territorial, walled states arose around 3100 BC.[206] While it was believed for a

205. Hui (n 87), 243.

206. 'No institution has done more to mobilize the technologies of landscape modification in its interest that the state.' Scott, James C. *Against the Grain: A Deep History of the Earliest States*. New Haven: Yale University Press, 2017, 3–5.

long time that the domestication of crops and the rise of agriculture necessarily led to state-formation, it now seems that it was not the case. States formed almost four millennia after the development of agriculture, the latter technology appearing about 10 000 years ago.[207] It seems that nomadic and hunter-gathering modes of existence were much more desirable for early man and did not form states.[208] Evidence shows that nomads had much more varied and nutritious diets than sedentary farmers,[209] and the number of hours spent in toil was less, too. Agriculture also did not necessarily provide food security, as the failure of crops for whatever reason could spell disaster.[210] Most humans tried to give early or proto-states a wide berth, regarding them as wretched hives of disease and forced labour.

How and why, then, did states nonetheless arise? What early states have in common are a sustainable balance between a significant population and resources; a bounded territory over which force could be monopolised; specialised production and exchange; and political authority which could invest in infrastructure.[211] Agriculture itself probably arose due to environmental stress, as usual with all evolutionary shifts.[212] Human societies were faced with either controlling population growth or working nature harder to sustain ever-increasing numbers. The setting-upon (or the *Ortung und Ordnung* as Carl Schmitt calls it) of land follows remarkably systemic rationality.[213] Once space had been indicated and demarcated, the first step was to reduce its complexity. In the earliest Mesopotamic cases, swamplands had to be drained, distinguished, and separated into soil and water[214], and from here, a complex ecosystem could be reduced to a simple ordered field yielding a single crop. Much effort was expended to maintain this boundary and restrict the complexity of the natural outside from taking over. It also required the domestication of crops

207. Smil (n 154), 21; Reinhart Koselleck (n 156), 35.

208. Strayer (n 54), 6.

209. Scott (n 206), 108. In a study of cultural complexity Ortman, Blair and Peregrine also find that there is no statistical correlation between the rise of social complexity with group health or birth rates and that the evolution of complex societies does not offer any biological advantages to humans. In Sabloff, Paula L.W. and Sabloff, Jeremy, A. *The Emergence of Premodern States*. Santa Fe: Santa Fe Institute Press, 2018, 195.

210. In contrast with this and closer to the traditional account, Smil argues that foraging did not provide enough energy for our ancestors to develop complex societies, as time was spent mainly searching for calories. However, he admits that a few cases of social complexity emerged from foraging communities that were exceptionally well-located geographically. On the other hand, the earliest farming was more labour-intensive than foraging. Smil (n 154), 28, 34, 42.

211. Sabloff (n 209), 5.

212. Smil (n 154), 41. It would also explain why agriculture developed around the same time across vastly separated world regions.

213. Daston, Lorraine. *Against Nature*. Cambridge: MIT Press, 2019, 45.

214. Scott (n 206), 56.

and livestock, which had artificially become dependent on human civilisation for survival. However, it makes just as much sense to argue that grains and animals had domesticated humans,[215] and it took the state-form to gather us all into a herd.

Agricultural technology did not automatically lead to the state. It should rather be understood as an assembly of technology (not forgetting the early farming implements that made agriculture more energy-efficient) that was captured to concentrate humans into a centre for political power.[216] The choice of crops in almost all early states were grains, chosen not for nutritional or environmental reasons alone but also for harvest's predictability and the countability of its yield – to predict and determine taxation (this is also why crops that grow underground proved unpopular). They could be farmed to surplus and stored centrally and for a long time, making them perfect for rationing.[217] Apart from grains, one of the other important objects of the states was walls, not merely to defend its grains but also to keep its workforce inside.[218] Especially harvesting required labour from outside to make a net gain in energy, yet most states could emerge very rapidly and violently and ultimately encountered futile resistance.[219] For most humans, the early state was marked by hard labour, disease and malnourishment and little loyalty towards the state-form existed. Another technology that arose in this period was writing, first in bookkeeping for tax collecting (about 500 years before it was used for history, literature or poetry).[220] Tradition tells us that swords can be beaten into ploughs and that pens are mightier than swords. But if you want to make a state, you have to use a plough, pen and sword in accord.[221]

215. Hui (n 87), 186.

216. Scott (n 206), 117.

217. Karatani points out that for its continuation, exploitation has to be accompanied by at least some redistribution for the relationship to be characterised as reciprocal plausibly. There is thus an interplay between violence and liberality. This relationship, he argues, continues in today's modern state. Or seen in the reverse, if this can be seen as a social contract, it is a profoundly unequal one and must therefore owe its existence to power and violence. In Karatani, Kojin. *Nation and Aesthetics: On Kant and Freud*. Translated by Jonathan E. Abel, H. Darwin Tsen and Hiroki Yoshikuni. Oxford: Oxford University Press, 2017, 4; Smil (n 154), 57.

218. This does not mean that urban growth is a requirement for state-formation. An exceptional example of an early state that had no urban centres is found in Hawaii. Sabloff (n 209), 3.

219. Sabloff (n 209), 19; Jessop (n 104), 41.

220. Scott (n 206), 141. It is worth noting that complex early states arose much, much earlier than writing. Sabloff (n 209), 17.

221. Or to put it differently, 'state-level organizations are best pictured as patterned "networks of matter, energy, and information"'. In Sabloff (n 209), 3; Scheidel, Walter. *The Great Leveler: Violence and the History of Inequality from the Stone Age to the Twenty-First Century*. Princeton: Princeton University Press, 2017, 8.

In these circumstances, powerful elites could enforce the production of a surplus, which could be extracted and sustained.[222] It is a fact that larger, more complex societies can produce more per person than smaller ones.[223] However, it is unlikely that the ability to feed more people serves as a great attractor, especially if one also considers that this extra production is spread ever more unequally.[224] Production causes a difference, namely surplus value and a class difference. From this point, societies become much more distinctly stratified between an elite and a peasantry (or, more accurately, slavery).[225] Humans were regarded instrumentally as tools, and the earliest wars aimed to capture populations rather than territory.[226] Patriarchal distinctions between men and women also became more pronounced, with female bodies reduced to breeding batteries for increasing the labour force.[227] If most humankind had set upon nature to farm it,[228] the state-form arose from powerful elites' ability to domesticate and farm human production and reproduction. What we have is the first complex machine, and it was made out of humans.[229] Scheidel's vast study proves that once states are formed, material inequality becomes inescapable.[230] Evidently, that technological retrogression is virtually absent in human society. Each generation inherited an environmental niche from which it became increasingly difficult to escape, causing the early state-form to recur and reproduce autopoietically.[231] Sovereign political power did not

222. Graeber, David and Sahlins, Marshall. *On Kings*. Chicago: HAU Books, 2017, 15; Karatani (n 217), 3; Scheidel (n 221), 36.

223. Ortman (n 209), 201.

224. Luhmann (n 32), 28.

225. 'The formation of states as a highly competitive form of organization established steep hierarchies of power and coercive force that skewed access to income and wealth. Political inequality reinforced and amplified economic inequality. For most of the agrarian period, the state enriched the few at the expense of the many.' Scheidel (n 221), 5. Roman conquests were also, in some cases, concerned instead with gaining power over people than over lands. See Elden (n 181), 79.

226. Scott (n 206), 172.

227. Scott (n 206), 181. Luhmann points out that societies prefigure the notion of families: 'Rather than society being put together out of families, the family constitutes a form of social differentiation'. Luhmann (n 32), 27; See also Engels, Friedrich. *The Origin of the Family, Private Property and the State*. London: Penguin, 2010.

228. Thus, capturing nature into a technical form, leaves us with a 'cybernetic nature'. Hui (n 87), 148.

229. It is instructive in this regard to remember the root of words such as 'colonise' from the Latin *colere* (to cultivate), *colonus* (settler or farmer) and *colonia* (settlement or farm). See Graeber, David. "Notes on the Politics of Divine Kingship: Or, Elements for an Archeology of Sovereignty." *On Kings*, edited by David Graeber and Marshall Sahlins, 377–466, 427. Chicago: HAU Books, 2017; Jessop (n 104), 33.

230. Scheidel (n 221), 10.

231. Ortman (n 209), 287.

arise from an upward agrarian society; rather, a ruling class existed prior, which enslaved and created the subject class.[232]

If powered elites prefigured the state-form, it is worth investigating where they came from. One possibility is offered by the anthropologist David Graeber. His study is of societies in North America, but he suggests that this model could have been applied in many parts of the world.[233] In pre-state societies, the direct power of command between adults was restricted only during ritual (or *telesma*). It was restricted to members who acted in the role of a clown. The clowns acted humorously and in contravention of rules and customs, giving nonsense orders and fining those who disobeyed. Their behaviour and orders were thus completely arbitrary, 'as if the clowns were the personal embodiment of the principle that only those not bound by rules can create rules'.[234] Still, this was restricted to specific ritual events and not a permanent state of affairs.

What is, however, clear today is that domestication, agriculture and surplus allowed for societies to generate complexity, hierarchy, centralisation and the state, which went together with inequality and violence.[235] This process is staggeringly uniform across space and time, from ancient Rome to ancient China. Scheidel's impressive study shows how these empires quickly established an equilibrium balancing maximum inequality and political stability.[236] In other words, the state redistributes resources as unequally as they came while still being operable.

In this light, it is worth taking a moment to consider taking Carl Schmitt's friend/enemy distinction, usually read as a distinction drawn by a political unity against those outside of their territorial boundary, and to find its first appearance in the war between the ruler and the ruled. Throughout history, violence has primarily occurred within this configuration rather than between nations, and

> There is no fundamental difference in the relation between a sovereign and his people, and a sovereign and his enemies. Inside and outside are both constituted through at least the possibility of indiscriminate violence.[237]

232. 'The superiority of the ruling aristocracy was not engendered by the process of state-formation so much as the state was engendered by the a priori superiority of an aristocracy from somewhere.' Graeber and Sahlins (n 222), 5. From the same page: 'the monstrous and violent nature of the king remains an essential condition of his sovereignty'. It was also impossible in segmentary societies to move up in the social order. Luhmann (n 32), 28.

233. Graeber (n 229), 381.

234. Graeber (n 229), 384.

235. Scheidel (n 221), 42–44; Elden (n 181), 49.

236. Scheidel (n 221), 84.

237. David Graeber, *The Divine Kingship of the Shilluk* in Graeber and Sahlins (n 222), 137.

What we call the state today is the rules of engagement that arise during any long-term (so far, 7000 years and counting) war, and despite this, as Schmitt recognised, the threat of violence still always lurks underneath.

The newest statistical analyses show that resource availability goes together with territoriality and hierarchy. Simply put, the scarcer resources are, the more jealously communities guard their resources. In guarding such valuable territories, hierarchical societies have an advantage, as they can more efficiently organise collective action. We have seen that hierarchies are linked to inequality and tend to amplify inequalities even further over time.[238] If we take it that resources will continue their scarcity in our time, it would suggest the grim picture (which nonetheless seems the case) that inequality is set to increase evermore.

After the agricultural revolution, we see the emergence of border practices. Nomadic peoples had little use for strict bordering, and it was only once societies became sedentary that the notion of the fence became important. As Elden points out, territoriality is a political strategy, not a human instinct.[239] The fence is easily misunderstood as functioning to keep chaos, disorder or complexity outside, but it is not exactly the case. Instead, the fence's point aims to keep inside and to draw the movement from the periphery towards the centre.[240] After cutting into the earth to dig a trench, the planted farm fence concentrates energy inside its borders; the city wall keeps human labour, captured violently from outside, from escaping into the environment. The fence is not a symbol of the power of a state but exactly of its literal and metaphorical limits – it was up to this point that it could exert control over what was held captive inside. Fences also appear inside the settlement, creating a difference, hierarchy and inequality within society. We will see in Chapter 6 that the modern nation-state was created similarly, from the national cartographic border *inwards* to the territory. This is true for any system, as in Luhmann's definition: a system is a difference between system and environment. It is only once the internal identity has been established that the border creates the very need for it to be defended and thus becomes a fortified structure.[241] Thus, the first border had several functions essential to state-formation: expelling the wild while drawing resources towards it; symbolically binding a community into a single identity; and finally, acting as a defence against enemies. It is not the result of a political community – it is the condition that makes the state possible in the first place.[242] Territory, too, is a process of

238. Sabloff (n 209), 123.

239. Elden (n 181), 4.

240. Nail (n 35), 49; Elden (n 181), 90.

241. Nail (n 35), 52.

242. Nail (n 35), 63.

legal and political arguments and technologies that took millennia to evolve from the starting point of the agricultural revolution.

Once a city polity or early state is established, it turns its fences into walls. It is a metaphor for the military expansion of frontiers. Rather than waiting for the barbarians to arrive, the state captured them instead.[243] Walls are made possible by laying uniform bricks, just as militaries expansion requires homogenising its young men into efficient soldiers.[244] Expansion relies on mobile repetitions that can be distributed.[245] Once the human wall has secured a frontier, the brick wall can be built as its stand-in. Human bodies were thus one of the first borders of the state. This process also carries a secondary cause of homogenisation: if one state builds walls, whether of bricks or humans, to expand, its neighbours had better do the same. This feedback loop is what lies at the heart of every arms race.

The final form of the ancient border we turn to is counterintuitively the road. It is also a homogenisation of objects that controls movement, albeit horizontally.[246] Remember that Hermes was not only the god of borders but also transport – in our study, this is a tautology. Benton argues that sovereignty spread in the age of European colonialism, not as vast blocs but that it was characterised instead through corridors and passageways to strategic points in the new world. Even the ship on the open sea (never quite so open, as a portolan chart shows the sea with established routes) carried the sovereignty of a state with it on the road.

This study always attempts to start with difference rather than unity. Agonistic theories have been used to describe the constitution of political unions in a nation-state against others[247] or as polities within a state.[248] However, the first difference, the first antagonism, the first enemies, were on the ruler's side and ruled. Even if the enslaved have seemingly become dependent on the structures of their bondage for survival, the battle has been waged over the sovereign's absolute power or his reduction to an increasingly symbolic figure.[249] It is this millennia-long struggle that has constituted

243. Elden (n 181), 82.

244. Smil points out that bricks were a particularly energy-efficient way of building. Smil (n 154), 197.

245. Nail (n 35), 66.

246. Nail (n 35), 82.

247. Schmitt, Carl. *The Concept of the Political*. Chicago: The University of Chicago Press, 2007.

248. Mouffe, Chantal. "Agonistics. Challenge of Carl Schmitt." In *Oxford Handbook of Carl Schmitt*, edited by Jens Meierhenrich and Oliver Simons. London: Oxford University Press, 2013.

249. In this regard, Graeber speaks of the divine king, the ability to act like a deity without impunity, and the sacred king who is set apart from society and can be symbolically or ritually revered despite having little say over practical matters. Graeber (n 229), 402.

the state.[250] As with the original states, the contemporary state cannot be regarded as a neutral instrument (as Schmitt claims) but is built structurally on domination and exploitation.[251] The concessions of sovereignty have been the list of procedures, rituals and taboos that are aimed at venerating him and limiting his power. The most recent evidence also suggests that it was only as rulers' political power became more contested, that they elaborated divine justifications and myths of progress for their rule to control the unrest.[252] It seems that another one of Schmitt's famous *dicta* must be reckoned. Instead of '[a]ll significant concepts of the modern theory of the state are secularised theological concepts',[253] it can be speculated on how many theological concepts are sacralised and politicised, or to what extent it is sensical to separate the two and to which point in history. Theological arguments were, after all, elaborated and turned against kings as recently as the Enlightenment.[254]

In Scott, Graeber and Sahlins' anthropologies of the ancient state, we can already unearth sediments on which today's sovereignty is built. Sovereign power started in a highly ritualised form. The exercise of power was limited and had been ridiculous until suddenly; it was not.[255] Power became permanent, and populations were enslaved. In the myths of rulers, they always came from somewhere else, external to society. Human captives were domesticated and made to produce an excess which could be exploited. Sedentary communities found their origin in violence: the mythical moment of violence in legal and political theory seems to be supported today by empirical evidence. As the populations grew, the instruments of their subjugation had to become more

250. Graeber (n 229), 398.

251. Schmitt, Carl. *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*. Translated by George Schwab and Erna Hilfstein. Chicago: The University of Chicago Press, 2008, 42; Jessop (n 104), 3.

252. It is only with the rise of complex imperial 'megasocieties' (where populations reached around the one million mark) that religions developed from impersonal gods or ancestor worship to gods with strict moral codes that punished indiscretions by the living directly. The first appearance seems to be in Egypt around 2800 BC (also after the invention of writing). While simpler religions could suffice in small societies of shared kinship or familial ties, imperial societies required a universal symbol. Moralising gods who punish are by no means a requirement for the evolution of social complexity but do seem to play a role in solidifying cooperation and creating united political identities. While this trend seems to be the definitive trend in most ancient societies, significant exceptions such as the Greeks and Romans are notable exceptions. Joseph Watts et al., *Broad Supernatural Punishment but not Moralizing High Gods Precede the Evolution of Political Complexity in Austronesia*, Proc. R. Soc B 282: 20142556; Whitehouse, Harvey, et al., "Complex Societies Precede Moralizing Gods Throughout World History." *Nature*, no. 568 (2019): 226–29; Smil (n 154), 414.

253. Schmitt (n 23), 36.

254. Even if the king had symbolically been replaced by 'the people', the exact mechanism remains or 'in practical terms, their [the ruled – *researcher*] defeat has always taken the same form'. Graeber (n 229), 419; Koselleck, Reinhart. *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society*. Cambridge: MIT Press, 2000.

255. However, the idea of the sovereign leader as a buffoon has still survived. Graeber (n 229), 462.

sophisticated, and concessions had to be made, but the fundamental structure of sovereignty remained intact.

By looking at research on the pre-history of society, we have seen on what bases the state arose. Undoubtedly the agricultural revolution was what made complex societies possible. It emerged within a certain frame that was possible for the first time: people became locked onto land, which they had to set upon to create a surplus, themselves set upon through violence. It is within these material conditions that the state arose, and it was its original function. During the last few centuries, states remained relatively static. Many humans lived a life of incredible work and inadequate nutrition because agriculture's energy efficiency quickly reached a limit that would not be shifted until the First Industrial Revolution reached its tipping point.[256] However, before we move to modernity, the next section will look at the period just before that and the legal, political and mechanical technologies that had emerged that were essential in paving the way for what was to follow.

## The stratified state

In the previous section, we saw how the agricultural revolution made it materially possible for complex social structures to emerge. Sedentism and a predictable energy source allowed populations to boom. With centralised power structures and hierarchisation came increased complexity. Man's relationship with the land also changed; one social construct that arose was new borders. Identities arose, although these would have a different colour from nationalism as we know it today and would end up being tied more closely with religion than with birthplace. If the ancient form of social organisation still centred around spatial centres of resources and power, medieval society was instead organised around rank and status, meaning that the law was concerned with the status of the individual rather than with territorial jurisdiction.[257]

This leads us to the complex structures of medieval Europe. State sovereignty and international law were far removed from its modern manifestations. However, surely the groundwork was being laid, and we see the origin of ideas that would become consolidated later.[258] Of course, we are taking a temporal leap of several millennia here. This is not mean that nothing has changed. Nevertheless, where the previous section focused on the beginnings of the prehistorical state to see where it might lead, this section looks at the end of the medieval period to see its progress, right before the

256. Smil (n 154), 120.

257. Luhmann (n 32), 51.

258. Grewe (n 174), 8.

important transformations that led us to where we are now. Where someone like Schmitt claims a certain eternal transcendence of something like a *Volkstaat* (and one instinctively feels would also reflect the general inclination of most people), a conceptual history can very simply and empirically disprove this. Only in the late medieval or early modern times did the evolution towards a nation (a demos from the bottom-up) and a state (or kratos from the top-down) become observable, leading us into modernity.

The sovereign territorial nation-state is not a given but the product of conscious construction around specific ideas. As Sassen says, 'there was nothing natural, easy, or predestined'.[259] The *Treaty of Westphalia* is, of course, treated as one of the great events, in the full philosophical sense of the term, in the evolution of the state. Luhmann rightfully points out that evolution is not a gradual, smooth progression but is somewhat marked by long periods of stasis interrupted by crises that radically change structures.[260] The more complex societies become, the more the pace of change accelerates.[261] The legal and political systems have to defend their autonomy under new environmental contexts, which cannot be done through planned reorganisation but more readily takes place through taking existing capabilities and directing them towards new ends.[262] Sassen makes a similar point about the development of the state from medieval assemblages.[263] Social evolution thus occurs autopoietically in steps rather than as a smooth progression.[264]

Medieval Europe had three main political structures: feudalism, Empire and the Church. The first was decentred while the other two were centralising. Two other less important forms also existed: the city-state and loose confederations, such as the Hanseatic League.[265] However, none of these was predicated upon

259. Sassen, Saskia. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton: Princeton University Press, 2006, 18; Agnew, John. *Globalization & Sovereignty: Beyond the Territorial Trap*. New York: Rowman & Littlefield, 2018, 114; Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*. Cambridge: Cambridge University Press, 2009, 176.

260. Luhmann (n 124) 233. See Chapter 7 for a more thorough discussion on legal evolution.

261. Ortman (n 209), 208.

262. Luhmann (n 124), 234.

263. Sassen (n 259), 27; several decades before Sassen, Strayer also wrote that 'any persistent institution may in time become part of a state structure though it was not originally intended to have this function'. Strayer (n 54), 7; Jessop describes this phenomenon in a language closer to Luhmann's in *Jessop,* the state past present future (n 104), 56; See also Ortman, Blair and Peregrine: '[w]e also view cultural macroevolution as a cumulative process in which innovation derives from the recombination of existing elements into new structures, which then become elements for further combinations, and so forth'. Sabloff (n 209), 188. A separate but interesting and related point is that large and complex states or societies usually possess all the traits of smaller societies (in the form of a Guttman scale, where one level in a hierarchy contains all the elements of lower levels), meaning social evolution is a cumulative process. See Ortman (n 209), 206.

264. Ortman (n 209), 280.

265. Spruyt (n 1).

fixed territoriality. Instead, the stratified differentiation of the medieval period came about from an upper class being able to differentiate itself from the rest of society and being able to close itself off.[266] This means that authority and jurisdictions overlapped, and the law was usually applied to one's status rather than spatial location.[267] This is one of the distinguishing features of a stratified society which prefigure modern functional ones. The forms of Empire and Church were both universal in their claims. The feudal form was not comparably as strictly bordered as contemporary territories, and authority arose from the ruler's ownership rather than his representing anyone or anything. The border as we know it today has not reached its full development yet. Many limitations on domains of authority were self-imposed and vague, rather than the precise boundary line drawn by two sovereigns through agreement.[268] The distinction between domestic and international politics had not yet arisen, and the recognition of others as equals had not taken root. No permanent institutions for dealing with 'external affairs' had developed, and in the patchwork of ownership and loyalties, such a distinction would have been meaningless.[269]

Sassen argues that thriving cities desired to escape the universal claims of Empire and Church that precipitated modern sovereignty. Schmitt claims that the European state arose to bracket religious wars through secular rule (a peace which Hardt and Negri regarded as devoid of transformative humanism but as a 'miserable condition of survival, the extreme urgency of escaping death').[270] At the same time, Luhmann recognises all of the above.[271] This was done *inter alia* through the return to Justinian *ius civile*, centred on local interests, against the *ius canonici*.[272] The first few centuries of the second millennium AD saw the rise of judicial institutions for settling disputes (and a vigorous rebirth of legal education) and treasuries tasked

266. Luhmann (n 32), 54.

267. Sassen (n 259), 32.

268. Sassen (n 259), 40.

269. Strayer (n 54), 27. At the same time, however, Strayer calls the prolonged and late development of foreign affairs and defence departments a 'puzzle'. For example, England appointed its first foreign affairs minister in 1782. Strayer (n 54), 80, 104.

270. Hardt and Negri (n 40), 75.

271. Schmitt, Carl. *The Nomos of the Earth*. Candor: Telos, 2006, 127; Luhmann (n 124), 408. Hardt and Negri emphasise the secularisation of society starting from the Middle Ages. They claim that as the persuasive power of immanent arguments declined, society began to pull knowledge down from the heavens onto the earth and that 'human knowledge became a doing, a practice of transforming nature'. (n 42), 72. This contributed to the legal subjectification of the individual. I regard this as a separate argument from that Sassen, who ascribes Papal power's decline rather than economic and political factors.

272. Sassen (n 259), 43–48. In the Middle Ages, the Catholic Church was by far the most powerful body in Europe and the one which can mostly be described as sovereign. With the church claiming divine leadership, local rulers lost this claim and became fully secularised. Strayer sees the church's monopoly on divinity as what enabled the concept of the secular state. Strayer (n 54), 22.

with taxation.[273] Territorial sovereignty as a concept came to assert itself by the 17th century slowly, and it was only then that the notion of public law arose.[274] Law tended to draw on a plurality of sources and could create structures whose ends could shift and adapt to new interests.[275] Through reinterpretation, Roman law concepts proved flexible enough to be filled with new content to create new political orders. Many of these interests were shaped by the changing face of European economics,[276] with technological advances increasing production and wealth for many, which made them more assertive in their claims for political inclusion: 'the complexity of the condition of powerlessness [...] shows us that the practices of the excluded are on factor in the making of history'.[277] Those powerless individuals used the law to include themselves in political rule; their rulers, in turn, could claim sovereignty for their cities despite more powerful authorities like empires and the Church existing. Authority could thus be abstracted from raw power.[278]

In line with the earlier thesis of Graeber, the *societas* of the early medieval period were seen as a contract between classes. However, in the later period, the metaphor of the organic body of the state grew in popularity.[279] From this epoch, the fathers of state theory, like Bodin and Hobbes could bring together the separate elements of political power and the rule of law, and the latter tied them to the soil of a bordered territory.[280] The systems of law and politics also become truly differentiated from here, as the law began to function as legitimate resistance to power.[281] However, no state can tolerate the constant intervention by citizens through the law. Thus the political system had to close

273. Strayer (n 54), 18.

274. Luhmann (n 124), 358.

275. Sassen (n 259), 62.

276. Luhmann (n 124), 387.

277. Sassen (n 259), 71.

278. This happened in the medieval era when a shift from power to authority took place in at least one account. See Strayer (n 54).

279. Luhmann (n 124), 419; Schmitt (n 271), 144; Agnew (n 259), 70; Sassen: 'The sovereign state needed to be imagined and personified before it could exist'. Sassen (n 272), 80. She argues that this change in authority was not as simple as a mere change of who held power, but that it indeed required a vast epistemic or cognitive shift. This led to the rise of the sovereign territorial state. Of course, if we take observers seriously (and we do) then we realise that 'paradigms don't shift. People shift', and 'Kuhn says that if a paradigm ceases to function in a variety of cases, then a paradigm shift is on its way. I claim just the opposite: Again and again we can show that once a paradigm is brought to perfection it topples and vanishes from the scene' by Von Foerster (n 61), 69; 139. Agnew criticises the metaphor of the body as one that had an ordering or governmental function to protect private property and capital from a rising labouring class and warns against its contemporary use. See Agnew (n 259), 74. See also Hardt and Negri (n 40), 94.

280. Bartelson, Jens. *Sovereignty as Symbolic Form*. New York: Routledge, 2014, 25.

281. Luhmann (n 124), 361.

its operations by making certain aspects contestable while making others beyond question (such as the sovereignty of the ruler or the property rights of the ruling classes).[282] Conversely, the legal system could not tolerate exceptions for the state and became operatively closed. Popular resistance against the state had to be disciplined, and secular yet immanent forms of mediation had to be found to reduce the complexity of human relations.[283]

During the late medieval period, European powers could extend themselves beyond their continent to newly discovered lands. This was made possible through advances in navigation and ship design and by lessening their reliance on human and animal muscle in favour of harnessing natural energy sources like water and wind.[284] Smil points out that the speed of oared ships cannot be mentioned without keeping in mind the tremendous human suffering that its energy consumption demanded.[285] Colonisation took the shape of empires cloning their forms onto new lands, and soon a race took off to grab as many colonies as possible. It is understood that state-forms occur in waves and that if a certain form seems powerful, it necessarily becomes imitated by others. Soon even city-states began taking colonies.[286]

While it might be that the rigid territorial boundary was still strange to the medieval era, it does not mean that there was no evolution in the employment of borders. If the fence and the wall could create singular homogenous group identities, what we see now is the individuation of these uniform lives. Nail calls these new kinds of borders under the collective name of the 'cell'.[287] Social life was divided into decentralised political authority, and hence borders took on a more sophisticated juridical element, rather than outright violence, to manage this complexity. Border logic began to zoom in on the individual, isolating him as a singular legal subject but linked by relations to others in an ever-stricter and more complex hierarchy.[288] Peasants were legally tied to the lands which they worked, perhaps indicating how strong the migratory tendency among peoples are, as it has been in all phases of history.[289] The cellular border has the simultaneous effect of individuating and homogenising; Luhmann points out that this process could occur almost unnoticed since

282. Strayer (n 54), 61.

283. Hardt and Negri (n 40), 84.

284. Smil (n 154), 393.

285. Smil (n 154), 187.

286. Maier (n 183), 32.

287. Nail (n 35), 88.

288. Luhmann (n 32), 50.

289. Luhmann (n 32), 283.

'[h]omogeneity was a matter of elaborated criteria in the first case, but in the second, it was the result of living at the subsistence level'.[290]

We know that in the medieval period the borders between territories were vague; a simpler solution was for subjects to carry the border with them, in the form of letters or passports. It identified the carrier as an individual, and linked him to the jurisdiction of an authority, and designated where he was legally free to roam or not. This reflects the medieval understanding of sovereignty as applying over persons and possessions rather than a uniform bloc of territory.[291]

With this individuation came other kinds of cellular borders, more physically concrete. What arose in this same period were monasteries, prisons and asylums. One notices that these are also accompanied by a specific legal status of the person contained. Within these locations time too became strictly bordered in the form of the timetable, regulating the movement and labour of individuals not only in space but also in time, connecting activities ever more complexly to the law. If ancient borders tended towards expanding outward, the medieval border intensified its complexity inwards.

One of the milestones in political thought occurred during this epoch in the writing and reception of Hobbes' *Leviathan*, written just a scant few years after the *Peace of Westphalia* but nonetheless a work that continues to fascinate to this day. The work was written as a response to both the English Civil War and the Thirty Years' War, and one of the central aims was to bring an end to the conflict through a theory of a strongly secular state. We should, however, not make the mistake of taking Hobbes to be a thoroughly modern writer; he is most certainly rooted in the medieval tradition.[292] Hobbes employed fantastic language and imagery to make his points clear, the most famous of which is undoubtedly the pre-legal wilderness, the war of all against all. As we saw in the previous section, this frightful picture painted by him belongs more to conjecture and original sin than it does to the scientific evidence we have today. Nonetheless, it continues to grip the imaginations and thinking of even the most modern game-theorist.[293]

290. Luhmann (n 32), 55.

291. To see how spatial understanding has shifted, it is interesting and instructive to look at a simple illustration. Soon after this period, roughly during what Koselleck has dubbed the 'Sattelzeit' between medieval and modernity, France built new fortifications all along its borders while tearing down all those on the interior. Maier (n 183), 52.

292. Elden (n 181), 298.

293. This construction was not created by Hobbes alone. The tradition can be traced back to the ancient Greeks and Romans, and *De Jure Belli ac Pacis* by Hugo Grotius also touches upon it. See Evrigenis, Ioannis D. *Images of Anarchy: The Rhetoric and Science in Hobbes's State of Nature*. Cambridge: Cambridge University Press, 2014.

Perhaps the second most famous image from the book is quite literally the decorative frontispiece itself, and it has spawned its micro-genre of scholarly literature. The focal point is the image of the gigantic king made up of innumerable homogenous human bodies, just like the bricked wall or military, looming over the city. Below is a pictorial list of the instruments of power, from weapons to councils to scientific 'symbols for sharpened distinctions'.[294] The peace that the huge machine of state brings is just through the terror it provokes and the instruments at its disposal. It feels rather counterintuitive that it is not exactly this which is the state of nature, rather than its opposite. Nevertheless, in *Leviathan*, 'the first product of the age of technology'[295], we see the foreshadowing of the revolution on the horizon.

## The functional state

If a complex society could arise because of the agricultural revolution, the next evolutionary tipping point came during the First Industrial Revolution. We have seen that while important pre-adaptive advances were made during the medieval period and the fame of Westphalia notwithstanding, the functionally differentiated nation-state of today is a modern manifestation of ancient power relations. The state finally became functionally differentiated from religion and, by extension, the monarch and made way for bounded territories and populations through a mixture of political philosophy and Roman law.[296] Yet it does not suffice to study this in terms of only law or politics. Just as agriculture made complex power structures possible, so did the Enlightenment and industrialisation's advances that shaped today's state. It also formalised international relations and law into its recognisable shape, as empiricism opened the door for imperialism. In this era, we also see the territorial border come into its own, mutually reinforcing its relationship with legal and political thinking. We also see the resurrection of an ancient idea of identity in a new form. To create self-contained states, nationalism arose as a new type of ancient kinship foreign to the medieval world. However, since the modern state could hardly be understood without this part, the rise of the nation-state will be discussed in both of its constituent parts.

One of the important causal factors that led to the speeding up of social evolution in modernity can be ascribed to the explosion of energy that could be harnessed after the invention of the steam engine.[297] Medieval society had

294. Schmitt (n 251), 18.

295. Schmitt (n 251), 34.

296. Maier (n 183), 75.

297. Smil (n 154), 236.

reached an evolutionary bottleneck shattered by an abundant source of new energy.[298] It revolutionised mobility and communication, exponentially multiplying road-like borders and demanding more sophisticated border technologies to be created. Maier also grants great weight to the energy capabilities of modern artillery as a changing the spatial element of military combat so much as to necessitate the territorial state.[299] As we saw with the development of agriculture, the industrial age has also led to greater inequality, this time more so between different nations. A further, very significant consequence is that the new nation-states were able to support their expansion by shifting their energy supplies from renewable resources to fossil fuels. While we reject simple causal explanations, one cannot unravel the rise of the state from its exploitative and harmful extractive practices. In this age, now commonly called the Anthropocene, the power of the first slave-holding agriculturalists had evolved to a point where its continued autopoiesis had become a threat to itself.[300]

While humanity has modestly burned coal since the beginning of time, it was only during the 19th century that nations at first – and very rapidly – shifted their economies to relying predominantly on fossil fuels. It is interesting, though naturally not directly causal, to note that this happened in the wake of the Congress of Vienna when the bounded nation-state as we know it today truly came into its own.[301] The age of the machine had arrived, exercising political power fuelled by fossil power. Certainly, the grand machines of state could exert their control over vaster territories than before, thanks to the new fossil-powered rail technologies, the telegraph and the press.[302] Smil points out that sources of higher energy usually tend to concentrate decision-making power in the hands of a disproportionately smaller group.[303] These technologies could also turn colonised territory into a productive asset, especially through rail, in what has been dubbed 'railway imperialism'.[304] The purpose was not only the transportation of material and human resources but also as an instrument of indigenous peoples' civilisation. This is the only way to make sense of Cecil John Rhodes' Cape-to-Cairo

298. Malm (n 153), 20.

299. Maier (n 183), 62.

300. Smil (n 154), 295.

301. Maier (n 183), 186.

302. Smil (n 154), 336; Maier (n 183), 189.

303. Smil (n 154), 364. It is also interesting to note Smil's point that the switch to fossil fuels propelled Europe out of proportion with the rest of the world. While around 1700, Europe and China consumed comparable amounts of energy and China was technologically more advanced, by the 1850s 'China and Europe belonged to two different worlds'. One of the main arguments for this difference is that China did not have access to coal that European nations had. Smil (n 154), 394.

304. Maier (n 183), 208.

colonial utopianism, especially if one regards the cost and added with the fact that it would not have saved any significant time in reaching the Cape from Great England by ship.[305]

But that is only one part of the story. The 19th century also saw, in big part made possible through the technologies mentioned earlier, the resurrection of kinship under a new guise called nationalism.[306] Our current political model also relies heavily on this nationalistic affectation to operate.[307] As Hardt and Negri write:

> [*T*]his uneasy structural relationship was stabilized by the national identity: a cultural, integrating identity, founded on a biological continuity of blood relations, a spatial continuity of territory, and a linguistic commonality.[308]

It became impossible to restrict individuals to only one sphere of society: functional differentiation had made it impossible.[309] A unifying principle for the political system was needed. At some point in the Middle Ages, subjects became convinced that preserving the state was a social good.[310] Benedict Anderson convincingly shows how national communities (like all others!) have to be justified in the realm of imagination.[311] Alternatively, to put it in the language of systems theory, these observers share a criterion for inclusion/exclusion that places them on the same side of a contingent distinction. At the same time, Hardt and Negri have called this the 'production of locality'.[312] Jessop emphasises the institutional exclusion of the state and points to paradoxical cases, the 'third spaces of sovereignty' where indigenous people enjoyed quasi-sovereignty under colonialism and had to fight for their freedom under the law of authority they did not recognise.[313] Imagination is creative

305. A trip of perhaps 15 or 16 days, compared to 17 or 18 days by ships of the day. Maier (n 183), 212.

306. Luhmann (n 32), 86.

307. 'By 1300, it was evident that the dominant political form in Western Europe was going to be the sovereign state. […] It took four to five centuries for European states to overcome their weaknesses, remedy their administrative deficiencies, and bring lukewarm loyalty up to the white heat of nationalism.' Strayer (n 54), 57.

308. Hardt and Negri (n 40), 95.

309. Luhmann (n 32), 87.

310. Strayer (n 54), 9–11. This contrasts with earlier periods where 'loyalty to the state was lukewarm. The vast majority of the subjects of an empire did not believe that the preservation of the state was the highest social good; in case after case, they viewed the collapse of empires with equanimity and either reverted to smaller political units or accepted without protest incorporation in a new empire ruled by a new elite'.

311. Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso, 2016. Or in the words of Kōjin Karatani: 'A nation is formed when people, who have been stratified by the feudal system, become equal to each other by obeying a single absolute king. […] the nation-state is formed when its people are represented as if they were older than their own origin, which is forgotten'. Karatani (n 163), 7.

312. Hardt and Negri (n 40), 45; Jessop (n 104), 153.

313. Jessop (n 104), 35.

and productive.[314] It takes the form of a difference between the actual and the normative could be and spurs us into action. So far, so good. However, the importance of Anderson's contribution is describing how and how recently this distinction has gained leverage. While the distinction between civilisation civilisation/barbarism or believer/non-believer has been around for a very long time, the specific logic of nationalism is comparatively almost brand new. Nation-states were at first able to strengthen even without national unity.[315] 'The People' came to be fictionally imagined as a source of social power, just like the fiction of divine right.[316] What makes nationalism different from earlier communities is the limiting notions of the territory (itself a notion that only stepped on solid ground in this era) and the boundary. Civilisations operated on a logic of centre/periphery, civilisation could be spread, and barbarians could be civilised. In the same manner, religious distinctions claimed universality and urged the conversion/inclusion of non-believers.[317] On the other hand, asserting to him that his peculiarities are universal would have the nationalist frothing at the mouth.

One of the most interesting aspects of Anderson's analysis is that he places the rise of nationalism not as stemming from Westphalia and the civilisations of Europe. Instead, he insists that nationalism first found its feet across the border, in the excluded peripheries of the new world, before migrating to colonial metropoles.[318] We will return to this dynamic of 'colonial mirroring' again in Chapter 6, when we see how scientific and legal practices were tested in colonies and then later imported to Europe. Ancient empires had already expanded their influence and claims to universality on the dynamic of peripheral hinterlands paying tribute to powerful centres (which rural leaders did in exchange for legitimacy at home).[319] European monarchs and empires took this further and directly conquered other parts of the world, often employing dogs-of-war rather than national armies[320] (an invention as recent as the French revolutionary state), or through commercial enterprises like the East India Companies (EIC) or the International Association of the Congo (IAC). These territories were then split into administrative units, usually containing disparate peoples with no notion of being bound together otherwise. Among these artificially bundled groups,

314. Karatani (n 163), 18.

315. Sassen (n 259), 79.

316. Koselleck (n 254); Jessop (n 104), 148.

317. Anderson (n 311), 12.

318. Anderson (n 311), 50. This is in contrast, for example, with the earlier work of Strayer (n 54), 109.

319. Sahlins, Marshall. *'The cultural politics of core-periphery relations'*. In On Kings, edited by David Graeber and Marshall Sahlins. Chicago: HAU Books, 2017. (n 222), 362.

320. Strayer (n 54), 84; Jessop (n 104), 129.

having been placed under the control of a central metropole like London, England, Paris, France, or Amsterdam in the Netherlands without being included in its rule, the outrage against exclusion led to the construction of new political communities.[321]

But mere exclusion does not create community. For nationalism to be manufactured, technology must create conditions for inclusion into the newly imagined group. If pilgrims on the periphery were not allowed to enter the hallowed gates of the central metropole, they had to create their centres. Reading *Imagined Communities*, one thing stands clear: just like the state before it, nationalism could not have been created without technology's instrumental use and reproducibility.[322] For example, geometrical methods used for exploring were later used to resolve European territorial disputes.[323] The printing press, in particular, had the most prominent role to play in its inclusory function. The communications revolution it bought about made it possible for the first time to mass-produce newspapers that could speak to everyone within a territory daily after standardising a usually artificial national language.[324] Furthermore, it allowed for political maps to be distributed, which represented the territory as a logo. This logo has become so internalised for most people as a representation of the world that we forget Heinz von Foerster's inversion that 'reality is a model of a picture'.[325] Liberation movements became national armies, and national currencies were created at this time.[326] Languages, literature and logos could be further reproduced and consolidated through textbooks in national education systems.[327] It seems that states can grow in their complexity up to the point that their technology

321. Fredrick Barth argues that cultural divergence occurs when value standards diverge. This means whom one is compared to, and what one's chances for advancement in prestige within a community are. Individuals tend to self-identify in groups with higher chances for esteem or status. Individuals will self-identify with ethnic categories that reward such identification and abandon unrewarding identities. See Barth, Fredrik. *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*. Long Grove: Waveland Press, 1998, 30. This complements the analysis of Anderson on the career trajectories of local bureaucrats in colonies who found a ceiling to entering imperial society and became the leaders of anti-colonial movements. See Anderson (n 311), 57; Maier (n 183), 19.

322. Anderson (n 311), 163.

323. Bartelson (n 280), 28.

324. Anderson (n 311), 67. It was also during the rule of Von Bismarck that the press became a sophisticated tool for control and propaganda in Europe. Clark, Christopher. *Time and Power: Visions of History in German Politics, from the Thirty Years' War to the Third Reich*. Princeton: Princeton University Press, 2019, 137. Also, according to Karatani, by the time of the French Revolution (1789–1799), only about 40% of the population could speak French. Karatani (n 163), 10.

325. Von Foerster (n 61), 149. Also instructive in this regard is Martin Heidegger: 'Hence world picture, when understood essentially, does not mean a picture of the world but the world conceived and grasped as picture'. *The Age of the World Picture*, 129.

326. Agnew (n 259), 182.

327. Anderson (n 311), 121.

allows. It is only when a new invention or reconfiguration is made (thanks to the pre-existing social complexity) that the growth limit of a society is pushed higher.[328]

These models of nationalism proved so flexible and adaptable that they could make their way to Europe and the rest of the world, where they took hold.[329] In contrast with the Berlin Congress, it took only a few decades to founding the League of Nations, where non-Europeans were not formally excluded, and the nation-state had become the presumed model.[330] Thus we have inherited a complex international society through a process well-known in the field of second-order cybernetics: 'to create something complicated, produce something very simple, but produce many, many copies of it [...] make a "big machine" out of them!'[331] This process has been so effective that in the popular imagination, just as in our manner of speaking, the 'nation' precedes the state and its sovereignty.[332] This is although states have played a decisive role in shaping these social identities.[333] To sum up, nationalism rises when a symbol of inclusion can be imagined and efficiently created, communicated and understood, and reproduced repeatedly. This process has occurred so effectively that it is now the basis of our global international life, and criticising the nation-state has become equated with criticising democratic rule 'by the people'.[334]

Despite the fact that its concrete manifestation, states rely on boundaries that are primarily imagined, or socially constructed. This is also true of national or ethnic boundaries, as it is true of all logic of inclusion/exclusion. While states might rely on the rule of recognition, in ethnic communities, the identification as such comes from the people themselves as a way to organise their communication.[335] The differences with other communities are in no way objective but are perceived as significant by the actors themselves. As Luhmann points out, nationalism hinges on a paradox of internal universalism but external particularism.[336] Such a cultural continuity is achieved by

328. 'It would appear that technology and scale place constraints on one another in such a way that a particular scale is required to support particular technological capabilities or vice versa.' Ortman (n 209), 282.

329. Agnew (n 259), 31; Bartelson (n 280), 85. Hardt and Negri (n 40), 50.

330. Anderson (n 311), 113.

331. Von Foerster (n 61), 109. For another instance of invoking the machine metaphor, see Hardt and Negri (n 40), 87.

332. Hardt and Negri (n 40), 101.

333. Jessop (n 104), 89. Of course, the identity of the state is, in turn, constantly redefined by contestations in both the political but also other systems.

334. Agnew (n 259), 68; Hardt and Negri (n 40), 42.

335. In many cases this takes the form of a *Volkspartei*, what Jessop calls a 'vote-maximising machine'. Jessop (n 104), 78.

336. Luhmann (n 32), 286.

maintaining a boundary, and social anthropology has shown that crossing individual people into and out of different ethnic cultures is typical, but affects identities very little as long as the boundary is maintained. It also means that the cultural features, what is 'inside' the boundary, can change much as long as the boundary distinction is maintained. As Fredrick Barth points out, it is 'the ethnic *boundary* that defines the group, not the cultural stuff that it encloses'.[337]

We can see similar processes in many regions of the world, for example, in Asia. While there are some differences, principle structures seem to be universal. In countries such as China, political power was classically regarded as flowing out from the metropole to (theoretical) infinity to the extent that the obedience over people could efficiently be controlled.[338] Japan had a relatively complex system of classifying external relations, such as countries for communication, trade, foreign countries and foreign areas, each of which regulated how diplomatic relations could be conducted.[339] As recently as 1874, in a territorial dispute with Japan over Taiwan, China argued that international law was a 'recent' European invention and served no purpose in the dispute.[340] As late as 1879, the Japanese foreign minister could state in the same breath that Ryukyu was an island country, but at the same time that it was Japanese territory.[341] Thus we see that while there are familiar universal elements, such as a core or periphery distinction or different classifications of territory, along with that came a discomfort with international legal categories to classify certain relations.

Never has it been more apparent than now that the universalisation of peoples as envisioned by liberal globalism is premised on an about-face from the mainstream political projects of the last two centuries.[342] At least, this is halfway true if one remembers the important features of self-identification and boundary maintenance in creating ethnicities. It is naturally true that increased communication among people has reduced differences in some objective sense – this is apparent in clothing, food and entertainment consumed. But we must remember that he is almost irrelevant to identity and boundary. Rather what globalisation seems to have achieved instead is a

337. Barth (n 321), 15. Another relevant part reads: 'So when one traces the history of an ethnic group through time, one is not simultaneously, in the same sense, tracing the history of "a culture"', 38. Emphasis in the original.

338. Yanagihara, Masaharu. "Some Thoughts on the Concept of Territory in the Late Edo and Early Meiji Periods." *The Japan Institute for International Affairs*, (2012): 1–27, 4. https://jiia.repo.nii.ac.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=70&item_no=1&page_id=13&block_id=21

339. Yanagihara (n 338), 7.

340. Yanagihara (n 338), 24.

341. Yanagihara (n 338), 22.

342. A universalism that is often anyway a mere extension of a certain particularism.

renewed insistence on difference, making it relevant in new contexts, especially in politics. This means that symbols of identity, the criteria for inclusion, are almost randomly chosen to create such ethnic-political communities.[343] And while many nationalisms have arisen as a response to colonialism and admirably were able to expel alien control over their territories, we have to be careful not to romanticise it too much, for this resistance is itself a dominating power which oppresses internal difference and opposition. As Hardt and Negri point out, if nations are 'imagined communities,' the problem is that it has become the only way to imagine communities.[344]

The rise of the nation-state in this modern, functionally differentiated society also had implications for borders. Now that it was technically possible to effectively control vast swathes of territory, it was more important than ever to indicate where the limit of power lied, and in the 19th-century leaders became 'obsessed' with drawing borders (it is also in this time that politicians, lawyers and geographers first pioneered the notion of 'natural frontiers', referring not only to landscape features but also the 'natural' territory of a distinct people, thereby naturalising ethnic distinctions).[345] As we will see later, with the Vienna Congress of 1814–1815, we see the first appearance of the scientifically precise national boundary that we know today in Europe. Maier describes how territorial states came to be understood as 'energy fields' where sovereignty could be applied equally and immediately at any point within the state's boundaries.[346] According to him, state territoriality arose within an intellectual climate in which force and motion in time and space were a 'philosophical and intellectual obsession'.[347] Naturally, this also then had implications for controlling the movements of people. While in the 19th-century, passport control went through a phase of decline, it was vigorously reintroduced with the *Paris Conference on Passports* held by the League of Nations in 1920.[348] Nationalism naturally required citizenship and, by extension, the foreigner.

Current biometric passports enable the application of a border at any place and time as needed. With the vast amount of data attached to each person, they can be included or excluded from only particular social systems or whole

343. Barth (n 321), 35.

344. Hardt and Negri (n 40), 107. Again, this argument will be echoed in Chapter 6, where we will see how political imagination has been trapped by cartography and methodological nationalism and that international law is suffering from its effects too.

345. Maier (n 183), 230; Grewe (n 174), 321.

346. Maier (n 183), 11.

347. Maier (n 183), 57.

348. United Nations, "Paris Conference on Passports & Customs Formalities and Through Tickets", UN Archives Geneva, accessed April 20, 2020, https://biblioarchive.unog.ch/Dateien/CouncilMSD/C-641-M-230-1925-VIII_EN.pdf

territories as required. Where the medieval passport served as identification, the modern version serves as information. The border is always enforceable in the form of a check or checkpoint.[349] In the modern era, the police force rose as a state institution and could enforce sovereignty as called for through inspections and checks. Sovereign power finds a sophisticated expression in the checkpoint: the more it watches, the less it must act. We see the fulfilment of Luhmannian power in that others are freely submitting to the wishes of the powerful without them needing to enforce their might. The state uses the scientific knowledge of its subjects (using the knowledge of the state and statistics) and objects (using cartography and mapping) to advance its sovereign power. This problem has come much more to the fore in the current surveillance state, including the incomprehensible scale at which it occurs within the private sphere while the law stands rather ineffectively to the side.[350]

In the international legal system, the checkpoint has found its place within the strictly delineated national boundary that became increasingly common after the Vienna Congress. It enforces the distinction between national and non-national primarily. It is built on the modern presupposition that ethnicity and language are tied to nationality, but it is confronted with the ancient fact that people tend to migrate.[351] Thus movement has become restricted, for most people, to something within their national boundaries. The boundary is used more instrumentally to redirect and navigate the flows of people, labour and goods around the world in a kind of 'social landscaping'. The variables for inclusion/exclusion are countless, whether legal or political or educational, and can take place anywhere and time. Suppose the medieval subject had been individuated to his singular personhood. In that case, the modern subject is divided into hundreds, if not thousands, of tiny individual data points relevant to different social systems to be selected for inclusion/exclusion.[352] By using the informational checkpoint, the linear boundary can almost disappear. Globalisation has certainly not made borders obsolete, except for the rather crude fences around nations (and even these are staging an impressive comeback). Where territory was adapted during modernity to structure decision-making and identity, we see today that identity-space and decision-space can no longer overlap perfectly.[353] No, globalisation is not a world without borders. However, one with thousands of invisible borders that

349. Nail (n 35), 110; Maier (n 183), 192.

350. It was also during the 19th century that states ramped up their data collection on citizens in other forms. It was in that century that, for the first time, national censuses began to collect data about individuals rather than from entire communities. Nail (n 35), 151. The first census known to history was around 3800 BC in Mesopotamia. Pasquinelli (n 190), 8.

351. Nail (n 35), 144.

352. Nail (n 35), 156; Pasquinelli (n 193), 291.

353. Maier (n 183), 3.

suddenly appear functionally focused not on individual bodies or goods but with a single data point that is associated with it, decides to include or exclude, and then disappears as if it was never there.

One can also see the Vienna Congress and the harder emphasis on nation-state sovereignty as a reaction to the French Revolution (the slain monarch had to be replaced by *something*),[354] but also other cases such as the Paris Commune, the first and second Internationals, and other red and black organisations that explicitly rejected the nation-state model. Maier places the founding of the Society for International Law in 1873 as a direct response to this, enabling governments to reinforce a social order with the state as a container for class rebellion, just as Westphalia had contained religious wars.[355]

The nation-state thus represents a kind of anachronism in modernity. Whereas society increasingly evolved towards functional differentiation, the nation-state conservatively clung on to the segmentary differentiation semantics of using borders and still carried traces of a centre/periphery organisation. While borders were flung open for the economic and scientific systems, internationalist politics was suppressed, and international law solidified the borders containing ordinary people. The nation-state was the vehicle to achieve this: in a functionalist society where individuated persons could no longer be said to belong to any one system, the rhetorical device of the nation-state provides at least some kind of identity.[356] Even if individuals are unequal in economic position, legal status or level of education, at least they are all equal citizens of a state. Thus, in conjunction with Luhmann, we must insist that what we call the contemporary 'state' is an artificial device, or an internal self-description, to collectively refer to a unity of two systems with different functions, operatively closed and with different codes.[357] If politics has the function of taking conflicting opinions to make collective decisions, the law attempts to depoliticise problems and come to decisions that can stabilise future expectations.[358] This does not mean that a single object or event cannot simultaneously have political and legally relevant meanings. That an observer can observe such a unity says nothing about the mutual closure of the two systems.[359] Law maintains stability while politics moves on to new problems. These problems include which laws are valid, how to spend public funds and more (it is not merely there to decide when to employ force or to decide on the exception, as Schmitt would have it). This means that

354. Luhmann (n 32), 284.

355. Maier (n 183), 273.

356. Luhmann (n 32), 286.

357. Luhmann (n 32), 96.

358. Luhmann (n 124), 369.

359. Luhmann (n 124), 377.

the two systems operate on different time scales, with politics moving at a much brisker pace than the legal system.[360] Luhmann points out that this makes the legal system 'nearly useless' for decision-making.[361] On the other hand, however, exactly because of doctrines like sovereignty, the political system is one of the least flexible in modern society and evolved counterintuitively in disequilibrium with the rest of society.[362]

Thus, the *Rechtstaat*, or the contemporary constitutional state, is the collective noun we have given the structural coupling between the differentiated legal and political systems. The systems have an almost mutual indifference, and their independence allows them to accelerate their dynamics freely. The autopoiesis of either system creates a paradox in its justification. In politics, the arbitrary exercise of power is solved with the arbitrary power of a single sovereign; in law, the legality of norms is granted by a basic norm. Both systems can refer to the other to untangle the paradox: sovereigns are granted their power by law, and the law is granted its legitimacy through the power of the state.[363] In functional logic, we cannot have master- or meta-rules: 'their ultimate formulation must be replaced with the rule of the unformulability of the rule, which constitutes the unity of the system'.[364] A slightly different but not irreconcilable description is offered by Karatani, who describes the political state as separate-but-dependent on the economic system, with the nation as the imagined community that binds the two together.[365]

Luhmann points to the later creation of the *Rechtstaat* as the conceptual development that could bridge these conflicting needs for closure.[366] The state becomes both an embodiment and enforcer of the law and accountable to it. The rise of the state and the market economy finally represents the shift of European society from hierarchically stratified differentiation to the modern logic of inside and outside. No principle can be universal anymore: it depends on the context of the system we are discussing.

The nation-state was born because scientific, legal and political advances made it possible, but as a project, it occurred counterintuitively to the direction

360. Luhmann (n 124), 371. Also informative on this topic is the essay *History, Law, and Justice* by the conceptual historian Reinhart Koselleck: 'We should thus hold onto the theoretical point that the history of law as well as of all individual legal determinations are dependent upon repeated application and subject to the necessity of repetition, and that the history of law thus thematizes longer-term frames of time and relative duration, that it thematizes structures, if you will, rather than events'. Koselleck (n 156), 131.

361. Luhmann (n 124), 382.

362. Luhmann (n 32), 100.

363. Luhmann (n 124), 408.

364. Luhmann (n 124), 409.

365. Karatani (n 163), 22.

366. Luhmann (n 124), 362.

society was evolving in. It did solve social problems, for example, that of identity, but it also caused others. Few regions in the world could be organised along state lines to be competitive, leaving us with nations that were equal in law only.[367] Despite the rise of nationalism today, the notion has lost plausibility for at least as many people. While in the 19th century the state seemed to answer some of the conflicts of the time, in today's climate crisis and global pandemics, these constructions have proven to be utterly meaningless. As Luhmann writes, '[t]he idea of nation obviously belongs to the set of short-lived semantics that can exercise a fascination for a transitional period without betraying what societal system they refer to'. In a functional world society, many scholars are searching in vain to find the meaning of the state today when our problems cannot be understood as a mere competition between states anymore. If anything, the chickens of this system have come home to roost, and holding on to these outdated notions, as hard as they are to get rid of, is doing more harm than good.[368]

## Conclusion

And so, we see that the modern state, rather than being something novel, is the same old wolf, perhaps only wearing a new mask. It is easy to miss the repetitive nature of the algorithm, for with every recurrence; the face has changed slightly. We can also see that this algorithm's extractive and exploitative logic is leading to their logical conclusion: intolerable inequality that at first affected perhaps thousands now affect billions, and the planet itself is reeling from the demands of it.

Social complexity has also reached dizzying, improbable levels. These were made possible by ever-sophisticated technologies, whether understood in the traditional sense or as social technologies. Harnessing both of these forms, bordering has been one of the greatest successes in dealing with complexity. It allowed for the segmentation of people into governable polities, divided social functions into distinct social systems, and compartmentalised knowledge into neat disciplines. Yet as successful as boundaries have been in simplifying complexity, they also made society blind to the fact that this social machine has become blind to the totality of the effects of its parts. Further and paradoxically, this devolutive mechanic has made it much too complex to cooperate against the shared threats it has played a part in creating. As Koselleck points out concerning historical structures, society cannot remain stable if they stay the same.[369]

367. Luhmann (n 32), 288.

368. Luhmann (n 32), 289.

369. Koselleck (n 156), 170.

The question thus becomes obvious: how does one invoke a halting procedure into the algorithm, and how do we break the feedback loop? Hui argues that there are only two possibilities for exit: negating the algorithm or transcending it – either is achieved by inventing a new recursive principle.[370] Given the vast complexity of world society that has been reached on established structures, merely destroying them would cause as many problems as it solves. Law, especially (but also science), relies on repetition: new laws can be as radical as one can imagine, but without repeatability, they will have no lasting effect.[371] Instead, a more imaginative approach is required. It means taking what exists and re-appropriating it, rearranging it to serve new functions. We must move from a systems theory of observers to one of constructors.[372]

This is naturally much easier said than done, especially since constructors will find their arguments unpersuasive without appeals to truth and power. However, such a project might find it worthwhile, to begin with history. As we saw, modern power relies on a degree of a-historicity, of uncoupling society from the vast complexity that lies in the past. Social systems function better when they can forego justifying themselves through their history.

In this sense, we can now also see our original argument on the horizon, returning towards us. If we are to imagine a future that is radically open to new, more desirable selections, we might need to justify them on our selective reading of the past. We can only negate or transcend oppressive histories by recasting them with a new history. Society has probably developed too complex to break this particular loop. However, suppose it allows us to move from mere observers to constructors, to let the 'future horizon dominate' our selections. In that case, its re-appropriation is perhaps worth more for international law and its history than its destruction.

Undoubtedly the history of a social system of the state has taught us about not only how the state came to be in its current form but also the structures that support it, that give it meaning and scaffold the decision-making structure in which it operates. We saw that this development was contingent and hinged on concerns of energy, gathering surpluses, and controlling the movement of peoples – first coercively and later emotively. This led to ever-greater increases in social complexity up to our current day. Today's nation-state is now nearly universal, defined internationally through the doctrine of sovereignty. In the following chapter, we will see how this spread came about and how it came to be expressed in international law.

370. Hui (n 87), 263.

371. Koselleck (n 156), 134.

372. Hui (n 87), 271.

Chapter 4

# Sovereignty and world society

## Introduction

In the previous chapter, we attempted historiography of the modern state, despite it being an imposing object of study. It was undertaken to break away from the traditional narrative of the state as a modern novelty. As Grewe wrote, '[t]he historical epochs of the modern law of nations are thus identical to those of the modern state system'.[373] By approaching the matter in a systems theoretical manner, ancient underlying structures of power were identified. The argument was made that while the exact assemblage of rule naturally shifts and transforms to adapt to its environment, its essence has remained constant for millennia.

This brings us to the manifestation of the state-form today. While it is undoubtedly more complex than anything that came before, it relies on the same operations as other governing forms. Therefore, the purpose of the chapter is to analyse today's nation-state, particularly its role as the central subject of international law, and how this status is constructed legally. In large part, this relationship can be understood through the lens of the doctrine of sovereignty: what sovereignty entails and to whom or what it is granted. Two key questions arise from this: how does legal doctrine express the particular political form of a nation-state, and how has the law contributed to its global spread and universalisation?

373. Grewe (n 174), 6.

**How to cite:** Buitendag, N 2022, 'Sovereignty and world society', in *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town, pp. 89–121. https://doi.org/10.4102/aosis.2022.BK319.04

Keeping within the theoretical bounds we have set, we further investigate an important element of the modern state: how it communicates with its environment. It employs at least two crucial symbolic/diabolic media in this regard. The first of these is traditional, namely through the medium of power. It is taken as a common cause that states interact with one another through power. International law plays an integral part in this, whether one takes it to be the leveller of state power in the international sphere or as the very instrument of power masquerading behind the language of equality. Naturally, the literature concerning power is vast, and the topic is well-tread. Despite this, one struggles to find a Luhmannian analysis of this classic problem. Thus, part of this chapter sets out to provide a system theoretical approach to the problem of political power in international law.

However, this chapter continues to argue that the modern state-form has increasingly come to rely on another communication medium to legitimise and consolidate itself, namely scientific truth. I argue that, especially in modernity, the state-form became so fervently intertwined with Enlightenment ideals that it became necessary to legitimise itself rationally. This meant that states could not only legitimise their acts of power through the language of power alone and setting aside the long and continual role that religious justification played but also use the language of the scientific system. Through a certain kind of Darwinism, ideas of progress, teleology and civilisation could justify states' expansion, aided by the rapid technological advances stemming from scientific discovery. Naturally, international law was used as one of the key legitimation strategies on this front. As a symbolic medium, truth, like power, has an inherent asymmetry – precisely because of the science system's claims to truth and objectivity that states could justify their political and legal ends.

The chapter begins with an examination of the legal status of the state under current international law. This entails several aspects of the object under scrutiny: how they came to be the primary subjects under international law, how the state-form became universalised (especially through the periods of colonisation and decolonisation), how their independent identities are maintained and to be understood, and the role that territory and borders play in their constitution.

We then turn to what is perhaps the most important single legal doctrine in this regard, that is, sovereignty. Outside of a strictly legalistic and reductive definition, the concept remains elusive, and while theoretical accounts abound, none seem to be fully satisfied. However, through the structural analysis of our previous chapter, we can come to the insight that whatever shape sovereignty takes in its continuing evolution, it inescapably has certain structures hardcoded into it. One of these is the exercise of power.

With this in mind, the next section turns to two important communication media of the modern state: power and truth. In the case of power, it is defined by Luhmann, but ultimately expanded on by thinking from the past and present. What contributes to the study of international law is that it does not paint the traditional opposition between politics and law as a zero-sum game but allows for a more nuanced picture of these distinct systems' influence on one another.

The discussion then turns to the medium of truth, most usually associated with the science system in our society. Where a traditional system's theoretical account argues that politics employs power as science does truth, I endeavour to convince that the state has effectively utilised the persuasive power of truth to its own (political) ends. Truth is not all it is made out to be. Throughout modernity, states have used technology, the fruits of the science system, to stretch their reach while using science's persuasive communication medium to legitimise this expansion. Just as political power finds its way into international law, so did the legitimate and pseudo-scientific rhetoric inevitably come to be reflected in the legal system too.

The chapter ends with describing the modern state using the well-worn metaphor of the machine – yet, in this case, emphatically, a *cybernetic* machine.

# The modern state

## The international law status of states

As is well-known, the typical birth of the modern state and classic international law was placed during the conclusion of the *Westphalian Treaties* in 1648. However, as this book argues for a much more ancient origin of the state-form,[374] its current modern incarnation can, for various reasons, be said to have manifested only a couple of centuries later, symbolically perhaps during the Congress of Vienna in 1814–1815. The reasons for this are given more profound attention in Chapter 6. Nevertheless, the Westphalian state ushered in an international legal regime that displays fundamental differences from what we have today.

A major break between international law today and that of modernity was that states were European, and they were generally imperial. Key to this dynamic was the civilisation/barbarism distinction that entered legal instruments exactly at the time of Vienna in its declaration against the slave trade (as we will see, the abolishment of slavery was also an important *cause*

374. Concurring with Grewe that a conception of international law equated only with the rise of the modern state is 'arbitrarily narrow'. Grewe (n 174), 11.

*célèbre* of the later Berlin Conference).[375] While Grewe typifies this as a distinctly 19th-century concept bound up in Enlightenment thinking, the form of the trope is much older.[376] Like all distinctions, the drawing of this asymmetric boundary between the 'us' and 'you' served as a precondition for action by European states.[377] What could be regarded as a spatial difference could be rhetorically moulded into the language of political power and scientific knowledge to acquire sufficient valence for it to be expressed in the international legal system?[378] Explicitly, part of the 19th-century conception of civilisation was that Europeans could master and subject nature while other peoples lived at the mercy of geography and the elements.[379] Suppose we remember one of our principle assumptions that all social systems consist only of communication. In that case, the arguments against equal treatment of foreign nations have a clear significance. As barbarians, they could not speak Greek or communicate in the systemic language of Europe's international law. In this sense, the so-called civilising colonial missions that led to eventual decolonisation as late as the 1970s[380] was a practice of teaching the barbarians how to speak Greek.

A second significant similarity, and the one that largely motivated Hobbes, was that while states might typically be regarded as competitive with one another, they were historically united in their aim to curb civil wars.[381] This was made even more apparent during the European military alliance that was agreed upon in 1820 following the Vienna Congress, which explicitly stated that revolutionary governments would not be recognised.[382] These two facts illustrate that states mutually defined themselves very

375. Cassese, Antonio. 'States: Rise and Decline of the Primary Subjects of the International Community', in Fassbender, Bardo and Anne Peters. *The Oxford Handbook of the History of International Law*. Oxford: Oxford University Press, 2012, 52. During this time in Vienna, references to 'Christendom' were also abandoned and made way for the term 'civilisation'. Grewe (n 174), 445–51.

376. Grewe (n 174), 447. The first person to use the term with specific reference was Bentham. Grewe (n 174), 450.

377. Koselleck (n 146), 155.

378. Something of this language can still be seen in Chapter XI of the UN Charter, which still refers to a spatial element (speaking of the metropole of colonial states) as well as distinguishing 'cultural' differences and the promotion of 'development'. See also Crawford, James. *The Creation of States in International Law*. Oxford: Oxford University Press, 2007, 606.

379. Grewe (n 174), 449.

380. Cassese (n 375), 53.

381. Cassese (n 375), 55. As Agamben argued, the civil war is dangerous because it suspends traditional borders, inside and outside, and friend and enemy, and posits them within the home. In response to this battle between the Leviathan and the Behemoth, Hobbes argues for the existence of the unified body politic. See Agamben, Giorgio. *Stasis: Civil War as a Political Paradigm*. Translated by Nicholas Heron. Stanford: Stanford University Press, 2015; Schmitt (n 251).

382. Cassese (n 375), 63.

narrowly, recognising exceptionally little equality from the outside and being intolerant to challenges from within.[383] In essence, sovereign recognition was reserved for a handful of European monarchs. Thus, we see, rather than only the idea that states clung together anarchically and in pure self-interest, that European states tended to share many interests, at least on some fronts.[384]

With the advent of decolonisation, European statehood had now achieved a single, universal and homogenous presence on nearly all of the globe. Most newly-founded independent states had their legal sovereignty bestowed to them through an explicit grant by former colonial states, this devolution flowing directly from the latter's sovereignty.[385] This had to be done to be compatible with the modern international legal system, conceived from the outset to take the sovereign state as its main subject.[386] It was obvious from the start that the criterion of civilisation held its ending within itself. Therefore, it could only ever have been intended as laying the groundwork for newer distinctions to take its place. Grewe pointed out that the primary aim of industrialised nations was to design a legal order that would protect their foreign investments.[387] It became clear that this could be achieved even with legal equality and as little political influence as possible.

One could naturally argue that decolonised states had, in large part, willingly chosen to conform to the standards of modern statehood. The reasons for this are numerous. On the one hand, newly independent states saw the doctrine of sovereignty as a powerful tool against the external interference that they had wanted to escape from. On the other hand, the state-form had proven itself as an effective tool in unifying disparate peoples through homogenising nationalism.[388] In fact, while the traditional powers were moving towards a post-sovereign order to unbridle economic movement, the new states sought to entrench the system.

Given this chequered history and the conflicting tendencies and attitudes towards sovereignty, the concept has become increasingly difficult to grasp. While this section deals with the history and legal understanding of the term, the next section will move closer towards a theoretical conception of what sovereignty means today.

383. Grewe (n 174), 319.

384. Grewe (n 174), 15.

385. Crawford (n 378), 330.

386. Grewe (n 174), 7.

387. Grewe (n 174) 457.

388. Grewe, (n 174), 653.

## Sovereignty

The conceptual history and very nature of sovereignty have made it notoriously difficult to capture and define. As a writer like Sassen shows, it has constantly been transforming.[389] However, despite its elusive nature, all agree that sovereignty exists. I hope to avoid the tendency to describe sovereignty as a disaggregated bundle of qualities. Phenomenology has taught us that the 'thing' has always remained the same and that new insights or perspectives exist because the objects show us different sides of themselves at different times. While objects might change, more often than not, it is the observer who changes or shifts, either by changing his position of observation, revealing a new perspective on the object or through a change in himself that makes him look with new eyes.[390] When Bob Jessop says that states are not only polymorphous but poly-contextual, this is what I take it to mean.[391] I want to argue that changing definitions of sovereignty reflect the human observation of it as it manifests to us but that there is essential sovereignty in itself out there. We must take the sovereignty of sovereignty seriously.

As we saw in previous chapters, the modern nation-state was the outcome of several processes arising from a logic of important distinctions, one of the most fundamental being that of inclusion/exclusion. By eliminating social caste distinctions, legal and political rights were created, resulting in the expulsion of competing for legal orders in favour of a single one; political and legal rights became one, resulting in the vested power of one state organ within an enclosed territory, the inclusion of those within the territory in a single identity based on a language and culture that unified but was artificial. The above needs arose from technological advances, which could also accelerate the process of addressing those needs. This feedback loop between society and technology, which we have traced from the medieval period, brings us to today, where we face the problem of the sovereign nation-state and globalisation.

Schmitt's famous dictum 'sovereign is he who decides on the exception' (appropriated from Leibniz) posits that the ultimate power holder is the one who decides on what the public interest is in a time of crisis when the law has run out of steam.[392] It is one of the reasons for Schmitt's placing the political as hierarchically superior to the legal system. Although a state may be described as a legal order, in a crisis, the 'legal' dissolves, and only the 'order' (*Ordnung*) remains. This is achieved conceptually by distinguishing the

389. Sassen (n 259).

390. Von Foerster (n 61), 69.

391. Jessop (n 104), 44.

392. Schmitt (n 23), 6.

sociological and jurisprudential unity of the state. In law, the state is seen as purely juristic and tautologically as its source and product. This is what is broadly meant by the rule of law. However, when the exception arises, Schmitt sees the full sociological force of the state step forth. It is sovereign authority or power, not the truth, which ultimately makes the law.[393]

Schmitt relates the exception to the religious notion of the miracle, noting that all major concepts of the state have their theological root or correlate. Despite the secularisation of the sovereign between Westphalia and Vienna, 'the state acts in many disguises but always as the same invisible person'.[394] The current idea of state power being bound by the rule of law originates only from the rhetoric of the Enlightenment, which abhors the exception as irrational.[395] The sovereign has taken an even newer guise since that epoch. The divine decision-maker had been replaced by the people, as the measure of all things, as the sovereign. Without its theological referent, 'the machine now runs by itself'[396] evading real politics in favour of technical decision-making.[397]

Jessop argues that we study 'state effects' because of this difficulty in identifying exactly where or what the sovereign is. The state finds itself within the broader political sphere beyond only the exercise of sovereignty.[398] He defines the state broadly with four main elements: its institutional character and function of making collectively binding decisions over a defined territory and an imagined community. This is not to deny that the state is still open to influence from other systems except the political. While the state has ultimate recourse to violence, it intervenes first through material or symbolic media. This is because, in most cases, a final decision will be asymmetrical, meaning that it will always exclude some interests or groups.[399] This definition describes the state as a social relation (a strategic-relational approach, as Jessop calls it) that generates state effects, not passively or neutrally. It also means we cannot speak of centralised state power but rather a power struggle occurring between different forces, both internal and external to the state. States should not be understood to be representational, but rather states fulfil a certain social function through their rationality, within the bounds of what is socially acceptable.

393. '*Auctoritas, non veritas facit legem*', as Schmitt quotes the saying coined by Hobbes. Schmitt (n 23), 19.

394. Schmitt (n 23), 38.

395. Schmitt (n 23), 41.

396. Schmitt (n 23), 48.

397. Schmitt (n 23), 65.

398. Jessop (n 104), 46.

399. Jessop (n 104), 51.

Elements of Jessop's definition reflect classical international legal thought on sovereignty, such as territory and a defined population or imagined community. However, we know that attitudes and practices, broadly understood under the moniker globalisation, are again shifting the debate around sovereignty, particularly its relationship to the territory. Agnew posits most of the positions on this relationship in two opposing camps: the 'anarchic' who want to untie sovereignty (or even dissolve it) from its territorial mooring to the 'imperialistic' who regard talk of a global system exerting influence on states as overblown. His position is more nuanced: sovereignty over territory has *never* been absolute, and globalisation has never been entirely new.[400] Empires have always sought to stretch their reach. Besides, Sassen argues that by the 16th century, it was not feasible for any single power to conquer Europe, and thus, conflicts were shifted to the control of the peripheries.[401] As we know, this was made possible by advances in shipbuilding, navigation and cartography, not to mention military capabilities.[402] States quickly became dependent on global circuits of trade and pillage, and a *lex mercatoria* accordingly increased in sophistication.[403] We will be mistaken if we think that the jet engine and the fibre-optic cable brought about globalisation. Consider the technologies of 17th-century Holland: it had a vast trading empire – not run by the state as such but through a global corporation in the form of the Dutch East India Companies (DEIC).[404] At the same time, the Bank of Amsterdam was formed, which could provide all known currencies and handle merchants' payments without moving (usually metal) assets from one safe to another, but through bookkeeping.

Furthermore, it developed sophisticated doctrines of international law through eminent jurists like Grotius.[405] Several European powers were engaged in this global accumulation and pillaging of capital and established international cooperation through various legal instruments. From this emerged the interstate system, both in law and infrastructure.[406]

Thus, sovereignty has never been exclusively territorial or state-based. It is based on a multiplicity of governmentalities and regimes. If we thought that a state could develop within a certain territory up to a satisfactory level of

400. Agnew (n 259), 21.

401. Sassen (n 259), 83. Schmitt (n 271), 172.

402. Bartelson (n 280), 26.

403. Sassen (n 259), 88.

404. The Dutch East India Companies present another complication for sovereignty in that these enterprises were not purely commercial but were also political communities, forming part of the patchwork of sovereignties found in Europe before it became the exclusive domain of the state. See Pitts (n 38), 96.

405. Sassen (n 259), 91.

406. Sassen (n 259), 137.

sophistication and then let it function, as exemplified by the qualification of 'civilisation', we would be mistaken. Spatial boundaries do not limit state projects; power networks have always been and are projected easily beyond them.[407] In this regard, the term 'world society' is preferable to 'international'.[408] In a similar vein to the concept of methodological nationalism we discussed earlier, Agnew warns against the territorial trap of sovereignty, which refers to popular misconceptions about sovereignty. States are exclusive to their borders, their borders exclusively define their societies, and domestic and foreign affairs are inseparable.[409] Thus, we cannot help but break with Schmitt when he argues that the earth is the basis of politics,[410] yet postmodern theories that argue for a flat or networked conception of space,[411] while undoubtedly a stimulating thought, run counter to our lived reality.

On the one hand, these networks are not quite new[412]. Furthermore, on the other hand, international law still inescapably communicates distinctions between inclusion/exclusion and the exertion of power using boundaries. Sovereign power is many things, but it is not straightforward.[413]

One of the main problems in talking about sovereignty is that any empirical analysis will create too many contradictions and exceptions. Its concepts and applications are too various to bundle together coherently. International law assumes states as unitary, individual subjects, as (perhaps necessarily) fictitious as that seems.[414] Sovereignty seems to exist more accurately as a theory, a communicative game or 'organised hypocrisy',[415] and even its status as a norm is questionable.[416] We can see time and again how powerful countries violate sovereignty under the guise of humanitarian intervention, although

407. Jessop (n 104), 86.

408. Luhmann (n 40); Jessop (n 104), 160.

409. Agnew (n 259), 31. Compare this to Bob Jessop, who emphasises territory as one of the essential characteristics that can be identified in nearly all state-forms across history. Jessop (n 104), 32.

410. Schmitt (n 271), 42. An interesting counterpoint to this can be found in Claude Lévi-Strauss' famous work on the Bororo peoples, who built all their villages in a specific structure around an imagined borderline that dissects villages physically and hierarchically in two. To quote: 'The village does not, in fact, consist either of the land on which it stands, or of the huts which compromise it at any one time; it consists in the lay-out which I have described above. And this lay-out never varies'. And also 'each of the three is the unwitting victim of artificialities whose purpose it can no longer discover'. Lévi-Strauss, Claude. *Tristes Tropiques.* Translated by John Weightman and Doreen Weightman. London: Penguin, 2011. 219–31.

411. Massey, Doreen. *For Space.* London: Sage, 2005.

412. Agnew (n 259), 129.

413. Agnew (n 259), 50.

414. Jessop (n 104), 23.

415. Agnew (n 259), 103.

416. Agnew (n 259), 106.

sovereignty is a fundamental principle of public international law.[417] In the neoliberal economy, deregulation points to the shrinking of state sovereignty over multinational transactions. Instead, this regulation has shifted to international law or governance without government.[418] The link between sovereignty and its territory has entered a new phase since the 1980s, with the former becoming decentred and the latter becoming denationalised through new legal regimes.[419] Even the state's citizenship can be seen to be filled with the content of international human rights regimes.[420] In this respect, however, we must keep in mind the operative closure of the political, economic and legal systems from one another.

Bartelson argues that the nation-state, bounded by territory and over a distinct population, is not ontologically before human society.[421] While this can be accepted in part, one of the arguments of this work is that state-forms have indeed been a requirement for complex societies. While it has not been strictly speaking inevitable, it has been produced through repetitive human communication and ex-communication with the help of technology. There is nothing self-evident about it;[422] in hindsight, it has been contingent. The doctrine of sovereignty subsequently works the same way: it is not the precondition for the state but a technological instrument that can be recursively applied as circumstances demand. Once it has taken hold, it seems almost impossible to get rid of.[423]

One of the functions of sovereignty has been making the operative distinction between the international and national, and as distinctions tend to do, it has withdrawn itself from view. As we will see later with maps, sovereignty is less a result of the world than it is a tool for shaping it in conformity to its desire,[424] or as Graeber puts it: '[o]ne might even say that's what sovereignty itself is: the ability to toss frames about'.[425] Bartelson also argues that sovereignty is the distinction that links the domestic with the international,[426] much like we saw that the state was the distinction that symbolically links the

417. Sassen, Saskia. *Losing Control? Sovereignty in an Age of Globalization*. New York: Columbia University Press, 1996, 2.

418. Sassen (n 417), 16.

419. Sassen (n 417), 28.

420. Sassen (n 417), 36.

421. Bartelson (n 280), 3.

422. Agnew (n 259), 134.

423. Graeber (n 229), 458.

424. Bartelson (n 280), 16.

425. Graeber (n 229), 379.

426. Bartelson (n 280), 41.

law and politics. We can say that sovereignty makes a distinction upwards and downwards: upwards between domestic or international and downwards between what is public or private.[427]

In addition, sovereignty also oscillates between the legal and the political. In some accounts, it is a purely legal norm or status. In realist accounts such as those of Schmitt, it reflects pre-existing political communities and their power relations. Fortunately, we do not have to choose. We can say it is an explanatory principle[428] to unravel a paradox: the norm of sovereignty can be used to justify the exercise of power, and *vice versa*, power is employed to justify the norm.[429] This also accounts for the changes in transformations of sovereignty over centuries. Rather than a concept with positive content, it is a symbol for distinguishing between the domestic and international. To maintain its functionality, it has had to evolve with its environment, and it retains elements that help in its function and eventually discards those that do not.[430] Once again, this makes the definition so elusive and why we do not have to choose between hard sovereignty and globalisation, for it is an explanatory principle for both poles. In this light, Bartelson echoes Jessop's claims that the fetishisation of sovereignty has turned it into an object that has become impossible for us to define in itself. We can now only observe and distinguish its phenomena.[431]

As we have seen, sovereignty is a status that is bestowed upon a people and their territory, just as 'civilised' had earlier been. The bordered territory has a dual function as a precondition and a limit on power. Despite being arbitrary, this limit works as it can limit universally. Unlike civilisation, all people can be placed under the same symbol or distinction of sovereignty and are thus included in the same international community. We are all Greeks now.[432] Sovereignty can justify the international system, but it also needs justification for itself. Therefore, it is bestowed upon those who 'play along' and meet the international community's standards.[433] The ultimate prize is to be included in a system of identity and difference that repeats, repeats and repeats its operations.

One of the early modern examples of European states not engaging with other nations was the lively debate around the notion of 'oriental despotism'.

427. Jessop (n 104), 70.

428. Von Foerster (n 61), 113. 'Explanatory principle' is here used in the sense similar to Gregory Bateson.

429. Bartelson (n 280), 48; Hardt and Negri (n 40), 22.

430. Jessop (n 104), 25.

431. Bartelson (n 280), 63.

432. Luhmann, Niklas. "Beyond Barbarism." *Soziale Systeme* 14, no. 1 (2016): 1–38.

433. Bartelson (n 280), 69.

This argument always ran parallel with other distinctions based on Christianity or civilisation, rejected by writers such as Vattel, a transition from an emphasis on religion to one on the grounds of legality. According to this view, the Ottomans, Moguls and Chinese could not be parties to valid treaties with Europeans on the basis that their rulers were totalitarian and that they did not respect *pacta sunt servanda*, whether because of Islamic law prohibiting treaties with infidels or because of undeveloped legal understanding which did not recognise legal continuity from one ruler to the next.[434]

So, not only does sovereignty function as a territorial or geographical ordering principle, it is increasingly ordering functional spheres. As society becomes ever more functionally differentiated, power evolves to manifest inter-systemically rather than territorially. In this guise, the global mean less universally inclusive political communities, but instead, an imperial will to a power spread over different functional terrains.[435] Increasingly, we see that nation-states or sovereignty means little for certain social systems while remaining vital for others. How are these countervailing tendencies to be understood? Perhaps the reaction to global pandemics, where borders suddenly harden very quickly to prevent the spread of infection, is instructive of the latter. Sovereignty again becomes useful as a tool for states to distinguish their inside and outside to protect the smooth internal functioning of a state against a dangerous environment. Sovereignty becomes an immunological response against those who disrupt states of their internal stability and the broader international order.[436] The opposite case is also true in what is often referred to as the 'bracketing' of war or disorder within a specific territory. Not only does sovereignty exclude external claims to power or law as it did with the Church, but also it orders internally against a barbaric, chaotic and brutish 'outside'. Sovereignty not only has the function of isolating a state from the international community but also can bracket or quarantine the disorder in an individual state to prevent it from contaminating the rest of the international community.

Notwithstanding hard territorial borders and strong sovereignty, sovereignty has also shown the tendency to dissipate and diffuse into worldwide functional systems rather than territorial enclosures. This picture resembles what Hardt and Negri have called an 'empire' in which sovereigns have lost power, and

434. Pitts (n 38), 39. In this regard, the civilisation/barbarian plays an interesting role reversal. Just like Europeans, Asian despots also regarded foreigners as barbarians. However, it became a standard argument in Britain that for these states, the European could never ascend to civility, while European law recognised the ability of non-Europeans to eventually reach a state of equality. This argument became another justification for not treating especially China as a sovereign equal. Pitts (n 38), 53.

435. Bartelson (n 280), 71; Hardt and Negri (n 40).

436. Bartelson (n 280), 75. Hardt and Negri argue that Empire uses the distinction of inclusion/exclusion as a disciplinary power against deviancy in the bio-political sense. Empire (n 40), 23.

power itself has become sovereign.[437] They argue that power has done away with territorial centres and their boundaries and is universally inclusive of all civilisation.[438] International law plays a constitutive role herein, and Empire further informs its evolution. Power and law work in tandem to delay crises and exert and legitimise control.[439] It has done away with any form of stable grounding, and rather, it constantly reconfigures geography, making territory atopic and subjects into nomads. Power seems to be floating in mid-air with no ontological ground, thoroughly autopoietic. States now intervene in ever more spheres of society, and it appears that sovereign power is growing. However, in its state-form, it is probably weakening for the same reasons. As sovereignty becomes increasingly complex internally, it sacrifices its unity and identity and subjects itself to increasing external forces.[440] World society is currently too complex for the traditional empire and social steering that one saw at, for example, the Berlin Conference.

Because of these limits to reducing complexity and steering, Jessop and others have introduced the concept of meta-governance, or to put it in a typically Luhmannian formulation, second-order governance or governance of governance.[441] This means, instead of direct systemic intervention, creating environmental conditions that improve the operation of state functions. This could mean, for example, creating small, flexible organisations to tackle issue-specific problems. While it might result in the bleeding of power from states, they nonetheless function as the body of last resort or final authority. It is a form of power not based on the command but based on the 'shadow of hierarchy'.[442] Even if governmentality can navigate complexity through labyrinthine networks and tangled hierarchies, it still requires a nation-state government's symbolic/diabolic form to appeal in the last resort. Reciprocally, the government requires informal governance to maintain order in the face of a world complexity that has exceeded its traditional capabilities.

It is thus misleading to say that the state and its sovereignty are disappearing. It is becoming more complex in its autopoiesis and algorithmic repetition, and it is polymorphing through evolutionary selections. This means 'either/or' descriptions become useless. The state is not gaining or losing power, nor can

437. Hardt and Negri start their canonical work by admitting early on (n 40), 13 that Empire can be explained through a hybrid of Luhmannian systems theory, and undoubtedly, the resemblance is clear. Unfortunately for this study, however, it is also the first and last mention of Luhmann in that entire work.

438. 'The concept of Empire is characterized *fundamentally* by a lack of boundaries: Empire's rule has no limits.' Hardt and Negri (n 40), xiv. Author's added emphasis.

439. Hardt and Negri (n 40), 60.

440. Jessop (n 104), 89.

441. Jessop (n 104), 169.

442. Jessop (n 104), 176.

we choose between government and governance as the site of 'real' power. We are not becoming either more globalised or more localised. Frustratingly, we must admit that states are gaining and losing power; they are employing more government and governance; we are becoming increasingly global and local simultaneously.[443]

Thus, we see the difficulty of pinning sovereignty to a single definition. Definitions attempt to grasp the truth universally, infinitely and across eternity. Sovereignty does not remain constant over those axes, and a definition that does not allow for the evolution and mutability of the concept's function is bound to fail. Further, sovereignty has been bound up in the history of imperialism. Not granting sovereignty for a perceived lack of civilisation says less about colonial possessions than it does about the European states. So, by negating those on the outside, an identity of European exceptionalism could be enforced, and an exploitative foreign policy could be justified.[444] Thus, we have to be sceptical of the depictions of (a particularly singular and homogenous) spread of sovereignty as part of a historical march of progress. Instead, it can also be understood as an imperial export.

The civilisation/barbarism distinction and its eventual transformation into worldwide sovereignty codified into a legal concept are predicated on non-legal discourses that have informed and justified its rise. In the functionally differentiated society of modernity, the legal state-form was aided by other (if not all) social systems. However, I would like to emphasise two as particularly noteworthy: the political and scientific systems.

We saw in the previous chapter that the prosperity of states has always depended on new technologies, both in the traditional and political sense, to increase their size, control and complexity. Law has thus always been influenced and shaped by what happens in the political and scientific systems. We know that these two systems each persuade through their own symbolic and diabolic communication media. Politics relies on power, while science makes claims over truth. In the following section, we will explore how law and the state bolstered each other reciprocally through institutionalising existing power relations (which is, after all, a well-known topic in legal theory) and justifying it through the scientific beliefs of the day. To do that, we will take a moment to investigate these two media, namely, power and truth, and their particular relationship with the law and the state.

443. Latour, Bruno. *Down to Earth: Politics in the New Climate Regime*. Cambridge: Polity Press, 2018.

444. Koskenniemi (n 259), 103.

## The communicative media of the sovereign state

### Power

One inescapable fact of the nation-state, and indeed all political assembly, is that of power. In systems theory, power has a specific meaning, and for my analysis, we will take that as our starting point. We know that social subsystems communicate with their environment by selecting relevant information from it and copying it into the system.[445] This happens despite the great improbability of successful communication, or what Luhmann calls its double contingency. Because of this contingency, certain generalised media of communication increase the probability of successful communication, for example, money, truth or power.[446] It is through the power that the nation-state can assert its sovereignty and affect other systems. As we have seen, unbridled power is one of the problems international law has stepped forth to address.

Jessop claims that 'power' is too complex and ill-suited for explaining social relations. Power is either a formal concept used so variously that we cannot precisely determine what it means, or it is a discursive and explanatory placeholder for mechanisms we have not fully identified yet.[447] Han echoes this in claiming that concerning power, 'theoretical chaos still reigns'.[448] Suppose power manifests in its ability to make a difference. In that case, it is unclear whether the concept refers to the capacity (as is the stance of Luhmann, as we will see) or the actuality of making this difference. In a sense, it is fair to say that power raises more questions than it answers.[449]

However, our approach to the concept of power will unsurprisingly be a Luhmannian or systems theory based on one of his first published books.[450] This approach provides us with several advantages in our analysis. The first is that power is understood to be the first communication. It is not theoretically grounded with a backwards-looking reference to material considerations or threats of violence. This is not a denial of their presence but rather the recognition that they withdraw and operate in the background in a social system of communication. If those background conditions make it possible, the actual exertion of power is first and foremost found in a communicative act. Secondly, it acts not necessarily as the central theme of the communication but as the subtext that accompanies it. Order, the central theme of

445. See Chapter 2.

446. Luhmann (n 25), 126.

447. Jessop (n 104), 92.

448. Han, Byung-Chul. *What Is Power?* Translated by Daniel Steuer. Cambridge: Polity, 2019, vii.

449. Jessop (n 104), 96.

450. Luhmann (n 97).

communication, is bolstered by the power relation within which the order is given. The power lies just in what is *not* said.[451] However, this does not mean that power is not still a causal relation: it is powerful because it can cause unlikely effects to manifest.[452]

A further advantage is that as a generalised symbol, power can work equally in all systemic communications. The way the political system exerts power over the legal system is the same way it does so over science or the economy. Because it functions similarly, it can be compared with other symbolic media, such as truth or money. Finally, by focusing on power as a communication medium, we do not have to reference individual actors but can remain on the meta-level of systems.[453]

Like all communications, power functions on a threefold selection process dependent on contingency and the ability to reject the communicated selection; such rejection causes social conflict. With recourse to generalised media like the power, selected communications gain a higher probability of being accepted, thus lessening the risk attached to the communication.[454] As mentioned above, the symbolic medium should be understood as complementary to everyday communication or language. For example, language's role is to make communication comprehensible to others. However, generalised media can make it more persuasive or likely to be accepted and expected to be so concerning the symbolic. In this sense, it takes some of the load of complexity off everyday communication.[455]

Thus, generalised communication media is both the manner of selecting for and a motivating structure for the other.[456] This, however, only works if we still assume freedom of choice on both sides or doubly contingent selectivity. In this sense, the power holder *alters* must have more than one choice of selection to make before transmitting it to the *ego*. On the other hand, the *ego* also must have different selection choices to pursue, with power making some of them more or less attractive. This becomes a precondition for recognising power, as '[p]ower is greater if it can assert itself even in the face of attractive alternatives for action or inaction'.[457] Power is not the same as coercion, which removes freedom of choice from the ego and substitutes his

451. Han (n 448), 1.

452. Luhmann (n 97), 117.

453. Luhmann (n 97), 120; Moeller (n 17), 19.

454. Luhmann (n 97), 120; see Chapter 2.

455. Luhmann (n 97), 147.

456. Luhmann (n 97), 121.

457. Luhmann (n 97), 122. One could take this a step further and claim that power is at its greatest when both ego and alter act as they normally do but to the ego's benefit. See Jessop (n 104), 94.

action or selection with that of the *alter*. Violence eliminates action through action and excludes communication and decision-making.[458] Definitionally coercion is the very lack of power and a hallmark of elementary societal systems. In this sense, this is a theory of power predicated not on outcomes but on structure or form. How an outcome is reached is as important as reaching it.[459] So, power is greater; the more options *alter* for selection, the more options the *ego* has for selection, which reduces the complexity of the communication by making the *alter*'s selection most attractive to the *ego*.[460] The causal relationship remains but becomes abstracted. It is also implicitly the hallmark of complex societies, which are usually defined by how many levels of hierarchy they contain. Power secures causal chains of an effect independent of, or neutralising (but not breaking!), the will of the one subjected to it. It regulates contingency by increasing the probability of improbable selections and causes a gain in time.[461]

One can see a homogenising dynamic at work here. If the powerful can reach a level where its subjects bid it will take even when they do not need to ask explicitly, it means their power is extended into the hearts and souls of their subjects. The hierarchical apex has smoothed the plane between them and their subjects, where its will now overarch as the will of all society.[462] This is the unified political community that aroused to be imagined in modernity, a polity acting as parts of a single whole, *a la* Hobbes. Han highlights the spatial element, describing power as the spatial expansion of the self, as the wishes of one can come to fruition across vast geographies.[463] Violence is inferior to power in that it is local. On the other hand, power is spatially broader, allowing for the flow of communication in a single and far-reaching direction,[464] like a water source whose rivers and tributaries all flow out to the coasts.

This does not mean physical force is irrelevant to power. As much as functional differentiation allows for power to become generalised as a form of communication, it still, at its base, requires the reference to violence. This does not mean it is a final resort when all else has failed.[465] It means that power can refer to something without degenerating into coercion. After all,

458. Luhmann (n 97), 172.

459. Han (n 448), 2.

460. Luhmann (n 97), 124; Han (n 448), 2.

461. The gain in time is because of the fact that selections and actions can follow swiftly without the need for convincing or deliberation. Luhmann (n 97), 125; Han (n 448), 6.

462. Han (n 448), 5.

463. Han (n 448), 6.

464. Han (n 448), 6.

465. Luhmann (n 97), 170.

symbols have to refer in the end to something. It evolves into something that must be held in the back of the mind without being ignored.[466] On this count, Luhmann seems somewhat idealistic when compared to the definitions of sovereignty and the friend/enemy distinction of Schmitt or in the anthropology of Graeber.[467] In this case, it functions as a form of security. Therefore, it is also essential that the use of physical force is constrained and not available to everyone (the familiar concept of the monopoly of violence) for the symbolic medium to maintain its effectiveness.[468] This means an increased dependence on the organisation.[469] This has led to exercises of coercion or force to be regarded as legal or illegal within international law. For Luhmann, power structures exhibit legitimacy as a kind of middle ground between two violent horizons: the creational act of violence from a past that is largely forgotten or ignored and the violent power that looms in the future if the law is not followed.[470] If violence kills, power lets us live.[471] Luhmann writes that while the legal system carries violence 'genetically', it can no longer be controlled through force:

> [*T*]he rises of the modern, sovereign state-based on the monopoly of decision-making about the use of physical force, and its inflation to a level of complexity which can hardly be controlled is the most significant example of such a development on the general societal level.[472]

Both physical violence and legitimacy need symbolism. They are not opposites in the sense that less violence lends additional legitimacy. They exist in a symbiotic relationship that must meet legal communication requirements, both being necessary to control contingency.[473]

Speaking of these original acts of violence that we delved into detail in Chapter 3, the further crucial point is that generalised communication media take shape in the presence of social problems, such as scarcity of resources, and become a way of solving these problems. As societal differentiation increases, the frequency of contingent selections increases, and the more this contingency must be stabilised to maintain order and development. Power thus

466. Luhmann (n 97), 172.

467. 'Killing is one symbolic act of which it is simply impossible to write off as "just" symbolic – because, whatever you may or may not be communicating through the ritual, when the rite of sacrifice is over, the victim continues to stay dead.' Graeber (n 229), 379.

468. Luhmann (n 97), 171.

469. Luhmann (n 97), 172.

470. Luhmann (n 97), 173.

471. Han (n 448), 20.

472. Luhmann (n 97), 174.

473. Luhmann (n 97), 175.

becomes an advantageous selection for further evolution.[474] In this abstracted and theoretical manner, power can thus be accounted for not only in its brutish sense but also in the modern highly institutionalised form of law.

In the institutionalised form of law, in its ability to reduce contingency, we see the characteristic of power to create order.[475] Different systems use the symbolised medium of power to orientate themselves meaningfully towards a situation and allow for similar orientations to be drawn from situation to situation, absorbing uncertainty. Power, as a symbol, can 'express a stabilised possibility, a readiness of the system to act as its own catalyst which can become production, if further conditions arise'.[476] Power structures society: despite the disparate goals of all social actors, power results in a particular specified distribution of the wanted and unwanted. Thus, power does not merely lie in individuals anymore but lies almost completely in structures.[477] It is systemic structures that not only construct the available selections to address a problem but also create their problems themselves through their observations. This institutionalisation of power makes it more impersonal, lends it legitimacy and builds on the assumption that power is reflexive and everlasting. The same power can be utilised again in the future and can be a catalyst for future communications, actions and selections.

International law has been particularly successful at referencing power via sovereignty. As a symbolically generalised medium, power needs universal relevance and validity independent of the particular participants. This is made more difficult because power still requires the selection and decisions of the participants. This means that the symbols of power must be able to be referred to by any party in relevant situations.[478] The universality of the international legal system is one in which power is created institutionally general and referable and creates a normative link to the reference to power. This means that power exercised legally can lead to consequential obligations through the binding power norms,[479] in keeping with the function of the law of stabilising future expectations. The result is that power becomes 'technicalities', meaning that its applicability becomes more context-free, while at the same time, a degree of sovereignty is sacrificed.[480]

Consequently, participants could potentially defer reference to their power. However, they can 'draw' power from the institution of international law using

474. Luhmann (n 97), 127; Jessop (n 104), 104.

475. Luhmann (n 97), 143.

476. Luhmann (n 97), 144.

477. Han (n 448), 16.

478. Luhmann (n 97), 154.

479. Luhmann (n 97), 155.

480. Luhmann (n 97) 155.

established rules and structurally lend legitimacy to the one who relies on the law. Certainly, this was the hope of new states after the decolonisation process. On the contrary, the one who is obliged to follow the law can submit to being compelled and thus relieves themself of responsibility and save face (even when one of the most powerful states loses a case against a smaller state). The law protects inherited structures even when balances of power shift.[481]

When one looks at the rhetorical history of international law, from the spread of civilisation to human rights and humanitarian intervention, positive legal principles have always been wrapped in moral language and aspirations. This managed to happen even despite the parallel development of positivism. One possible explanation is that as power became increasingly institutionalised, it required external support to not degenerate into constant legitimacy problems.[482] In the next section, another such symbol, scientific truth, will be discussed. We will see that the scientific discourse of the day was often employed, especially in modernity, to lend legitimacy to legal and political projects as support of moral sentiments or as a refutation against those who had an opposing moral conviction.

In such struggles, who holds ultimate power is important, for arguments will be more widely accepted by having the symbolic force of power behind them. It leads to power being abused, as the powerful take control not only of the public imagination but also of the narrative that informs all action.[483] Traditionally, this has been understood as where the role of law comes in; to curb the exercise of power by those who hold it. Luhmann, however, asserts that this legalisation of power is an outdated notion still rooted in ideas of morality and that a theory of communication could perhaps lead to a new way in a time where misuse of power is greater than ever.[484]

He does this with recourse to evolutionary theory.[485] Through evolution, different systems move, change and evolve at different speeds, and differentiation and scarcity lead to different roles. One can think of an ecosystem to understand the different roles different organisms play within it. This eventually results in the power of decision-making concentrating at one point more than in others, which can further lead to the risk of too much or too little power concentrated at other points. It is, however, evident that all social decision-making is too complex to be carried by one point alone.[486]

481. Luhmann (n 97), 159.

482. Luhmann (n 97), 163.

483. Jessop (n 104), 118. Schmitt (n 247). This aspect will be further discussed in more detail in Chapter 6.

484. Luhmann (n 97), 190.

485. Luhmann (n 97), 190.

486. Luhmann (n 97), 191.

Such a concentration leads to problems: it can cause a slowing down of decision-making, meaning nothing happens, or decisions are made at the wrong moments in time. An overloaded or inflexible system causes problems with the pace and synchronisation of social change. Luhmann sees this as having happened in the state-form, and the power of the political system seems to be no longer capable of standing up to this task, and tensions and crises are manifest.[487] This leads to a complimentary risk that it will become painfully obvious that 'power does not realise its possibilities'.[488] Like all symbolically generalised media, power has a discrepancy between the possible and the actual, leading to expectations which are bound to be disappointed. This risk can have several effects: it can change attitudes, typifying these as problems or crises, or calls for increased or decreased power in state and legal institutions. When the crisis becomes too great, states must summon their power more draconically in the form of emergency or martial laws.[489]

However, when such deficiencies arise, we face a new problem: power is distributed unevenly and is concentrated so much in certain structures that redistribution is nearly impossible.[490] It is too tied with the differentiation of the political system, which specialises in managing power. However, any politically centralised hub of power quickly realises that there are power hubs outside of it – be it in other political systems or other subsystems such as law, science or economics.[491] With military might and a monopoly on violence, the state can become an important nexus for decision-making but will never hold complete control. This shows that there are also limits to the politicisation of power.[492]

A functionally differentiated society implies differentiation on the one hand and interdependency on the other. In the case of the power of the political system, it appears that there are two solutions to the limits of power and the complexity overload present in decision-making. These are the juridification and the democratisation of power.[493] The legal system has become a means for generalising political problems. Power becomes preserved in law as an institution; as we have said, it is made available to those with no power.

487. Luhmann (n 97), 192.

488. Luhmann (n 97), 192.

489. Luhmann (n 97), 194.

490. Luhmann (n 97), 197.

491. Buitendag, Nico. "Power and International Law: Towards an Autopoietic Framework." *Westminster International Law & Theory Centre Online Working Papers* 1, 2014.

492. Luhmann (n 97), 198.

493. Luhmann (n 97), 200.

Luhmann gives the example of a contract (important in international law) in which political power is employed in a private agreement. The legal and political power exists somewhere external and can be called upon if needed. In this way, the generalised medium of power increases the differentiation of society while also implying its interdependency. Individual states do not need to exert power to fulfil their legal claims.

Despite this interdependency, Luhmann, however, remains sceptical of the uses of power in the end. Society has simply become too differentiated. The functional differentiation of society cannot be undone, and as a society, today is just too complex. The clock cannot be turned back. As he writes:

> [*T*]here is less prospect here than anywhere else of altering society through interactions which use the communication medium of power. The weaknesses of power in the context of societal evolution are obvious today.[494]

We have seen how political power, especially when it lacks any real political will to speak of, falters in the face of global crises. Establishing firm, unified responses seem more unlikely than ever without a powerful core to drive it. While international law has sometimes been successful in drawing upon power for its legitimacy, this association has also led to its dismissal as the mere handmaiden of politics. Particularly in modernity, states and international law have turned to another symbolic/diabolic medium to legitimise and structure their aims in scientific evidence or, as we shall call its symbolic medium, truth. This will be the focus of the next section.

## Truth

The rise of the modern nation-state and the positivisation of law occurred within the broader milieu of the Enlightenment, or the age of reason. The ideal was that humankind had left superstition and unquestioning belief behind and would act, distinguish and decide based on human rationality. This spirit left no part of European society untouched, and as we saw, the political and legal systems underwent drastic transformations in appearance and their justification. A new rational system of science delivered incredible results quickly (much thanks to the energy bottleneck shattered with the arrival of the steam engine).[495] One can only imagine how that opened up the imaginations of nations and rulers alike in what was now not only possible but also essential to be done. It became so that political power and the law became open to harsh critique, and they had to be able to justify themselves and their projects rationally.[496] In this sense, other social systems could be pressured to

494. Luhmann (n 97), 202.

495. Smil (n 154).

496. Koselleck (n 254), 9.

change their programmes by external communications that had a newly-legitimate arrow in its quiver – scientific truth.

In the abstract form, truth functions similarly to political power. It is a symbolic/diabolic medium that, hiding in the subtext, a communication can reference to increase its chances of acceptance. In this case, rather than rejection possibly leading to violence or exclusion, the one who rejects a truth-coated communication runs the risk of appearing irrational or erratic. By rejecting what is commonly held to be true, an individual is ex-communicated from the inter-subjectively-held meaning of the world, and he loses his place as a fellow participant.[497] On the contrary, the one who can successfully enlist truth on his side can come out of an exchange not only as the victor but also as seeming intelligent and self-disinterested. This has been a rhetorical strategy of law long before then too. Benton had pointed out that law had regarded itself as a science for uncovering the truth long before the natural sciences purposefully entered the fray.[498] An appeal to reason is also a 'political manoeuvre'.[499]

So, while it is well-known that international law has often relied on political power to legitimise its programmes, a closer look reveals that scientific truth or evidence has played a strikingly important role. This occurs and continues to occur on various levels. When technology made it possible to create unified nation-states, the doctrine of sovereignty had to adjust accordingly. When navigation and cartography led to the discovery of new continents, the law was engaged in a lively dispute on how it should react. In the face of troubling and overwhelming climate science evidence, environmental law turns its attention to reversing the causes of these findings.

While many, if not most, would applaud the advancements made during the modern Enlightenment and hold laws adapting to that as a positive development, I want to argue that this process has not been without a sinister side. It is precisely within the context of evolutionary theory and a march of progress narrative that polities could be placed on a development timeline. Thus, foreigners on far-off lands were empirically marching behind Europeans, and would not it only be a moral duty to 'bring them up to speed'? Differences and distinctions became 'objective' and 'scientific', and the one who wanted to civilise came across only as an educated, free-thinking philanthropist.

These projects were draped in the language of the science of the day, bolstering their political and legal programmes by reference to truth. But of course, truth, no matter how scientific it seems, is not without a problem.

497. Luhmann (n 97), 57.

498. Benton, Lauren. *A Search for Sovereignty: Law and Geography in European Empires*, 1400–1900. Cambridge: Cambridge University Press, 2010.

499. Feyerabend (n 5), 9.

Within specifically social systems, its function remains that of convincing. The Latin *veritas* still contains within it a core of objective fact that someone else can later verify. The usual English translation of *truth* has another, but also ancient Germanic root, more closely related to *trust*. It implies that the communication comes from an authority that does not need to be verified but can basically be taken at their word. While this might be a mere curious little detour (and even though Luhmann himself named the symbolic medium *Wahrheit*, closer to *veritas*), I nonetheless impose that the English term gets closer to the veracity of the medium's actual functioning and beg that we remain on the notion of trust for a brief moment longer.

At its most fundamental level, trust implies confidence in one's expectations.[500] In the face of complexity, stable expectations are required for coordinated action and planning. We know that the other has the potential to decide to harm us, but we trust that they will make the optimal selection. Hobbes solved this problem narrowly through law and order and absolute rule.[501] Scientific truth, on the other hand, increasingly wagers its legitimacy on its past success, and one is as much asked to merely place one's trust in its findings rather than verify each of its claims.[502] This is, of course, a result of increased complexity and functional differentiation. We assume that the scientific community is oriented towards truth. The political system gains trust from its subjects in providing for their needs, subjecting its sovereignty to incremental stages of decision-making, and making it transparent to scrutiny.[503] Thus, even the exercise of power is accompanied by the trust when all goes well. Trust in the political and science systems allows the observer not to need to question their motives. The systems themselves can trust that environmental conditions are stable enough that they can reasonably plan their actions.[504]

The symbolic medium of truth, as an outcome of the knowledge-creation of the science system, is inextricably linked to the sovereign state. Poulantzas, too recognised that states legitimise themselves through the sciences and have shown a tendency to monopolise scientific knowledge just as it does violence. Even the distinction between scientific and manual labour is, for him, a sign of this.[505] Science becomes organised in such a way that it becomes a

500. Luhmann (n 97), 5.

501. Luhmann (n 97), 8.

502. Luhmann (n 97), 24.

503. Luhmann (n 97), 60.

504. Luhmann (n 97), 62–63.

505. Poulantzas, Nicos. *State, Power, Socialism*, 55. Another important distinction that arose was that of the natural sciences from the humanities, thus separating 'truth' from 'culture'. This allowed European states to disregard culturally sophisticated states, such as the Chinese Empire, as civilised enough for equality in international law matters. See Wallerstein, Immanuel. *European Universalism: The Rhetoric of Power*. New York: The New Press, 2006, 75–77.

state science, unlinked from its historical context[506] and entrenching power relations.[507] This has been true at least since the development of writing, as we saw in the previous chapter, and intellectuals have traditionally served the interest of the state.[508] This is also true in the case of the juridical class.[509]

Just as the political system relies on scientific truth to legitimise itself, there have been enough cases of the scientific system relying on political power too. As much as we can hold the law, politics and science to be individual systems, their intercommunication sometimes makes these distinctions blurry. Perhaps the most classic example of this is the agrobiological doctrine of Lysenkoism in the early days of the Soviet Union. A deep understanding of the scientific details is not important but deserves a quick overview. During the reign of Stalin, a young scientist by the name of Trofim Lysenko had developed a competing (though commonly accepted as deficient) account of hereditary evolution in crops, in conflict with the prevailing account of Gregor Mendel. In the scientific controversy that ensued, Lysenko and his followers were remarkably successful at presenting their theory within the rhetorical and ideological framework of dialectical materialism (and as closer to 'true Darwinism', thus also historically sounder),[510] and soon, the regime and Stalin himself became advocates of Lysenkoism. Many accomplished but opposing geneticists were eventually murdered, and because Soviet agriculture was organised according to Lysenko's principles, low crop yields led to the starvation or suffering of many.[511] By the 1960s, Lysenkoism was abandoned.

In his study of Lysenko's rhetorical and ideological techniques, Stanchevici identifies how he communicatively bridged the gap between science and politics (and eventually law). Through speeches at academic conferences, Lysenko draws clear, fundamental boundaries or distinctions between his theory and Mendelian genetics, to some degree causing an opposition that did not even necessarily have to exist.[512] In an attitude later echoed by George W. Bush, one was either with or against him. The hard boundary meant that one was either a friend or an enemy. This process of division and identification underlies all of the rhetoric, even if these distinctions are more or less

506. Feyerabend (n 5), 3.

507. Wallerstein (n 505), 59.

508. Poulantzas (n 505), 59.

509. In this regard, Poulantzas points to the ignorance of the law in which the general population is kept, and he describes the law as a kind of 'state secret'. Poulantzas (n 505), 90.

510. For an excellent study on the topic, see Stanchevici, Dmitri. *Stalinist Genetics: The Constitutional Rhetoric of T.D. Lysenko*. New York: Baywood Publishing, 2012.

511. Stanchevici (n 510), 91.

512. Stanchevici (n 510), 71.

imagined.[513] For the Soviet geneticists who opposed Lysenkoism, the distinction proved fatal.

While this case might be a particularly extreme example, it shows us how the discourse between science, politics, and law oscillates. It is also not simply a case of the state getting too involved in politics; counter examples can also be found. When the Church allowed Galileo to teach his theories as a hypothesis only, and not as scientific truth (on the basis that his claims were, for the time, methodologically deficient), he refused.[514] When scientific communications are presented as truth, especially by states or lawyers, it is not *just* that. The science system is partly sense-making and order, but it is also part of value and tradition. Many of its truths carry veracity only within a certain social structure.

In the history of international law and the state, scientific truth has always been partnered with political power for its expansion, rationalisation and legitimacy. For a long, the apparent fact of civilisation justified exploitative and extractive practices. When colonisation ended, paternalism was redirected through the rationality of human rights.[515] What power finds beneficial or desirable, the truth can transform into a necessity, thus shielding it from moral critique. In current international law, scientific evidence still plays this role, and this becomes particularly apparent when opposing states or parties have conflicting scientific arguments. More broadly, these same caveats must be considered when international law itself is depicted as rational or scientific.

## The state as an empirical cybernetic machine

As we have seen, technology has played a central role in the creation of the nation-state; from the first advancements in agriculture and writing to the later developments of shipbuilding, navigation, cartography and weaponry, technology allowed for the spread of the first global empires. Later the printing press played a central part in the organisation and sharing of information. Newspapers led to unifying languages, maps led to the territorial formation of states, and the outlines used as logos in nation-building and school textbooks led to the unification of imagined peoples. While the details of specific technologies differed between regions, they are universal in the social functions that they performed.[516] The creation of sovereignty can be understood as a technological response to the problem of controlling time and space or, more simply, being able to exert authority over a certain territory

513. Stanchevici (n 510), 79.

514. Feyerabend (n 5), 132.

515. Wallerstein (n 505), 16.

516. Ortman (n 209), 212.

effectively.[517] We also saw that social complexity and technology go hand-in-hand, with each placing natural limits on the other until a breakthrough is made. It is a probable explanation why societies evolve, not slowly nor steadily, but in stops and violently incredible starts. Sovereignty also evolves and becomes more complex with advancements in technology. We live in an epoch where global imperial sovereignty is technologically possible but also very costly. However, it is perhaps more insightful to relate the concepts in the way of a sovereign state *as* technology.

This can easily be accommodated within Luhmann's definition of technology as the 'coupling of causal elements, no matter what the material basis'.[518] This means that a certain cause, when processed through technology, will always lead to a reliable effect or decision. Another name for this is a trivial machine.[519] This reliability means that the underlying process does not need to be understood, and the result can be taken for granted. This is clear in the well-known model of environmental input, technological processing and output back into the environment. When there is no interference, the technological process performs in autopoietic closure.[520] If we are to understand states as machines or systems, we have to regard them as non-trivial machines, meaning that their processing is so complex that the outcome is unpredictable.

Nonetheless, if we regard technology as bringing about a causality, whoever uses technology must thus be using it instrumentally. For this reason, Martin Heidegger says that technology causes a bringing-forth or *poiesis*.[521] It brings something concealed into the spotlight, the light of truth.[522] There also exists a second function of technology: it is also an agent of order. Through technology, humankind sets order upon nature and challenges it by extracting from it. The whole planet has been harnessed, harvested and hoarded for future utility, and Heidegger warns that even man himself can be ordered and placed in standing reserve like this, as we have already seen. When technology

517. Jessop (n 104), 133. Elden convincingly argues that territory itself can be understood as a political technology or the extension of a state's power. It is an assemblage of the technical and legal and requires the firm boundaries that arose in modernity. Elden (n 181), 322.

518. Luhmann, Niklas. *Organization and Decision*. Translated by Rhodes Barret. Cambridge: Cambridge University Press, 2018, 304.

519. As opposed to a non-trivial machine, in which processing is such that inputting the same information could generate two different outputs. See Von Foerster (n 61), 15–16.

520. Luhmann (n 518), 308. For illustration let us consider the word 'automation'. *Matizein* means to decide, and thus, automation is literally something that decides by itself. See Von Foerster (n 61), 112.

521. Heidegger, Martin. *The Question concerning Technology, and other Essays*. Translated by William Lovitt, New York: Harper, 2013, 10.

522. Heidegger (n 521), 12.

frames objects this way, it conceals rather than illuminates the truth,[523] as a non-trivial machine would. Thus, for Heidegger, technology's true essence is to order and reserve man and nature for future consumption, obscuring their actual being.

Schmitt is also fully aware of the autonomy of technology when he writes that technology takes on a life of its own, outside the frame of humankind and beyond superficial judgements of good and evil. The hand that holds a weapon is not an appendage of humankind, but the individual themself is a prosthesis of a whole social and technological complex.[524] He equates technology in this sense directly with power and likens the one who wields power the same to the one who wields the weapon. Power, too, acts of its own accord, and the sovereign nation-state is a technology that functions according to its internal logic and programmes. It is a machine, in fact, the machine of all machines, compiled of humans with its objective autonomy and autopoiesis.[525]

States fulfil any definition of technology. They are instrumental, namely, something to do something. Heidegger could argue that we might not recognise tools or instruments at first, as we are always more concerned with the work we are doing than the apparatuses we use to do it.[526] A tool has a forward reference to the work being made, but it also references back to the material it is itself made of.[527] Thus, a state is a technological object made up of materials or components to be used for something.[528] By now, we know that states, and the law, are very complex tools that draw on an incredibly vast array of materials.

Comparing the state to a tool or a machine has a long history, having been introduced in the 17th century.[529] This was after the Copernican revolution and right before the industrial one, and a mechanistic, causal image of the universe and nature was beginning to take hold. Great clockworks of remarkable precision were being built and marvelled at.[530] The metaphor of the machine

523. Heidegger (n 521), 28.

524. Schmitt, Carl. *Dialogues on Power and Space*. Cambridge: Polity, 2015, 45.

525. Schmitt (n 524), 46; Hardt and Negri (n 40), 34.

526. Heidegger (n 6), 69.

527. To use Heidegger's own example of the hammer: it references its work, perhaps a house being built, but it also refers to the materials it is made of, namely, a wooden handle and a metal head.

528. Empire's authority needs 'the capacity to set in motion the forces and instruments that in various ways can be applied to the diversity and plurality of the arrangements in crisis'. I am thinking here specifically of the border. '[A] form of right that is really a right of the police.' Heidegger (n 6), 17.

529. Although references to the world or nature as a machine are much older, with examples of this in the writings of Pseudo-Dionysus the Areopagite in the sixth century or from Oresme, the bishop of Lisieux in the 14th century. See Feyerabend (n 5), 260.

530. Stollberg-Rilinger, Barbara. *Der Staat als Maschine*. Berlin: Duncker & Humblot, 1986, 26.

provides us with several implications. It invokes the idea of a whole created of smaller yet essential parts. It further implies that there is an end towards which the machine is created and serves a specific function. If these functions are not met, the parts can be adjusted or fixed and, consequently, perfected.[531]

This is not a mere matter of the state or the political system. Karatani argues that law, especially international law, is the foremost characteristic of an empire. Even from the start of the Roman Empire and Roman law, the focus was not on direct rule but on regulating relationships between peoples as *ius gentium* or, more specifically, *ius inter gentes*, much like a cybernetic system would. Domestic affairs were ignored as long as tribute was paid.[532] Far from its contemporary insistence on universality, he supports our thesis that the roots of international law are to be found in difference, division, inequality and Empire. The doctrines of sovereignty and the rule of recognition have been complicit in colonial domination from the very start, as has also been convincingly demonstrated by Anghie. From the classical period, writers like Vitoria invented these concepts strictly to exclude non-European populations. Similar to Anderson's argument of nationalism arising from the colonies and making its way to Europe, Anghie argues that it is through the colonial encounter that European powers were able to define and refine sovereignty.[533] As we have seen, various legal and rhetorical gymnastics were employed to affect the exclusion of non-Europeans through the mechanism of sovereignty in what he calls the 'dynamic of difference'.[534]

As discussed earlier, subjugated peoples could not be sovereign unless it was bestowed by Europeans,[535] paradoxically when these peoples ceded their sovereignty through treaties to create protectorates or mandates over their territories. Sovereignty was a mechanism or technology for creating international order, legal coherence and economic exploitation under the banner of a civilising mission.[536] Pitts points to the 'double-edged quality' of many concepts in international law, demonstrating that they can be used to justify inclusion/exclusion simultaneously.[537] We could also simply call this quality hypocrisy or even simply a sham.

Besides the mentioned machine, another metaphor for the state made famous by Plato in the Republic is that of the ship, steered artfully (*kubernētikós*)

531. Stollberg-Rilinger (n 530), 20.

532. Karatani (n 163), 24. This also points to the specific economic or exchange foundation of international law.

533. Anghie (n 78), 29. Pitts (n 38), 2.

534. Anghie (n 78), 37.

535. Pitts (n 38), 74. Hardt and Negri (n 40), 106.

536. Anghie (n 78), 107.

537. Pitts (n 38), 5.

by the philosopher king. Etymologically, it is also the root of the name of the modern science of cybernetics, an important precursor to systems theory. Today, we can say that the state is a thoroughly cybernetic machine.[538] Instead of controlling subjects directly, it attempts to control the environment. International law is vital in stabilising the environment and the state's future expectations, aiming towards self-replication and infinitely reproducing the present. This approach has become so ingrained that when faced with novel challenges, international law's only reaction is to use the same procedures but scale them up: create a world sovereign bigger than the current sovereign.[539]

The foundation of modern sovereignty is built upon the ground of positivism. As a scientific approach to law, it asserted that law was created by sovereigns which lawyers could discover.[540] A society that did not have the institutions of sovereignty, and most notably control over territory, could thus not be said to be a subject of international law. Positivism made it possible to replace any notions of universality with the particularity of a patchwork of international laws. By placing others outside of the *Ius Publicum Europaeum*, colonial powers thus did not consider themselves bound by law in their dealings with subjected peoples. Rather, the first true universalisation of international law only occurred during decolonisation.[541] Thus, we should regard the formation of the United Nations (UN) not only as the result of the gathering of states in one organ but also as the final act in rationalising the nation-state as the ultimate political unit after the dissolution of the Empire.[542]

The contemporary empire model, as Hardt and Negri described, argues that imperial power has become more fluid and network-like. By granting sovereignty to all states, they are now included or plugged into a network of control. Empire requires peace, not war, to function. We saw that power is most effective when it lacks direct violence or coercion and can portray itself as common sense. This is partly a result of no more space left on our maps to

538. Culp, Andrew. "Control after Cybernetics: Governmentality as Navigation by Homeostasis and Chaos." *Symplokē* 28, no. 1–2 (2020): 1–26, 13. So far, the world knows of one interesting case where a state did attempt to run itself on expressly cybernetic principles, namely during the brief reign of Allende in Chile and called 'Project Cybersyn'. A central control room was built that would get daily updates from all centres of the economy, and a committee would make national decisions in real-time, taking national variables into account, and feed their results back. When Allende was ousted, the project was abandoned. For the definitive account of the project, see Eden Medina, *Cybernetic Revolutionaries: Technology and Politics in Allende's Chile*. Cambridge, MA: MIT Press, 2011.

539. Culp (n 538), 21.

540. This could be achieved through discovering state practices and customs, treaties and so forth. The great conceit is that the classical international lawyers were, of course, highly selective in what qualified as relevant sources. See Pitts (n 38), 124.

541. Pitts (n 38), 15.

542. Jessop (n 104), 151. Karatani (n 163), 22. Karatani also argues that the UN arose from capitalism's need for a single 'super-state'.

be conquered; meaning power has to be extended in new ways, a conceptual frontier rather than a spatial one.[543]

## Conclusion

After tracing a structural and systems theoretical account of the rise of states and sovereignty, this chapter moved on from history to understand these concepts in their modern manifestation. While the argument is made that certain structural elements remain fundamentally the same, they also evolve in complexity over time and come to express or manifest themselves in new ways.

The case was made that states and international law operate within feedback relations, both being constructed and expressed by the other. We can see this clearly when our level of analysis is that of communication. While they communicate differently, within their environments, they can couple some of their structures in a mutually beneficial way. An excellent example of this coupling can be seen in the legal-political doctrine of sovereignty. While it might at first have been used in Europe to order and simplify overlapping powers, it also allowed for consolidation on two fronts: internal protection from the civil wars of neighbours and external protection against the rest of the world. What became clear after the Vienna Congress was that European powers had, despite their differences, a shared interest. Turning these differences to the outside was more productive, where increasingly sophisticated asymmetrical distinctions were developed to withhold entry into the family of nations and justify interventions.

However, the doctrine of sovereignty, despite its utility (or perhaps because of it), has always been oblique. Like all knowledge, it rested on a series of distinctions. Nevertheless, these distinctions have sometimes been somewhat murky or vague and, through the decades and centuries, have shifted – sometimes slightly, other times dramatically. This means that the present state itself has become decentred, not a singular object but rather an assemblage of programmes and effects. Some elements held to be fundamental – such as territory or a population – prove to be fluid and have historically always been so. Thus, to some degree, the state is a framework or even a rhetorical device. Within the vast network created by different functional systems, the concept of state or sovereignty seems like a somewhat arbitrary reference point that can be inserted on any point of the tapestry, much like the modern functional border, to make sense of certain system operations.

Thus, to return to the question, we started with how the sovereign nation-state could spread as a near-universal governing structure. We identified two

543. Hardt and Negri (n 40), 182.

important mechanisms for this and argued that the sovereign could exert its wishes through important communicative media. The first one is well-known, namely, power. Power has evolved from the times of the first civilisations, and it can no longer achieve the results it desires through violence or coercion. Instead, it operates communicatively, structuring the environment of actors or the shape of the network within which the nodes find themselves so that they would rationally prefer to act in a manner beneficial to the state. Law is perhaps the primary method for achieving this. It can erect structures while at the same time obscuring the violence that lies beneath them. It creates order, and because it is communicated through the legal system rather than through sheer force, the political system is legitimised. This ordering also has a robust spatial characteristic to it, as technology allowed for the greater bounding and policing of territory and travel across vast distances.

The other communication medium that international law and the state have used increasingly in modernity is that of scientific truth. While it remains the domain of the science system to produce knowledge or truth, states and the law were quick to adopt the persuasive force of the rational spirit to legitimise and justify their projects. As the scientific method is a human observation enterprise, its results are unavoidably a product of precious distinctions. When the law co-opts scientific arguments, it is often a political act in itself. Even the evolution of law as science is implicated in this, and it could justify using rational criteria to legitimise political projects. States have attempted to capitalise on and monopolise knowledge production. As appealing as truth may be, it is no less susceptible to the power of rhetoric.

We concluded that the old metaphors of the state as a ship or as a machine should be updated to an understanding of the state as a cybernetic machine. It draws inputs, as it finds it valuable, from the whole of society. It combines the products of different systems into a larger assemblage, using both the law and science as standing reserves. The image of the state as strictly controlling territory is outdated. Instead, it is a spectre floating above a complex, networked environment, inserting itself where it deems that conditions demand it. It regulates the flow of communication not violently but by controlling the choice structures of those within it, both spatially and communicatively. It is not necessary to control subjects such as individual states, and it is enough to shape the environment in which it operates. We saw this during the era of decolonisation. Sovereignty had become the appealing rhetorical justification for this interjection.

The next step is to look at how each operated practically and in detail, having established these two structurally fundamental communication media in the state. European states could colonise because of their political and material power, and this medium affected the expression of international law in that period. The Berlin Conference of 1884 was an act of colonisation in which international law was thoroughly, and from the start, an accomplice.

As an example of the communication between the state and international law through the medium of power, it is a sobering example. In this comparatively short-lived event, we can see the actual operation of our theoretical model. All our parts are there: international law, states, sovereignty and borders, all weaponised towards the purpose of exclusion and extraction. That is why this will be the focus of our next chapter.

Chapter 5

# Case study one: Law, political power and borders

## Introduction

As we know, this work aims to see to what extent international law, during the era of colonialism, expressed and justified its norms through political and scientific discourses. Nation-states' legal and political forms have historically developed so that expansion and enmity have become structurally embedded within them. In previous chapters, we concluded that this could not be accomplished without considering their legal and political forms. Throughout history, the sovereignty doctrine has shaped and justified developments in international law and influenced discourses on inclusion/exclusion.

From the earliest times, border technologies were vital, from the earliest ancient state-formation to the multiplication of nation-states in the modern epoch. In this chapter, we will directly look at how borders, in conjunction with sovereignty, were used to implement colonialism in Africa. In particular, we will look at the Berlin Conference of 1884–1885. It is taken as an example, as it represents one of the great and perhaps last acts of colonial appropriation in our collective history. It was a moment when international law worked hard to lend legitimacy to the actions of European powers, and a tension between what was legally possible and politically desired was tangible. We naturally know the outcome of the Berlin Conference today, and we must thus answer the question of how the law reflected the political ambitions of the attendees.

**How to cite:** Buitendag, N 2022, 'Case study one: Law, political power and borders', in *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town, pp. 123–150. https://doi.org/10.4102/aosis.2022.BK319.05

The other reason the Berlin Conference serves as a useful example is that it presents us with a pinnacle in the achievement of borders, or as Schmitt coined it, 'global linear thinking'.[544] We see in this example that the legal border was essential not only in constructing the nation-state but also in the subjugation of the colony. As the attendees bent over maps with pens and rulers in hand, drawing distinctions and borders, we could see the full efficacy of the border as ruling technology on display.

The chapter proceeds with a historical account of the events concerning the Berlin Conference. We look at the political actors and the ambitions that they bought to the table and to what extent it was expressed in the final agreement. After that, we view the Berlin Conference in hindsight and see the effects well over a century later.

Our analysis then turns to perhaps one of the most famous commenters on the international legal implications of the Berlin Conference, Carl Schmitt. Schmitt had made a name as a brutal realist thinker about the role of power in international law and the importance of space. We identify three important pillars in his thinking surrounding the Conference and discuss them each.

The first is Schmitt's association of the law with power, specifically within his spatial reading of the term *nomos*. Schmitt famously argued that the universalisation of international law, rather than representing the pinnacle of European power, instead meant Europe's loss of a privileged position. This is understandable when one considers Schmitt's notion of power as essentially coercive compared to our more sophisticated idea of power embodied in decision-making and sense-making structures. In this regard, the universalisation of international law can still be read as a triumph. We also take issue with Schmitt's reading of the ancient Greek term *nomos*, which he combines into an amalgamation of law and space. We argue that this is a relatively narrow or opportunistic reading of the term and suggest a more nuanced alternative relating to the Berlin Conference.

The idea of power comes more directly under scrutiny in the next section. For Schmitt, power seems to have two imperative elements. The first is that it can exceed the control of the power holder and that it animates and becomes something in itself. The second element is that it must be exerted spatially or, more specifically, over a territory. Although this has historically not always been the case, today, we live in a functionally differentiated society that is becoming abstracted from territoriality to some degree. Schmitt's conclusion is unavoidable if one remembers that he regards the political system as the primary among all others rather than a flat anarchic plane of systems. Schmitt fails to see that the ideas of law, order and even territory are largely effective as rhetorical constructs.[545]

544. Schmitt (n 271).

545. Or more likely, being a master rhetorician himself, merely failed to point this out.

His final idea that we analyse is the famous friend–enemy distinction. This is the 'other' that is always present and that is always a threat to those who are included. By now, we are familiar with these asymmetric antagonisms. However, this boundary can appear anywhere where identities are seen as essentialist. In this sense, the distinction operates as a highly sophisticated border. Yet, Schmitt exhibits that he is seemingly too married to the notion of the nation and the state. We argue that this is a major blind spot in his observations and one of the important reasons why his thinking has its limits.

Finally, we turn to the effects of this instrumental use of borders by looking at the case of *Eritrea v Ethiopia*. We see a border war hinged on colonial-era borders that were under dispute. However, perhaps because of external influence, the great influence was placed on the parties to resolve their dispute through the demarcation and delimitation of a clear border. Clearly, the thought was that borders could resolve wars. In the end, however, this process was a failure, and questions are asked as to what went wrong.

# The Berlin Conference of 1884

## Cutting up a continent: The historical context of the Berlin Conference

It was a cold, snowy day in November, and the clocks were striking 14 °C. Fourteen Western representatives slipped through the doors of No. 77 Wilhelm Straβe, Berlin, the home of Chancellor von Bismarck. Their intention was simple: discuss the matter of trade and occupation in Africa under a great map of the landmass towering in the room over them. However, it was rather these men who were casting their shadows over the continent. The year had seen Germany claim territories in South-West Africa (now known as Namibia), Togoland (now known as the Togolese Republic) and Cameroon. For six months, the Siege of Khartoum had slowly strangled the life out of British and Egyptian forces in Sudan. In other matters in Washington, it was decided that the world should bisect through Greenwich during the International Meridian Conference. At the International Meridian Conference, parts of the world were brought under the ruler. This event, the Berlin Conference of 1884, sounded in history as the starting pistol for colonisation in Africa, and our ears are still ringing.

There are three separate-yet-inseparable elements to consider when talking about the events of Berlin in the winter of 1884–1885. The outer and most public layer is the humanitarian mission or, more precisely, the language invoked by the parties regarding their stated objectives and endeavours in Africa. Underneath that, the true mission of the Berlin Conference lay, namely, the economic expansion and free trade for European powers in the Congo. Finally, the issue of how to implement it lies at the core and is of most interest to international law: the doctrine of effective occupation. These three, namely,

the political, the economic and the legal, all complement and reinforce one another in what we will eventually see as a project doomed for failure.

The run-up to the Berlin Conference is a picture of politicking and intrigue. It was contested exactly what Von Bismarck, vocally uninterested in colonies, hoped to gain,[546] but his explicit aim was to free trade for Germans in the Congo. Further, it represented the real entrance of Germany into global politics.[547] Clark has recently argued that history was an irreversible process of change for the Germans. Perhaps he saw his nation's participation as part of an inevitable becoming that he could not change but only manage.[548] The French were his biggest ally despite being the most protectionist, and their relationship with the British (the party with the most significant reach in Africa and thus the most to lose) was smarting. The Portuguese were clinging to their possessions in Angola and Mozambique. Yet lest we forget, there is another significant protagonist in this event: King Leopold II of Belgium.

Leopold had ambitions for his modest state to gain a seat at the adult table of European Empires and founded the IAC, applauded by the *Institut du Droit International*, as an instrument to this end.[549] It claimed itself to be a great philanthropic society, seeking not political power but free trade in the Congo,[550] which aligned with the free trade aspirations Von Bismarck had. However, those present indulged in the most benevolent and humanitarian rhetoric at the Conference, proclaiming to abolish slavery – the *cause célèbre* of the day[551] – and bring civilisation, commerce and Christianity to the Dark Continent. The British ambassador in Berlin had ensured that the matter would be a priority during the Conference of the Anti-Slavery Society.[552] The face of old colonialism-through-conquest had changed into something more utopian,

546. Pakenham, Thomas. *The Scramble for Africa*. London: Abacus, 2015, 240. German nobility had historically set their sights on the European stage and was reluctant to engage in colonialism. To the extent Germany engaged in the colonial enterprise, the aim was not to be left behind by its neighbours or as an outlet for its rapidly growing population. See Koskenniemi (n 259), 110, 146; Maier (n 183), 215.

547. Förster, Stig, Mommsen, Wolfgang Justin and Robinson, Ronald Edward. *Bismarck, Europe, and Africa. The Berlin Conference 1884–1885 and the Onset of Partition*. Oxford: Oxford University Press, 1988, 248.

548. Clark (n 324), 120. Clark paints Von Bismarck as keeping himself non-aligned and free from ideology and could easily play different sides off one another to his benefit. Factions were mere players on a more significant historical stage for him, each with an inevitable role to play in the script of social evolution. This should not be understood as progressivism. If the state in its sovereign power was the leading force in history, his role was to pace the plot steadily through constraint and conservation, perhaps reminiscent of Schmitt's *katechon*.

549. Koskenniemi (n 259), 156.

550. Koskenniemi (n 259), 123; Pakenham (n 546), 244.

551. Koskenniemi (n 259), 111.

552. Miers, Suzanne. "Humanitarianism at Berlin: Myth or Reality?" In *Bismarck, Europe and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition*, edited by Stig Förster, Wolfgang Justin Mommsen and Ronald Edward Robinson, 336. Oxford: Oxford University Press, 1988.

underscored by idealistic notions of natural law.[553] Instead of the mobs of conquistadors sent to South America, Africa was won over using individual intrepid explorers like Livingstone and Stanley or lone missionaries, who approached local leaders armed with treaties and pens rather than swords.[554] After all, trade would blossom more effectively under conditions of peace.[555] For Pakenham, this was the event's great significance: Leopold's idealistic language triumphed over the *real- und machtpolitik* of Von Bismarck.[556] Miers writes that the expressed humanitarianism of the delegates was mere political lip service as no concrete proposals were ever made.[557] The *General Act of the Berlin Conference on West Africa* did end up, however, containing a declaration that the maritime export of enslaved people was against international law. It fell short of declaring slavery an international crime, and besides, nothing concrete was implemented following the declaration.

Economically, the same degree of hypocrisy could be found. In the years preceding the Berlin Conference, the Institute of International Law produced a report on the Congo basin, calling for establishing an international commission.[558] This perceived need came to be fulfilled by the Belgian International Association (BIA), which became charged with creating a kind of 'international colony' in the basin.[559] Despite its false pretences of humanitarianism and free trade, the BIA became a monopoly.

Finally, a core of international law was required to make it all work, which came in the shape of the doctrine of effective occupation for new territories. The need for this arose because nations claimed vast swathes of African soil where they had hardly any occupancy.[560] Thus, the conclusion reached that occupation should be *effective*.[561] The principle held that states held rights over territories they effectively occupied through treaty agreements, performed administrative and policing duties, and economically exploited

553. Förster et al. (n 547), 258; Koskenniemi (n 259), 116.

554. Themselves becoming avatars of a kind of travelling sovereignty. Benton (n 498), 33.

555. Geiss, 271.

556. Pakenham (n 546), 254; Koskenniemi (n 259), 189. The events of the Berlin Conference occurred during a period in German legal thought when international law was approached in a 'scientific', or we could say sociological, way. Gone were appeals to religion or nature, and the justification for why nations acted the way they do were looked for in social laws based on rationality and power relations.

557. Miers (n 552), 336. In fact, the British were very eager to make sure that they would be the first to mention the issue of slavery at the Conference (ahead of the Americans) to gain political points at home.

558. Förster et al. (n 547), 247.

559. Förster et al. (n 547), 258.

560. Förster et al. (n 547), 255.

561. Pakenham (n 546), 253.

the land.[562] Some countries were careful to distinguish between occupation and protectorates, the latter implying a right arising through a treaty with native leaders which functioned both in moral and legal legitimacy as well as the curbing of obligations to the territory as the protector does not acquire legal title. As an illustration, English law did not directly apply to their protectorates: slavery was illegal in its colonies but could be legal in its protectorates.[563] The *General Act of the Berlin Conference on West Africa of 26 February 1885* could not clarify the distinction between colony and protectorate. With the doctrine of effective occupation complicating it further, it carried this contradiction within its very core.

This contradiction in justification is a complex one. It was assumed that the soil of the earth was open for occupation by political powers that met a certain criterion of civilisation. By this time, the bar for civilisation was set by the so-called scientific standards, whether through a lack of certain technologies or direct reference to bogus scientific racism. Civilisation also meant that there could be a state, and where a state in the European mould was not recognised, it consequently meant that there was no civilisation to be found. Indeed, the same rights of sovereign rule were not exercised over the people of Africa as in Europe. Fisch states that for Europeans, this meant that Africans were regarded as 'ownerless' from a state point of view, and their right to freedom and political organisation was disregarded. This meant the native populations were treated as ownerless beings, *res nullius* roaming *terra nullius*. As Koskenniemi points out, Africans were regarded as not possessing a concept of sovereignty by not possessing land as property.[564] This meant that the *General Act of the Berlin Conference on West Africa* could treat them not as subjects but as objects of international law and, by extension, as slaves.[565]

Thus, we see that each of the Berlin Conference's three elements was trying to cover the inconsistencies of the other. The goal was to exploit Africa economically through free markets, but monopolies arose; Africa could not be colonised in the traditional sense, but the occupation was needed; the stated goal was the Enlightenment of Africans, but instead, it resulted in their oppression. 'Spheres of influence', a term coined during this period for the first time, came to be established on the continent. The European nations attempted, because of popular political opinion, economic costs and acceptable legal theory, an impossible tight-rope act: *to have colonies without having colonies*, and there was no way it could succeed on all three counts.

562. The other requirement stipulated that other signatories to the *Berlin Act* had to be notified of any claim to African territory. England officially held the position that this requirement was sufficient as it could only be enforced through effective occupation.

563. Förster et al. (n 547), 352.

564. Koskenniemi (n 259), 139.

565. Förster et al. (n 547), 357.

## A feast of the uninvited: An analysis of the Berlin Conference today

As we saw in Chapter 3, the history of international law provides grounds for its theoretical foundation and allows for the platform from which critique can be launched. When international legal theory engages with past legal instruments, we must pay attention not only to its temporal historicity but to the spatial specificity of the text, for 'what serves as "history" at any one moment – including its boundaries and conditions – also has its historical place'.[566] During the time of the Berlin Conference, the field or perhaps the very notion had started to take on its modern character, where cyclical notions of history were abandoned for open, creative and progressive futures. Humankind did not have to suffer history but could make it for itself, and the whole world could be brought under a single chronology.[567] In this light, the trending concepts of the time were civilisation, humanitarianism and internationalism, and international law was eager to play its role in this grand *telos*.[568] Europeans saw their past in other cultures and felt the need to bring them 'up to speed' with themselves through science and empire.[569] International law as a discipline was deeply complicit in this. Discourse within the *Institut du Droit International* was uniformly predicated on an inclusion/exclusion logic, with European superiority deemed central. Sovereignty was regarded as unknown outside of Europe (with the Ottoman and Chinese Empires and a few others being debated exceptions).[570] Africans could be included under universal humanitarianism, but in the realm of cold hard international law, they could be excluded from the family of nations.

There were critical voices over the Berlin Conference as it took place, and there have been many since. However, the effects of the Berlin Conference are still debated today. While for many, it is the root of international law's colonial tendencies in Africa, and others claim that the effects of the Berlin Conference are grossly overstated and that it was an abject failure in reaching its goals.[571] Many international lawyers felt that the atrocities in the Congo occurred

566. Craven (n 155), 2.

567. Craven (155), 8.

568. Or, in more contemporary parlance: technology, human rights and globalisation.

569. Once again, the honourable exception is Reclus. See Reclus, Elisée. *Anarchy, Geography, Modernity: Selected Writings of Elisée Reclus*, edited by John Clark and Camille Martin, 4. Oakland: PM Press, 2013. He further criticises the privileging of the present as the apex of progress over the past as 'chronocentric' and equates it to the 'ethnocentrism' of patriotism. See Reclus (n 569), 188.

570. Koskenniemi (n 259), 133.

571. Pakenham (n 546); Craven, Matthew. "Introduction: International Law and its Histories." In *Time, History and International Law*, edited by Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi, 1–26, 33. Leiden: Martinus Nijhoff, 2007.

exactly because they deviated from sound colonial principles.[572] The last two kinds of accounts seem to make the mistake of taking the sincerity of Conference's stated goals with *bona fides*.

Nonetheless, the *General Act of the Berlin Conference on West Africa*'s formal life ended in 1919 with the *Treaty of Saint-Germain-en-Laye*.[573] How do we explain these disparate opinions of the same events? One of the most compelling contemporary analyses comes from international legal scholar Matthew Craven.

The Berlin Conference occurred during a period in international law theory where one of the leading questions was how to reconcile sovereignty with the notion of binding law. The problem was most carefully probed in Germany.[574] The maturing scientific approach to law attempted to remove morality and power from the equation and, instead, typified international law as coordination between sovereigns. In an 1896 monograph, Paul Heilborn defined international law as an epistemic system whose function cannot be defined externally by political power or morality but can only be done internally by the law itself.[575] While this is, of course, a positivistic manoeuvre, it naturally reminds us of Luhmann and his systematising attempts.[576] What his account lacked, however, was that the influence systems could nevertheless exert over the law through symbolic media.

Craven's answer for the conflicting accounts of the event in Berlin, of how it could be both a failure and simultaneously devastating, is precisely to emphasise the point between the stated aspirations and the mode of their realisation.[577] Drawing upon Foucault's description of the prison system, he claims that:

> Berlin was [...] an institution whose effect may be traced through the apparent confounding of its own expectations. It could be viewed, in that sense, as both anti- and pro-colonial, as an instrument that fostered partition while apparently opposing it.[578]

The Conference gave a legitimate cover for the expansion of colonialism and thus held perhaps more symbolic than legal power. As Karatani points out, 'imperialism only exists in the gesture of rejecting it'.[579]

572. Koskenniemi (n 259), 165.

573. Craven (n 571), 40.

574. Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*. Cambridge: Cambridge University Press, 2009, 181.

575. Koskenniemi (n 574), 187.

576. The work of Heilborn could very well be considered an intellectual precursor. However, it is unclear if Luhmann drew inspiration from this, as his vast network of notecards contains no reference to him.

577. Craven (n 571), 35.

578. Craven (n 571), 35.

579. Karatani (n 163), 28.

There are several paradoxes at play here. Craven first identifies that while the aim of internationalising the Congo basin was to ensure free trade, colonies also discouraged free trade through intense regulation and control. Colonies were also expensive, and it was not accepted universally that economic expansion could be best achieved through colonialism.[580] A second paradox relates to the rise of the political entity of the nation-state and its requirement for nationalism. While, on the one hand, nationalism seems like a natural bedfellow for colonial ventures, the problem of its logic became apparent to many. If the nation-state justified itself through the self-determination of ethnic and linguistic homogeneity, then how can the imposition of its laws on another group be justified?[581] Thus, one could say in a sense that colonialism inevitably carried within its DNA the code to its self-destruction. These paradoxes extended to international law itself. No matter which legal position one took in the debates around the Conference, anyone can be construed as either a critique or a defence of colonialism.[582]

In any case, it is at this point where Craven inserts the novelty of his analysis. The European powers had the double goal of economic expansion without corrupting the institutions of self-determination. Thus, the Berlin Conference allowed for economic growth while at the same time curtailing political expansionism, not by prohibiting it but by rendering it fruitless.[583] Through internationalisation, effective colonisation became unviable. Even the gross failure of the humanitarian ideals of the Belgians in the Congo was not a failure of the plan. However, it should be regarded instead as a natural extension of it. Once the kingdom had invested in the infrastructure of extraction, it had to be policed and administered. Eventually, the economic goal of free trade ended in monopolies, and most tragically, the philanthropic end to help Africans led to the murder of 10 million Congolese.

In Craven's analysis, apology and utopia become two parts of the same coin. Economics had to rid itself of old colonial rule to expand, but in the end required effective occupation, policing and administration to protect it. On the contrary, the old colonial system could only survive insofar as it was imbued with a philanthropic mission not of subjugation but of bringing the exploited into the fold of civilisation. Jessop reminds us that a state can only appear successful within a spatiotemporally bound unit: at one place at a time. The ungovernable is ex-communicated to the outside, and for every 'zone of stability', there exists 'future zones of instability'.[584] This echoes the

580. Craven (n 571), 52.

581. Craven (n 571), 52.

582. Koskenniemi (n 259), 142.

583. Craven (n 571), 53.

584. Jessop (n 104), 181.

nuanced reading of Miéville on the subject of apology and utopia, which also proposes a third way, namely, that 'international law *is* law, *is* effective, but cannot maintain justice and order',[585] making conflict and exploitation, not the ailments that international law cures, nor making it pathological to law. However, that international law is part of the very process, the autopoietic loops or algorithms we encountered in Chapter 3.

Colonial international lawyers had placed civilisation and sovereignty together. Ideologically and legally, this was untenable. While the parties at the Berlin Conference could, for a moment, pretend to collaborate in a universal programme, their interests quickly conflicted. International lawyers of all creeds could justify their nation's scandalous projects while decrying those of others. Despite its dubious grounding in scientific observation, there merely was never a single 'civilisation' to speak of, and sovereignty was a legal tool for organising European conflicts rather than an export to the colonies. Neither civilisation nor sovereignty had any fixed concretely fixed legal meaning, and it could be said that it was used at the time as little more than a rhetorical device.[586] Only after the *S.S. Wimbledon, Britain et al. v. Germany PCIJ Series A, No. 01* judgement of the Permanent Court of International Justice in 1923 did the term become filled with actual legal content.

In the end, sovereignty served an ideological function little beyond lending European power justification to act outside of its own rules on the international stage. However, after the decolonisation movement, the doctrine became essential for new states to affirm their independence. As we saw earlier, the 1950s and 1960s represent the final victory of the state-form as a political organisation.[587] The inclusion/exclusion logic, rather than having been dissolved through all-inclusiveness, has been solidified in the state. Its form is now so entangled in world society that the horizon bears no evidence of its demise.

## Carl Schmitt and the Berlin Conference

The words of Miéville in the previous section bring us to the writings of Schmitt. Miéville singles him out as the best articulator of international law in this third position. In literature discussing the controversial Schmitt, it is traditional to lace the text with caveats regarding his Nazism, with opinions divided on whether his work should be denounced on those grounds or whether there is something to be salvaged between the baby and the bathwater. Luhmann, the primary figurehead of this work, also held him in low regard. When asked

585. Miéville, China. *Between Equal Rights: A Marxist Theory of International Law*. Chicago: Haymarket Books, 2005, 25.

586. Koskenniemi (n 259), 169.

587. Koskenniemi (n 259), 175.

about it during an interview: 'I happen to find that Carl Schmitt is overrated, at least as a jurist. At most, he was a conceptual historian'.[588]

Recently, many on the left have attempted to reclaim some ideas from Schmitt, most notably Chantal Mouffe and, in international law, Martti Koskenniemi,[589] while more recently, Bruno Latour wrote that Schmitt 'can be likened to a poison kept in a laboratory for the moment when one needs an active principle powerful enough to counterbalance other even more dangerous poisons: it is all a matter of dosage!'[590] Again it is Miéville who offers the most insightful comment on the matter, denouncing the much-talked-about left appropriation of Schmitt, noting that it seems rather like Schmitt's appropriation of the left.[591]

Nonetheless, I deem it necessary to devote a section of our discussion to Schmitt. Although he cuts a tragic figure, and we do not need an anti-Semite to teach us that politics consists of conflicting parties, I include him for three reasons. The first is that he is a lawyer and thinker in general who was greatly concerned with the question of power. He wrote explicitly about the Berlin Conference in *Nomos of the Earth*. We will attempt to fuse his ideas around the Conference and of power with how we already understand it as a symbolic medium. Second is that he famously anchors international law fundamentally within a spatial order. It is worth mentioning that some scholars are reviving this specific spatial aspect of his thought for contemporary issues. The final reason to reanimate Schmitt is to place him within a historical trajectory concerning Luhmann. While we already know he was not a follower of the older scholar, some have argued that Luhmann wrote in conscious contrast to Schmitt.[592] I want to controversially argue that in systems theory, we find a refinement of certain Schmittian concepts, or put differently, some of Schmitt's ideas can be seen as proto-Luhmannian.[593] Neither existed in a vacuum, and we can trace, albeit less clearly in Luhmann than in Schmitt, conceptual genealogies from the history of German international legal scholarship back to at least the 19th century.[594] The motivation behind this is to show international

588. Luhmann, Niklas. *Warum haben Sie keinen Fernseher, Herr Luhmann? Letzte Gespräche mit Niklas Luhmann*, edited by Wolfgang Hagen. Berlin: Kulturverlag Kadmos, 2011, 27. Translated from German by a researcher.

589. Mouffe (n 248).

590. Latour, Bruno. *Facing Gaia*. Cambridge: Polity, 2017, 228.

591. Miéville (n 585), 27.

592. King, Michael and Thornhill, Chris. *Niklas Luhmann's Theory of Politics and Law*. Hampshire: Palgrave MacMillan, 2003.

593. It must be noted that even though Luhmann's theory is strikingly original, he was never silent on his multiple inspirations, never having counted Schmitt among them. What is argued here is that there is an intellectual lineage. It might be conscious or not, and it is certainly minor. However, it is not implausible.

594. For an overview, see Chapter 3, Koskenniemi (n 259).

lawyers who regularly deploy Schmitt's arguments that there are more sophisticated theoretical tools at hand in the much less familiar Luhmann. At its heart, I argue that their similarity lies in their formulations of binary distinctions being deployed within society, but that in Luhmann, we find the more sophisticated performance of this operation.

Therefore, let us turn to the three important topics we have identified – space, power and social systemic concepts.

## The Berlin Conference and the loss of *nomos*

For some, the Berlin Conference represents the peak display of the arrogance of European states in placing themselves in the centre of the globe.[595] For Schmitt, however, it was exactly the opposite, the moment where Europe squandered its primacy and centrality. It represents an event in the full philosophical sense of the term[596] for international law. He considered international law as a purely European concept and said the Conference was exactly the moment where it lost its uniquely European character and decentred itself within the world by raising other territories to equal status.[597] Legally, this rests on the notion of effective occupation.

Schmitt argues that before the Berlin Conference, Africa was home to a wide variety of treaties between local populations and European nations, colonial societies and private actors. The functions of these treaties covered an array of interests, from settlement to trade to scientific study and exploration.[598] The *Ius Publicum Europaeum* had, according to Schmitt, always rested upon the distinction between the European and non-European. The *General Act of the Berlin Conference on West Africa*, however, changed that by formalising the status of colonial territories between European states.[599] At the moment of the Conference, European lawyers saw the need to project European-style sovereignty onto Africa. This was deemed necessary to deal with the relations between European states and the colonised territories, but also with jurisdictional claims between the states themselves (or as some kind of combination, as at least one international lawyer felt that inter-European squabbling over territory would undermine the image of a

595. Hardt and Negri (n 40), 76. They argue that eurocentrism could crystallise exactly because Europe became aware of its exterior, in what Mouffe (n 248) would call the 'constitutive outside'.

596. Žižek, Slavoj. *Event: A Philosophical Journey through a Concept*. London: Penguin Books, 2014.

597. Schmitt (n 271), 214.

598. These include agreements for the purpose of cartographic surveys, which is of interest in light of the preceding section.

599. Schmitt (n 271), 216.

civilised front to Africans).[600] Colonised African soil came to be considered the extended territory of European states through occupation, thus shifting the soil from the exterior of public international law into its interior. Invading a colony would now amount to invading the motherland. Schmitt identifies a certain paradox here in that legally, there was still a distinction between the European territory and the African territory – two different categories but recognised by international law. He summons the familiar centre/periphery distinction between the metropolis and the colony.

On the contrary, liberal economic thinking called for the parity of different spaces. In Schmitt's view, this conflict of interest perhaps made the European states give too much away. To quote him directly:

> The whole enterprise was a helpless confusion of lines dividing spheres of interest and influence, as well as of failed amity lines simultaneously overarched and undermined by a Eurocentrically conceived, free, global economy ignoring all territorial borders. In this confusion, the old *nomos* of the earth determined by Europe dissolved.[601]

Thus, Berlin represents to him the transformation of a Eurocentric international law into a genuine one. Craven points out that historical accounts of international law as far as 1795 placed international law as a product of European cultural identity and history and rooted spatially in the soil of Europe.[602] It is argued in *Nomos of the Earth* that the traditional global order of the earth became generalised and universalised into 'empty normativism'.[603] The distinction between *ius inter gentes* and *ius gentium* faded, and international law's emphasis turned to the relations between states. Schmitt points out that legal scholars 'naïvely' saw the global spread of European law to all states as a victory of its citizens when instead it was knocking Europe from its pedestal. What was left was not a law of the European community but a loose system of norms that regulated the factual relations between heterogeneous states when the distinction between civilisation/barbarity became legally insignificant.[604]

Economic liberalism had been the downfall of the *Ius Publicum Europaeum*. The paradox arising between economics and politics was clear: free commerce

600. Koskenniemi (n 259), 121, 148. This also further shows the rhetorical element inherent to the discourse around 'civilisation'.

601. Schmitt (n 271), 226.

602. Craven (n 155), 3. In his reading of Ward, he points out that this international law explicitly represented the cultures and traditions of Europeans, excluding what was non-European. It is also at that point where Craven points to the recognition that international law was differentiated and dispersed from other academic fields like politics and economics.

603. Schmitt (n 271), 227.

604. Schmitt (n 271), 234.

but within distinctly delineated territorial states. As Schmitt points out, it was not a territorial boundary but one between spheres of social participation.[605] At this time, the sharp distinction between internal domestic and external international law becomes more sharply drawn. Furthermore, in this period, the law shifted from the notion of individual domicile to the principle of national citizenship.

Thus, Schmitt's views on the Berlin Conference can be summarised as follows: The Conference represented a great shift in the global order. The liberal economic system had caused the legal system (specifically the *Ius Publicum Europaeum*) to change the legal status of certain territories from external to itself to include the whole globe. However, political order needed to be maintained for economic exploitation to function. Therefore, the effective occupation had been introduced, and to justify it, the legal distinction between civilisation/barbarity had to be done away. This led to the further consolidation and spread of the abstraction that is the modern nation-state, while at the same time, economics functioned more and more independently of the state.[606] For Schmitt, the loss of the 'outside' led to a confused international law of general, universalised norms with no coherent spatial order, which led to the First World War (WWI).[607]

As we can see, for Schmitt, the law is tied to its spatial or geographical mooring. He supported this through an intellectual history of the ancient Greek term *nomos*, mostly extrapolating it from the work of the French linguist Emmanuel Laroche. In Schmitt's *Nomos of the Earth*, the work's title indicates what we are facing: the law of the earth, to be understood literally and concretely as a theatre of spatiality and as the precondition and origin of the law. Schmitt devotes substantial attention to the etymology and explication of the term. I will attempt to summarise his findings briefly.

Drawing on Laroche, Schmitt posits that the Greek word *nomos* is derived from the verb *nemein*, meaning 'to take', and is the root of the German *nehmen*,[608] with *nomos* being the correlate of *namen* in German.[609] The second meaning of *nemein* is 'to divide'.[610] The third and final meaning of *nemein* is pasturage. Schmitt uses these three meanings as the successive phases of

605. Schmitt (n 271), 236.

606. Schmitt (n 271), 255.

607. Schmitt (n 271), 239.

608. English seems to be the only West Germanic language that does not have a correlate, although it is still present in all others: *nemen* in Dutch, *neem* in Afrikaans and *nimme* in Frisian. *Namen* has its partner in the English *name*, both as a noun and, importantly, in this case, as a verb.

609. Schmitt (n 271), 326.

610. This meaning Schmitt relates to the German *Urteil*, which can be read as something like 'original division' but also as judgement.

human activity on and over space: to take or conquer, to divvy up and fence off, and finally, to produce with and exploit through toil. Finally, the appropriator names his booty, for 'land appropriation only is constituted if the appropriator can give the land a name', for power has to manifest visibly, symbolically and through ceremony.[611] This forms the basis of property ownership, the 'original constitution'.[612] By the time of the Roman Empire, Cicero translated the Greek *nomos* into the familiar *lex*.[613]

Schmitt recognises that this appropriation of land is synonymous with imperialism, colonialism and regression. However, he argues that in each age of humanity, there had been an execution of the threefold action of *nemein* by all of the great civilisations. Each considered himself the centre of the world, and whatever lay outside its boundaries was open to conquest.[614] However, as these boundaries expanded, we are now in an age of complete understanding of the terrestrial space of our finite globe, and global unity is a foregone conclusion.[615]

Through the enactment of the *nomos*, human society can plant its feet on the earth to create order and orientation. The appropriation of land sprouts the precondition for any ontological judgement, creating order through law. From its division, humans orient themselves to the distinction of internal and external, the former representing the order and title of international law and the latter signifying chaos.[616] It is relevant in this sense that Schmitt writes that in its orienteering function, *nomos* can be described as a wall.[617] In Chapter 3, we made a similar argument that this process has kept reproducing itself as new founding acts of law, perhaps reminiscent of the famous law-creating violence Walter Benjamin wrote about, and Schmitt predicts this process to keep reoccurring. He points out that the functional weaponisation of law as a positivistic system by modern states only occurred in the 19th century to exclude certain parties from law-making, but that *nemein* still lies at the black heart of the law.[618] This order-through-appropriation can occur within existing international law or, when it does not, it happens outside of it and creates a new *nomos.*

611. Schmitt (n 271), 348.

612. Schmitt (n 271), 345.

613. Schmitt (n 271), 342.

614. Schmitt (n 271), 352.

615. Schmitt (n 271), 354.

616. Schmitt (n 271), 45. In this regard, Schmitt writes: 'The traditional history of international law also is a history of land appropriations'. Schmitt (n 271), 48.

617. Schmitt (n 271), 70.

618. Schmitt (n 271), 78.

The second spatial concept that Schmitt brings to international law is what he calls global linear thinking. This means that when the entire globe at once became known, any notion of centre/periphery had to be discarded, and new divisions and distributions had to be made. Schmitt makes the connection with cartography by pointing out that politics also instrumentalise scientific maps. Indeed, he writes, 'even arithmetic and geometric certainties become problematic if they fall within the sphere of the political: the intense friend/enemy distinction',[619] which will become relevant again in the next chapter.

The reader will, by now, undoubtedly understand that the shadow cast over all of this can be traced and return us to the nation-state. International law is, after all, the law between states, and one should remember that the state is a highly contingent phenomenon, what Schmitt calls a 'singular historical particularity', which arose to secularise administration in Europe, and the effect changed the spatial order.[620] As we know, it placed overlapping rights and rules from various sources (feudal lords, Church, etc.) into an ordered and centralised structure within bordered territorial jurisdictions. Through time, the justification for nation-states has become inverted; the argument is that (artificially created from the top-down) cultural and linguistic groups should have their states for sharing the same soil. As such, this was an internal ordering, but it made external relations with similar territorial orders possible. It also had the important function of bracketing war in Europe, meaning wars were either civil, meaning contained within the borders of one territory, or interstate wars between two like entities as *justi hostes*. This also made it possible for European states to create the 'zones of future instability' and justify their colonialism on other continents through legal and scientific discourse that claimed that those populations were 'uncivilised' to be treated as outlaws that could be annihilated.[621]

Whether one regards Schmitt's writings as imperialist or realist, scholarship today has proved that his reading of the term *nomos* (so fundamental for the ideological justification of his arguments) was essentially wrong. To the extent that he typifies *nomos* as law or order, it is indeed difficult to read such a juridical sense into the ancient Greek milieu in which the word appears and is probably a late interpretation.[622] Second, the word comprises an element of distribution, but again Schmitt probably 'arbitrarily' stretches it too far by making the spatial element primary.[623] In fact, one of the earliest meanings of

619. Schmitt (n 271), 88.

620. Schmitt (n 271), 127.

621. Schmitt (n 271), 142.

622. Zartaloudis, Thanos. *The Birth of Nomos*. Edinburgh: Edinburgh University Press, 2019, 140.

623. Zartaloudis (n 622), 119.

*nomos* in the sense of distribution rather has the connotation of evenly distributing a grazing herd over a theoretically unlimited pasture,[624] a meaning that could lead to a much more egalitarian consideration of the word Schmitt entertains.[625] In sum, he takes a wealthy family of words and meanings and essentially strips them down for his ends.

Reading *nomos* in the context of the Berlin Conference remains meaningful if one considers some of the many nuances that Schmitt discards. It remains true that *nomos* carries a meaning of distribution or handing out, accompanied by a measure of power.[626] It implies a measure of ritual, more specifically, a feast between ancient leaders. At such an event, the meat of a sacrificial animal was cut, divided, and distributed among leaders according to political rank or power – an act reserved for free men.[627] These feasts were the moment in which 'a guest's social status could be affirmed, honoured or negotiated through the use of distribution practices', according to Zartaloudis.[628]

Is this not the more interesting way to read the *nomos* of the Berlin Conference? The famous political cartoon of Von Bismarck, knife in hand over the cake, reflects something of this. Within the ritual provided by international law, these powerful, free men came to a feast to distribute a sacrifice to reaffirm and perhaps realign their power relations with one another. Yet, as one of our earlier titles hinted, this feast was, in the end, a feast of the uninvited. We know this much about rituals: they only deserve that name if they bear repetition. Han writes the following of Schmitt's state: 'The activity of this sovereign consists in the repetition of his name and of "I will"'.[629] But what repeats always comes back slightly differently. The rules and laws of the ritual had to be somewhat modified and slightly adjusted to be still relevant to the changing times. Was this not the *nomos*, or even the law, of the Berlin Conference?

## Spatial power

We can now note that for Schmitt, political power and law are intertwined, co-constructing one another on a spatial stage.[630] The state has contingently

624. Zartaloudis (n 622), 141.

625. As we spoke of the god Hermes in Chapter 2, it is interesting to note here that he was also known as *Nomios*, the god of herds and flocks, in conjunction with being associated with boundaries and communication. Zartaloudis (n 622), 147.

626. Zartaloudis (n 622), 3.

627. Zartaloudis (n 622), 21.

628. Zartaloudis (n 622), 24.

629. Han (n 448), 62.

630. Han (n 448), 67.

arisen from land appropriation and exercising power within its borders: this power is neither natural nor transcendental but arises, for Schmitt, from the Hobbesian need for protection, and the state is trusted to do this, a notion that we have already rejected. Nevertheless, this ties the protected subjects into a political unity that gives their consensus to the state.[631] However, he admits that with time, power becomes something more than this, having a kind of 'surplus value' and independent objective.[632] It remains important that power, at the end of the day, still is exercised through the hand of individuals who are limited by their understanding and are subject to indirect influence by those selected few who have their ears. The power-wielder becomes alienated from those he exerts power over and *vice versa*. Within our framework, we could say that the political system has its function, and only its autopoiesis is at stake. It is only natural that it should keep growing and growing in complexity, far beyond the control of a single or even many human beings.

Another question is morality, whether power is good or evil. Schmitt points out that a man from the 17th century would have held that power is good, but that from the 19th century, one will probably find the opposite position being held. What is the reason for this? He argues that it is exactly the transformation of power from a natural or transcendental state to the bare power wielded by the secular state. Power is not neutral; it is not what the wielder makes of it; as I have said, it has its objective, and again I quote at length:

> The human arm that holds the atom bomb, the human brain that innervates the muscles of the human arm is, in the decisive moment, less an appendage of the individual isolated human than a prosthesis, a part of the technical and social apparatus that produces the atom bomb and deploys it. The power of the individual power of holder is here only the perspiration of a situation that results from a system of incalculably enhanced division of labour.[633]

He calls the state the first modern machine, a Leviathan or *Übermensch* or Super-Power (or, as we argued in the previous chapter, a cybernetic machine), the *machina machinarum*, with all the little human figures scurrying around to produce it. Power exists in a different reality from mere individual humans.[634] Thus, to call power good, evil or neutral is naïve: it exists beyond those human categories of comprehension.

What is the implication of the territorial state in a modern, functionally differentiated society? Jessop points out that the relationship between state and territory has at least two roles: a territory is first the object of governance,

631. Schmitt (n 524), 31.

632. Schmitt (n 524), 32.

633. Schmitt (n 524), 45.

634. Schmitt (n 524), 47.

but it is also its means, by defining the internal and external, and allows the selectivity of communications or ex-communications.[635] However, he breaks from Schmitt in giving territory primacy to the features of the state, just as Luhmann breaks from Schmitt about the primacy of the political system. The role of territory, just like the farm since the beginning of agriculture, is bound and then reduces complexity. Where in stratified societies, this allowed for a core and periphery dynamic to exist, functional differentiation allowed the state to overcome spatiotemporal limits and cover its entire territory equally and at all times.[636] The problem of time and space must be conquered to transform from nomadic tribes or chiefdoms to early states.[637]

Today's modern state falls between Agnew's territorial trap and the networked communication system. Schmitt was perhaps too invested in the idea of power as being reducible to pure violence. Such violence still requires a degree of materiality to function. What he failed to see was that power could also be communicative. In the case of the colonisation of Africa, these went together. Undoubtedly, ghastly violence was committed to enforcing imperial rule. However, what was also crucial for European leaders was that the communicative rhetoric of the process was convincing to others. The ritual of sound international law and the philanthropic language of the civilising mission, the sharing of scientific advancement, had to remain intact and be seen.

## The border between friend and enemy

Schmitt starts one of his most famous essays by stating that the state cannot be disaggregated from the political and that a state consists of a group of *people* enclosed within a *territorial unit*.[638] This, however, does not mean that politics is the exclusive domain of the state. In the modern democratic nation, politics necessarily interpenetrates both the state and society. This means that 'apolitical' social spheres such as education or economics become politicised, implying that all aspects of society are potentially political.[639] For Schmitt, this signifies the primacy of the political system above other social systems and creates the potential for the state to totalise society. In the state of exception, the state continues even when the law disappears.[640] In stark

635. Jessop (n 104), 124.

636. Jessop (n 104), 129.

637. Jessop (n 104), 130. An interesting detail regarding this is the level of bureaucratisation and hierarchy needed. Jessop reports that chiefdoms usually have only up to three levels of hierarchy in political decision-making, even early states exhibit four or more levels.

638. Schmitt (n 247), 19.

639. Schmitt (n 247), 22.

640. Han (n 448), 61.

contrast to Luhmann, Schmitt argues that the separation of certain social spheres (he explicitly mentions religion, culture, economy, law and science) was antithetical to politics as a 19th-century project that could not be upheld anymore by 1932.

However, even in a total state, Schmitt acknowledges that the political still rests upon its particular distinctions to imbue social phenomena with political meaning. The distinction that he identifies here has become perhaps his most notable contribution to theory and is worth quoting at length:

> Let us assume that in the realm of morality the final distinctions are between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable. The question then is whether there is also a special distinction that can serve as a simple criterion of the political and of what it consists of. The nature of such a political distinction is surely different from that of those others. It is independent of them and as such can speak clearly for itself. The specific political distinction to which political action and motives can be reduced is that between friend and enemy.[641]

He continues that this distinction is entirely independent of others in that the enemy could be good or evil, beautiful or ugly, and even profitable to do business with him. However, this enemy remains 'intrinsically alien' when all is said and done.[642] For Schmitt, the enemy is always found in a society of humans outside of one's society. He traces this antagonism through Plato's description of wars between Hellenes and barbarians to Europe's struggles between Christian and Islamic civilisations. The enemy is not simply one who disagrees with, but, in the end, those who are so completely other that one is prepared to resort to violence and kill them.[643] Any distinction or antithesis can become political if it moves one group strongly enough to want to destroy the other. The political difference thus implies recourse to war ultimately. Schmitt argues that a world without war would also mean a world without neutrality and politics.

This ultimate recourse to matters of life and death raises politics to the prime space of human activity for Schmitt, transcending all other social associations.[644] But we must be careful to remember that politics as a social sphere is always divided into at least two polities, the friend and the enemy. In a world with no enemies, there can be no politics. A *uni*versal state that encompasses the whole world and all people is definitionally impossible.[645] Politics implies differentiation. If we remember that a distinction is a boundary

641. Schmitt (n 247), 26.

642. Schmitt (n 247), 27.

643. Schmitt (n 247), 33.

644. Schmitt (n 247), 47.

645. Schmitt (n 247), 53.

with two sides, the friend/enemy distinction works as inversely reciprocal through indication and negation. It is exactly this mutual negation that creates the conditions for war. The so-called humanitarian wars are thus dangerous, seeing that the enemy must necessarily be inhuman. They do not simply have to be defeated into retreat into its boundary but must be utterly conquered and eradicated with all means being justified: 'whoever invokes humanity wants to cheat'.[646] What makes this situation more dangerous is when the law is invoked to justify one's will to power, and here law functions as a political instrument. Schmitt believes that the law is always the instrument of those who hold the most power.

If friends and enemies can be distinguished who hold differences over which they are prepared to go to war, politics and the state cannot be exterminated. The political sphere will always be relevant and cannot subside into legal regulation or mere economic competition and cooperation. A 'peaceful' world order based on economic cooperation (or sanction) is no less warlike or imperial in its force. Those who resist are labelled as disturbers of the peace, or even the outlaw of humanity, the *homo sacer*.[647] This only shows that the political distinction of friend/enemy, and indeed politics itself, cannot be extinguished.[648]

Schmitt wrote with the antagonism between nations in mind but could imagine differences even within the same nation. This precious distinction or border-drawing between the friend and the enemy is of interest to us here. In a sense, this border is very modern (as we saw in Chapter 3) in that it is not always concrete but can float around and manifest itself for one moment and then perhaps be resolved. On the contrary, Schmitt fears a world with no borders, and plausibly. The question then is, what would be worse: a return to the power-play of Berlin or the establishment of a global Leviathan? Or rather, is this problem, not the one that is caused just by the logic of the nation-state, where the only options become enmity or scaling up to universalism? Is this perhaps the blind spot behind this distinction? After all, inclusion/exclusion hinge on *something* – a historically contingent and socially constructed something – that has already been embordered. Despite his thought-provoking ideas around power and space, this preciousness of Schmitt is, among other reasons, why his thought can only take us so far.

646. Schmitt (n 247), 54. In this light, he criticises calling the *League of Nations* either universal or international as it still regulates the relations between states that are potentially friends and enemies. He cites the example of the Third International being genuinely international in that it transcended the borders and territorial integrity of states.

647. In this regard, one must point to the work of Giorgio Agamben, probably the most influential thinker on Schmitt in contemporary literature.

648. Schmitt (n 247), 79.

## Border regimes

Territorial borders are best viewed as a medium and outcome of historically specific strategies and ceaselessly renewed attempts to shape the geographies of political-economic activities within and between states.[649]

In its attempts to analyse the world, philosophy or theory has always contained within it a certain tension. If meaningful observation relies on two primary axes, namely, time and space, the tension often lies in the thesis that we are privileging one over the other.[650] Of course, there are ways to resolve this tension by introducing a third distinction, one example of which is Heidegger's Being. However, we can do it more simply and do not necessarily require all of the intellectual baggage that that notion comes with. If we want to understand borders as a spatial construct that operates in time (a requirement for all operations),[651] one helpful way to think about them is in terms of *movement*.[652] We already understand that borders are used to filter the movement of information between systems. As material borders, they regulate the movements of objects and persons. But what Nail's valuable analysis makes us aware of is that borders are mobile either by themselves, an observation that already haunted Bartolus,[653] or through the actions of others.

We saw how historically artificially constructed national borders have been and that they have been quite unstable over time. Even during periods of stability, their meaning is still subject to change. To put it more simply, they have kept moving over space, time and meaning. Borders are never made once-and-for-all but are, in every moment, dynamically being remade. This means that even in the operation of inclusion/exclusion never has its final say – an object is never done being included or excluded, and one's fortunes can change in a moment.[654] Movement captures this restlessness and points us rather to thinking in terms of circulation or return. Are one of the defining problems of borders today, if one thinks of a refugee, for example, not the fact that one is suspended in an indeterminate zone of being neither included nor excluded? It is thus appropriate to say that borders regulate movement by setting the conditions of inclusion, exclusion and redirection, creating a dynamic circulation of people, objects and communications.

649. Jessop (n 104), 43.

650. Soja (n 182).

651. Luhmann (n 50), 142.

652. Nail (n 35), 5. Nail calls this approach 'kinopolitics'.

653. Cavallar, Osvaldo. "River of Law: Bartolus's Tiberiadis (De alluvione)." *A Renaissance of Conflicts: Visions and Revisions of Law and Society in Italy and Spain*, edited by John A. Marino and Thomas Kuehn. Toronto: Centre for Reformation and Renaissance Studies, 2004, 31–82. See Chapter 6 for the exposition.

654. Nail (n 35), 7.

## The Eritrea-Ethiopia Boundary Commission

The impact of the Berlin Conference and the colonisation of Africa, in general, remain a source of conflict today because of the various sovereignty and border regimes left in their wake. A typical case-in-point is the long-lasting tension existing between the states of Eritrea and Ethiopia. While the latter's long-standing independence is somewhat of an anomaly on the African continent, Eritrea has a more typical colonial history, having been controlled at some point or another by Egypt, the Ottoman Empire and Italy. Featuring a brief conflict between Italy and Ethiopia towards the end of the 19th century, a peace agreement was reached, and three border agreements were signed in 1900, 1902 and 1908, respectively.[655] The British took control of Eritrea during the Second World War (WWII). In the post-war agreements, the United Nations (UN) General Assembly classified Eritrea as an 'autonomous unit' federated under Ethiopian sovereignty. The then-Ethiopian emperor, the famous Haile Selassie I, spent most of a decade attempting to undermine Eritrean sovereignty, finally annexing it in 1961. Unsatisfied with this turn of events, Eritreans quickly organised resistance against Ethiopia and a protracted war of independence ensued. Eventually, the Eritrean liberation movement was successful, and by 1993, it gained independence and was accepted into the UN. However, the exact location of boundaries between the two states remained in dispute, and another conflict broke out between 1998–2000.[656] After the declaration of cease-fire in what became known as the *Algiers Agreement* (founding a Boundary Commission), a demilitarised frontier zone was formed. According to Article 4 of the agreement, the Boundary Commission was to be established to delimit and demarcate the disputed boundary under the Permanent Court of Arbitration.[657] The Boundary Commission's finding was published on 13 April 2002; however, it would not mark the end of the troubled relationship between the two states.

The legal sources for the arbitration were already indicative of the mark that colonial history had imprinted on the dispute. Both parties had recognised the authority of the Organisation of African Unity's (OAUs) Cairo Summit (in which colonial borders were recognised) and that of 1900, 1902 and 1908 treaties between Italy and Ethiopia. Under the rule of contemporaneity, the Commission was bound to interpret these treaties under the conditions that

655. Decision regarding delimitation of the border between Eritrea and Ethiopia. Permanent Court of Arbitration. 13 April 2002, 104.

656. Gray, Christine. "The Eritrea–Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?" *The European Journal of International Law* 17, no. 4 (2006): 699–721, 700.

657. Shaw, Malcolm N. "Title, Control, and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission." *The International and Comparative Law Quarterly* 56, no. 4 (2007): 755–796, 758.

prevailed during their signing,[658] but not disregarding current scientific evidence deemed relevant. Another interesting point of the case was the staggering number of maps submitted by the parties – 281 in total[659] – of differing accuracy and value, including ancient maps to prove state practice over a century. Naturally, many maps were also sourced from outside, particularly those of Italian colonial origin.

The Permanent Court of Arbitration reiterated its usual cautious approach towards maps as evidence. It is common knowledge that maps can be self-serving or even contain bona fide mistakes and inaccuracies, but they can form part of a treaty and express the will of states. However, the Court admitted that maps could have a law-creating effect in themselves: if the map of one state makes a significant claim to the territory of another, and such a state does not react sufficiently, the publication of such a map could have 'significant legal consequences'.[660]

The Boundary Commission's decision on 13 April 2002 had interpreted the three colonial treaties sufficiently to give a delimitation order between the two parties. This was presented in the rather classical, early modern form of textual tables we had seen before. It further commissioned an independent body to enact the physical demarcation of the border on the ground. Further, it commissioned a definitive map to be drawn of the region.[661]

Had this been the end of the dispute, the case would have been rather unremarkable. However, subsequently much occurred that raises questions about arbitration regarding borders, their demarcation and the legacy of colonialism. Shortly after demarcation commenced, first Ethiopia, and subsequently Eritrea, stopped cooperating with the independent Commission.[662] Given that initially, both parties entered the arbitration willingly, it is worth questioning why the decisions were met with such difficulties. Ethiopia was known to be unhappy with losing territory to Eritrea, and the latter was disillusioned by the ineffectiveness of the Boundary Commission and the expensive war reparations it was ordered to pay. Nevertheless, there are additional conclusions to be drawn from this episode.

Perhaps one of the most important shortcomings in the process was that a very swift border resolution was initiated to establish peace between the two states. Thus, one infers that it was thought that the instrumental use of a good border could make good neighbours without necessarily considering the

658. Decision (n 655), 109.

659. Decision (n 655), 113.

660. Decision (n 655), 114.

661. Decision (n 655), 175.

662. Gray (n 656) 708; Shaw (n 657), 786.

fuller context. For example, it has been argued that the border negotiated by Italy and Ethiopia was never intended by the colonial power to be a final boundary. However, it was a temporary frontier from which further military campaigns could be launched,[663] a strategy we have seen being deployed since ancient times. Thus, a tactical colonial frontier in the form of Eritrea became the basis for the sovereign territory of a modern nation.

One would also make a mistake regarding that conflict arises purely from the location of the border itself, that it is purely a matter of economics or resources and that a new border could instrumentally be applied to achieve peace. It disregards the symbolic nature that the contested territory has for parties.[664] In all, the speed at which the bordering process occurred seemed to have done more harm than good.[665] It has been speculated that the parties agreed to such a speedy arbitration perhaps because of external pressure from the international community[666] (even the Border Commission had been suggested by the mediators rather than the parties themselves), and it might explain why the process ended up having little legitimacy for the parties concerned. One cannot help but get the feeling that, once again, borders are swiftly and decisively trying to impose themselves from the outside. It should, actually, come as only a tiny surprise that Ethiopia's rejection of the Boundary Commission represents the first such case.[667]

What further enforces the impression that the border was applied externally and instrumentally as a legal device towards conflict resolution rather than as a reflection of the concrete needs of communities on the ground was that the Boundary Commission contained only lawyers and no geographers.[668] While the Court had confidence in its ability to adjudicate the accuracy and relevance of maps as evidence, it also rejected the idea that it required communication from the science system on the matter of delimitation and demarcation. While the Commission could refer to the UN Cartographic Unit as it deemed necessary, the role it played was primarily only in providing maps.[669]

In the end, the state parties could not cooperate sufficiently with the Boundary Commission (reminding us of peasants being hostile to the royal surveyors of early modernity), which was, in the end, driven to complete their

663. Anebo, Lantera. "The Fallacy of Virtual Demarcation as a Primary Scheme of International Land Boundary Setting: Why the Eritrea–Ethiopia Boundary Conflict Remains Unresolvable?" *Willamette Journal of International Law and Dispute Resolution* 24, no. 2 (2017), 266.

664. Pratt, Martin. "A Terminal Crisis? Examining the Breakdown of the Eritrea-Ethiopia Boundary Dispute Resolution Process." *Conflict Management and Peace Science* 23 (2006): 329–341, 330.

665. Shaw (n 657), 794.

666. Pratt (n 664), 334.

667. Pratt (n 664), 333.

668. Pratt (n 664), 336; Shaw (n 657), 794.

669. Pratt (n 664), 337.

mandate through a process of 'virtual demarcation'. This meant that while it could not complete the physical demarcation, the theoretical delimitation that had been established ought to be recognised as the concrete border.[670] Thus, an official border was created as a purely legal construct disregarding the parties' geographical, emotional and symbolic considerations. This might have played a part in Ethiopia eventually rejecting the border. Even the Claims Commission got to work after the Border Commission expressed a preference for the frontier zone created by the *Algiers Agreement* rather than the borders of the earlier Commission.[671]

Thus, the case of *Eritrea v Ethiopia* holds some valuable lessons for our study. Even though the parties formally agreed to engage under the authority of the old colonial treaties, we see that even a century later, it remains the legal sense-making and decision-making structure that is available, as flawed as it might be. One can only speculate as to the extent that this was because of external diplomatic pressure from the international community. In this case, the mechanisms available to international law were maps and treaties created by colonial powers in their interest, never designed to create a stable relationship between two independent, sovereign states. Trapped within the logic of the territorial state, it seemed only natural that a fixed border could bring a swift end to a border war, and a speedy imposition seemed the best solution. When this proved to the contrary, even an abstract, virtual, and legally constructed border was still preferable. One of the lessons this case can teach international law is that a purely legalistic and instrumental approach to borders is not always the answer. Societies, geography and, yes, even borders themselves are much too complex for that.

## Conclusion

We started this chapter by questioning how power emanating from the political system was used to shape and legitimise legal order in the pursuit of colonialism. We looked at the case of Africa and, more specifically, the events and effects of the Berlin Conference of 1884.

We saw that, in the end, the Conference was little more than a ritual for carving up the African continent for European powers to expand their growth and establish their hierarchy among one another. However, this required rather sophisticated rhetoric surrounding it to legitimate and justify it. Taking advantage of the spirit of the age, the colonial nations saw themselves as harbingers of progress to the Dark Continent, spreading civilisation to those lagging on a teleological timeline. At the same time, this logic was used to

670. Anebo (n 663).

671. Gray (n 656), 711.

justify the unequal treatment of African peoples and territories. Their sovereignty was hardly recognised, and treaties with them enjoyed a dubious status. International law was interpreted in such a way as to maximise European exploitation and extraction in the colonies.

In hindsight, we also can see how this contradictory approach carried its destruction within it. One could not civilise with one hand while the other was extracting. All it achieved and was probably ever intended to achieve was to create wealth, stability and power in the metropoles, while the colonies paid the price with instability. Additionally, the nationalism at the heart of colonialism and sovereignty (at least in its nation-state form) led to the inevitable paradox: if peoples have a right to sovereignty, why not the colonial subjects?

One legal theorist who had a sense of these implications was Carl Schmitt. He understood that the inclusion of foreign territories into European international law would inevitably result in a universalism in which Europe would become a mere equal among equals. Nevertheless, we also know that we should be cautious of Schmitt's thinking and that several problematic assumptions underlie it. In his famous analysis of the *nomos*, of land and law as order, his reading is a near-mythical one suited to his toxically nationalistic outlook. We showed that the term *nomos* that is so dear to him is much more nuanced and can even credibly lend itself to a different reading of the events at Berlin.

As a consequence of his close linking of law with the land, we also see that he closely links power to space and violence. As a creation story, this holds sway, but it is too crude for understanding power today. His analysis of the Berlin Conference fails to see that power is more effective as communication or as the scaffolding in which meaning and decisions can make sense. We thus argue that including Africa in the system of nation-states and international law brought them into a framework where communicative power could reach a higher level of effectiveness.

The final problem we found in Schmitt's thought is his well-known friend/enemy distinction. His insistence on this distinction is understandable when one considers his prioritisation of the political system (and the violence inherent to it). This contrasts sharply with our systems theory approach, where no system enjoys a privileged status within society. We argued that such a distinction is dangerous because it shares many features with the modern, mobile border: it can be deployed quickly at any time and place and create an inclusion/exclusion antagonism as it wishes. This is especially dangerous when coupled with the frothing nationalism of someone like Schmitt.

We ended by looking at a case where the legacy of colonial borders is still a cause of conflict. In the case between Eritrea and Ethiopia, violent liberation struggles and a later border war led the two states to seek arbitration. The international community seemed to believe that the mere establishment of a

border would lead to peace, disregarding that other symbolic causes could lie at the heart of the problem. We saw that even though the dispute was between two sovereign nations, the entire legal and even meaning-making structure in which the dispute could be argued was within the context of colonial treaties between Ethiopia and Italy, as well as the colonial maps drawn up by the latter. After a Border Commission was established, their work enjoyed little support from Ethiopia and then-Eritrea, and consequently, the border could not be demarcated effectively. Rather than abandoning the project, the Commission decided to enact a 'virtual demarcation'. Unsurprisingly, this border has been largely ignored in subsequent cases.

Thus, we see that international law and its aims at order are intertwined with discourses around power. For better or for worse, barbarians all speak Greek now. When a dispute arises between peoples, their international legal claims still have to be presented within the frame of colonial objects, partly because the sovereign nation-state is a colonial object. An example is how Eritrea and Ethiopia relied on Italian maps – created with the function of colonialism in mind – to argue their cases. In our next chapter, we will look more carefully at the cartographic map. It represents an interesting boundary object between the systems of law, science and politics and deeply implicates states and colonialism.

Chapter 6

# Case study two: Law, scientific truth and maps

## Introduction

As much as the Berlin Conference casts its long shadow over Africa to this day, the members of that fateful Conference were themselves bargaining and negotiating under a looming symbolic representation of the continent. A great map of Africa was prominently mounted in the negotiating room, as has been documented and seen in several illustrations of the event.[672] A famous illustration aiming at satire rather than dignified representation turns the image upside-down, showing Von Bismarck and company leering over Africa, represented by a cake and a knife in hand. We can take for granted that the Conference room was at any moment filled with maps of Africa, from the one covering an entire wall to smaller ones within the delegates' papers. Opposed to the towering poster, which one can easily imagine had the delegates standing around it, pointing to high sections on their tip-toes and pacing while drawing imaginary boundaries with stretched out arms, we can also see the smaller maps changing hands across a table to be studied and scribbled. Maps were undoubtedly crucial in this stasis-disrupting evolutionary event of international legal evolution.

672. Examples of contemporary illustrations depicting the wall map are found in *Die Gartenlaube* newspaper of 1884. Refer to these illustrations on the Internet: https://www.google.com/search?rlz=1C1CHBD_enZA882ZA882&source=univ&tbm=isch&q=Illustrierte+Zeitung%E2%80%9D+of+1884&sa=X&ved=2ahUKEwjHh_XAhKfqAhU2QhUIHTUYA9YQsAR6BAgIEAE&biw=1600&bih=708 (accessed 20 April 2020).

**How to cite:** Buitendag, N 2022, 'Case study two: Law, scientific truth and maps', in *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town, pp. 151–185. https://doi.org/10.4102/aosis.2022.BK319.06

The purpose of the above sketch is to illustrate the two complementary relations between the delegates as lawmakers and the object of the map. While the image of a few men leering over a cake is perhaps more memorable, it remains only half of the story. Modern scientific cartography had indeed made this method of appropriating territory possible. However, it must also be kept in mind that the vast map in the room, probably almost constantly within the delegates' field of vision, had made the entire practice even *imaginable*. The argument should already have become apparent: cartography and the law operate in a constructivist loop.

One of this book's aims is to outline the relationship of public international law, consistently depicted as an autopoietic social system, with those systems found in its environment. This chapter aims to understand how international law not only expresses the scientific truths of the day but also relies on them for legitimacy. The map provides us with a fascinating case study for this purpose. It is also used to address our second research problem in this chapter, namely, how a scientific object can inspire legal imagination and limit and confine it. The map is particularly suited to illustrate this: it is an artificial material object that, since the Ptolemaic revolution in cartography, came to represent the outcome of a rigid, objective scientific system.[673] As we shall see, it is also intimately tied to the political system not only as its instrument but also as an inspiration for its imagined objectives. Finally – as with perhaps everything that spans both science and politics – it also draws the law into its gravitational pull. Thus, on the map, we have a seemingly simple object with at least science, politics and law orbiting it.[674]

We begin by attempting to look at the map first on its terms. This means regarding it as the outcome of a scientific process that presents itself as information. It is an object that communicates something and sets up and thematises further communication relevant to different systems. The idea that a map is a medium of communication is unremarkable in the everyday understanding of the term. What is specifically and importantly meant here is that a map is a medium of communication, like earlier examples of power or truth, in the specifically autopoietic systems theory sense of the term.[675] It is thus important for our purposes that we can give an adequate theoretical

673. For a good synopsis of the history of maps, see the *Smithsonian Magazine* at https://www.smithsonianmag.com/innovation/brief-history-maps-180963685/.

674. What Bennet calls the assemblages of 'thing-power'. Bennet, Jane. *Vibrant Matter: A Political Ecology of Things*. Durham: Duke University Press, 2010, 20.

675. Rajkovic provides an interesting account of the medium of the map through a reading of Marshall McLuhan's medium or message distinction. He convincingly argues that international lawyers have been blinded so much by the apparent information that maps carry that they are blinded to the medium itself, which communicates just as much, or more, information consumed unconsciously. This chapter will attempt to take heed of this warning and provide a second-order observation of the blind spots of the first observers. Rajkovic, Nikolas M. "The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis." *Leiden Journal of International Law* 31 (2018): 267–288, 281.

account of something that seems rather concrete at first glance. Systems theory helps us provide such an account; however, a theory of communication might feel like it de-emphasises the materiality of maps. One of the big strengths of systems theory makes it feel like a pity to ignore the wonderful and beautiful materiality of the map, a feature which, in this case, I want to emphasise than discard. In light of our discussion, maps are perhaps, unfortunately, the kind of technology that easily fades into the background as long as one can read it easily – a typical case of the ready-to-hand (*zuhanden*) of Heidegger's tool analysis.[676] Therefore, I employ two techniques to overcome this. The first is to offer a novel reading-by-analogy of Luhmann's *Art as a Social System*.[677] The second solution comes from one of the big sociological rivals of systems theory, namely, actor-network theory, which will be employed as an improbable supplement in our theorisation.

With cartography's scientific and theoretical foundation and the map in place, we turn to its constructive relationship with the political system. It is worth remembering that early cartographic projects were nearly universally commissioned by states. Cartography finds its origins in political instrumentality and was primarily understood as a technology of sovereignty. However, from here, something else occurred: the relationship becomes reciprocal and constructivist, and attitudes to those essential features of the state, territory, borders – and perhaps most impactful, imagination – became shaped by the humble map.[678] From this account, it should be clear that what is meant by constructivism is not an indication of only social relations – it is certainly this – but that there is also constructivism at work between objects and communication, between the social and the non-human.[679]

Finally, we turn to the legal system. The relevance of maps in international law has perhaps been dismissed too easily, except perhaps as an adornment to textbook covers. This is despite the many functions that they serve in the discipline.[680]

676. Heidegger (n 6), 522; Jacobs, Christian. *The Sovereign Map: Theoretical Approaches in Cartography throughout History*, edited by Edward H. Dahl, translated by Tom Conley. Chicago: The University of Chicago Press, 2005, xiv.

677. Luhmann, Niklas. *Art as a Social System*, translated by Eva M. Knodt. Stanford: Stanford University Press, 2000.

678. An important study in this regard comes from Branch, Jordan. *The Cartographic State: Maps, Territory, and the Origins of Sovereignty*. Cambridge: Cambridge University Press, 2014, 38; See also Craib, Raymond B. "Cartography and Decolonization." *Decolonizing the Map: Cartography from Colony to Nation*, edited by James R. Akerman. Chicago: The University of Chicago Press, 2017, 17; Maier (n 183), 55.

679. Bennet (n 674), 17.

680. Worster, William Thomas. "Maps Serving as Facts or Law in International Law." *Connecticut Journal of International Law* 33, no. 2 (2018): 279–302.

## Cartography and the scientific system

Broadly understood, maps have existed for millennia. If we are thinking about scientific maps as we understand them today, we are speaking of a decisively modern phenomenon. While the intellectual history of international law traditionally traces itself back to Roman law, the science of cartography in the ancient empire was not noteworthy and even regressed compared to the capabilities of the ancient Greeks.[681] While the root of modern cartography lies in Ptolemy's *Geography*, his ideas lay dormant until the early 15th century – contemporaneous with the *Peace of Westphalia* – when it was finally translated into Latin. However, it took another century for the techniques to be applied to create new maps.

However, we should briefly examine cartographic practice and spatial thought in the preceding Middle Ages. If anything, it allows us to see the great shift that the Ptolemaic revolution brought about, but it is also instructive in the footprints it left behind.[682] Cutting the narrative into distinct, progressive epochs is a useful shorthand but obscures many nuances. The medieval map's evolution is intertwined with that of sovereignty and can be read within the greater story of society's shift from being undifferentiated to functional differentiation.[683]

The *locus classicus* of the medieval map is the *mappa mundi*.[684] Just like the maps that hang in every classroom today, they intended to convey information about the world in an ordered and instructive way. In most cases, Jerusalem was at the centre, and from there, the world as it was known to its creators (Asia, Europe and Africa) radiated out. These maps were supplemented with depictions from the bible of history and the natural world.[685] Judging these maps by today's cartographic standards would force us to regard them as failures. But this would be to miss the point. Artistic depictions were not created for their own sake but to support other social functions.[686] In a world

681. Elden (n 181), 143.

682. Latour points out that it is exactly during moments of innovation that, by disrupting the normal flow of society, the influence of objects on society can be seen most clearly. Latour (n 12), 80; Bennet (n 674), 14.

683. Luhmann (n 677), 181. Henry Sumner Maine already recognised something of this in his 1861 work *Ancient Law* where he proposed that legal systems evolve from being status-based to contract-based. He argued that the British should help the Indian colony evolve towards the latter, as a civilising mission, but neither too slowly nor too quickly, so that the British would not have 'to make their watches keep time in two longitudes at once'. For this chapter, such a cartographical metaphor is revealing to the utmost. Quoted from Benton (n 498), 246. See also Smil (n 154), 410.

684. It is worthwhile to point out that the term applied to pictorial maps and texts containing geographical information. See Jacobs (n 676), 19.

685. Elden (n 181), 148; Branch (n 678), 42; De Sousa Santos, Boaventura. "Law: A Map of Misreading. Toward a Postmodern Conception of Law." *Journal of Law and Society* 14, no. 3 (1987): 279–302, 285.

686. Luhmann (n 677), 140.

of undifferentiated religious, scientific and political systems, the *mappa mundi* represented a unified meaning behind the world, which was still plausible. Their function was to didactically repeat the ordered structure of the world to the viewer rather than to elicit innovative or creative thinking from them.[687]

The medieval map used for travelling took the shape of linear itineraries. More concretely, geographical information was conveyed textually, and if a visual scheme was accompanied, it took a specific form. These would typically be by straight lines from the origin to the destination, with the line interrupted by the towns and cities to be found along the way, with the travel time between them given textually. This is in line with a culture in which textual description was still privileged over visual representation.[688] Branch argues that this illuminates the medieval mind's different understanding of spatiality compared to our own. Space was not a smooth geometric plane but rather a consecutive series of unique places,[689] and it took time to get from one place to another. Places of interest were columns of light defined by human activity. This also had clear implications in international law practice, as we will note later in this chapter.

Towards the end of early modernity, cartography had evolved sufficiently into a rigorous scientific practice, and rulers came to be in possession of sophisticated visual representations of territories. This occurred within a cultural *l'esprit mathématique* influenced by 'Descartes's coordinates, Kepler's orbits, and later Newton's laws'.[690] Society was marching towards functional differentiation, and the sciences could evolve by their logic. The products of the scientific system, however, just like any other system, had effects on its environment which implies other systems too.[691] As mentioned, in our case, the scientific map held decisive consequences for the legal and political systems. How do we make sense of this intra-systemic communication?

687. Luhmann (n 677), 182. Luhmann points out that in the medieval world and the context of the wars arising from the Reformation, 'innovation' in the realms of religion, politics, and law carried negative rather than positive connotations (n 660), 200. However, the argument has also been made that the *mappae mundi* indeed excited the imagination by placing Jerusalem in its centre, towards pursuing the many Crusades of that epoch. Elden (n 181), 151.

688. Branch (n 678), 46; Luhmann (n 677), 17; Benton (n 498), 10.

689. The uniqueness of individual spots of space in medieval pre-map times, as opposed to the homogeneity of space post-map, will be delved into deeper later.

690. Maier (n 183), 80.

691. We should remember not to regard causality as a linear, unidirectional process. Latour points out that the traditional claim that political theory is built on scientific materialism can be turned on its head: physicists might have borrowed the idea of a sovereign local entity that enters into relation with more prominent entities from Hobbes. Latour, Bruno. "*Onus Orbis Terrarum*: About a Possible Shift in the Definition of Sovereignty." *Millennium: Journal of International Studies* 44, no. 3 (2016): 305–20, 319. In addition, Maier describes the need for territorial precision in maps as standing in a constructive relationship with capitalism. While this work does not refer explicitly to capitalism or even the economic system more generally, it is not difficult to grasp that economic considerations are always looming in the background of the issues we are dealing with. Maier (n 183), 101. See also Hui (n 87), 9.

The second problem is that reducing a map to a simple scientific truth seems reductive. Its effect cannot be simply measured by its ability to communicate pure veracity, for example, through textual lists. One could hardly imagine the point if, during the Berlin Conference, instead of a map, an entire wall was plastered with the names of all the known mountains, rivers and towns in Africa. In its creation, representation and reading, the sheer visuality and materiality of the map excite something more. To account for this, I will do a systems theory analysis of the map as scientific communication and pilfering Luhmannian insights from his monograph, *Art as a Social System*. More than any other text, Luhmann engaged with the communicative power of objects. Although this leads to the end of art for art's sake,[692] I believe that creative theoretical engagement allows us to interpret the map as a scientific object not only for science's sake but also for the sake of law and politics.

## The observations of the map

Maps are, in the first instance of their creation, the product of the precious distinctions of the commissioner and surveyor. They come into being through observations made by observers. Towards the end of the 16th century, various European rulers commissioned the first maps of their entire territories.[693] Already one can see the first distinctions being drawn: that the rediscovered scientific techniques should be employed in a space defined by the extent of a particular political rule and aid said rule. It begins with this difference. The practice of cartography in the first instance of its commissioning was never for the pure pursuit of scientific knowledge[694]: it was an instrument of governmentality to increase the effectiveness in matters of the military, taxation and administration.[695] As Jacobs correctly points out, maps are not merely drawing the world as it is but as it needs to be.[696] Or, as Berry points out, revolutions in cartography were not purely scientific but, just as importantly, an ideological shift in how space was understood.[697]

692. Luhmann (n 677), 265.

693. Branch (n 678), 73. It is interesting to note that surveyors were often (violently) resisted by local populations, also through appeals to law. (n 661), 76; Edney, Matthew H. "The Irony of Imperial Mapping." In *The Imperial Map: Cartography and the Mastery of Empire*, edited by James R. Akerman. Chicago: The University of Chicago Press, 2009, 31.

694. Or we could say, truth for truth's sake. It is perhaps illuminating to note that many of the first state cartographers and geographers formed fell under the command of the military, pioneered in monarchical France. See Jacobs (n 676), 20; Edney (n 693), 31; Benton (n 498), 10.

695. Maier (n 183), 96.

696. Jacobs (n 676), xiii; De Sousa Santos (n 685), 285.

697. Berry, Mary Elizabeth. *Japan in Print: Information and Nation in the Early Modern Period*. Berkeley: University of California Press, 2006. 60.

Furthermore, what makes a map authoritative hinges on the authority (whether this is expressed through media such as power and/or truth) that the cartographic object *is* authoritative.[698] This necessarily frames the work of the surveyor. How we observe and order materials changes, even something as given as the natural landscape, depending on the formulated problem we want to solve through ordering. The surveyor creates his map, spurred on by the motivations of the commissioner, through a series of observations and encoding and decoding the world.[699] What he has observed influences and tightens what can further be observed. In a sense, one could say that once the process has started, from contingent or even arbitrary beginnings, the surveyor is then led by his creation. Of course, it is not to say that mapmaking is a completely arbitrary or 'unscientific' process – the distinctions made can be stable, can recursively relate to one another and can be repeatedly observed.[700] However, this does not mean that they are value-free or unburdened by ideology, and scientific rigour in mapmaking remains elusive because of the distortive effects of scale, projection and symbolisation.[701] As we have seen, to know is to cut violently, to provide oneself with an object for further observation, and we know it to be true that for an operation to work, it does not require knowledge of its function.[702] The point is rather that there is feedback between different objects and observers: the cartographer, the land being surveyed, and the tools and techniques employed to submit this land to scientific understanding. It is a dynamic process that continuously reshuffles and renegotiates relationships between objects.[703] Within this loop, choices are made. The cartographer acts as the first-order observer and is thus preciously blind to his distinctions; distinctions appear as common sense and truth. Only as second-order observers can we appreciate exactly how

698. Berry (n 697), xiv; Worster, William Thomas. "The Frailties of Maps as Evidence in International Law." *Journal of International Dispute Settlement* 9, no. 4 (2018): 1–20, 11.

699. 'We need to look at each map in terms of what it includes and excludes, whose interests are served or rejected, and what social context shapes and is shaped by the map and its use [...] maps directly embody power relations between those who produce and those who use them'. Branch (n 678), 39. Or as Jacobs puts it: 'Maps suggest a way of thinking as well as seeing. They materialize a view of the mind more than of external reality. They project an order of reason onto the world and force it to conform to graphic rationale, a cultural grid, a conceptual geometry'. in Jacobs (n 676), 2. As for the notion of encoding and decoding as related to borders, see Mezzadra, Sandro and Brett Neilson. *Border as Method, or the Multiplication of Labor*. Durham: Duke University Press, 2013. See also Craib (n 661), 13; Worster (n 698), 2.

700. Luhmann (n 677), 216. Some would like to maintain a clear distinction between the scientific and political choices at work in mapping as if a map could somehow be better if one could only remove the political influence on the actor's choices. My position is sceptical of this possibility, and I hope to show that this might be possible in degree but not absolute. See Worster (n 698), 8.

701. Edney (n 693), 12; De Sousa Santos (n 685), 283.

702. Luhmann (n 677), 137. Jacobs (n 676), 23.

703. 'Objects' broadly understood as including not only material ones but also systems and humans. Latour (n 12), 65.

improbable the cartographer's distinctions are.[704] If we maintain the premise that a map is but a bundle of distinctions,[705] then we have to remember that every distinction always points back to the observer that drew it in the first place, even as it hides its contingency. The cold, hard, scientific map has lost its innocence.[706]

Maps are nothing if not a reduction of complexity.[707] They are a representation of the world within the world. What is preciously observed and communicated in the final product comes at a gigantic cost of what must be excluded and what becomes silenced. As useful as the political map has been, the high price we have had to pay is that it has now become nearly impossible for us to look at our world in any other way.[708] One of the criteria for reducing complexity that is of interest to the map, also as an object of political rule, is that their depictions and symbols had to be easily reproducible in printing. It is widely accepted that the map as a mass-reproducible and repetitive object was instrumental in fostering nationalism, as perhaps most famously argued by Anderson in his notion of the logo map.[709] Maps have the power to represent nature as ordered and to consolidate identity. The scientific aims of cartography fell within the wider Renaissance ideals of generalising, describing and ordering objects in nature and their relationships. It allowed for the homogenisation of space into the bounded territories that became crucial for the formation of the territorial nation-state.

704. Luhmann (n 677), 62. It is with apologies to Luhmann that I continue along this line of investigation. He describes second-order observation as having a 'toxic' quality. He continues to write that '[w]hile the first-order observer could still cherish the hope of penetrating beneath the surface and grasping a Beyond appearance, the second-order observer harbors suspicion about this "philosophical" project. He is not particularly fond of wisdom and know-how, nor does he love knowledge. Rather, he wants to understand how knowledge is produced and by whom, and how long the illusion might last. To him, Being is an observational schema that produces "ontology", and nature is nothing more than a concept that promises a comfortable end and blocks further questioning'. Luhmann (n 677), 96. I take this as a bittersweet comment on the consequences of second-order observation. Luhmann distinguishes and expresses a preference for this search for origins over the typical critical attitude of searching for the essence of things.

705. Of course, such a definition would hold true for anything. Jacobs calls it just as appropriately an 'inventory of differences'. See Jacobs (n 676), 23.

706. Jacobs (n 676), 6.

707. In this sense, there also exists a connection with emblems from the same era. For a thorough study of this, see Goodrich, Peter. *Legal Emblems and the Art of Law: Obiter depicta as the Vision of Governance.* Cambridge: Cambridge University Press, 2014; Luhmann (n 677), 170. For support of the notion of maps as a reduction of complexity, see also Edney (n 693), 17.

708. 'A work of art must distinguish itself externally from other objects or events, or it will lose itself in the world. Internally, the work closes itself off by limiting further possibilities with each of its formal decisions.' Luhmann (n 677), 29.

709. Benedict Anderson (n 311); Branch (n 678), 6.

## Observing the map

The materiality of the map, in the particular way it chooses to represent its particular reduction of complexity, allows it to become the theme of new communication. Maps are created for the very sake of being observed, and '[a]ll communication consequently depends on perception'.[710] The choice of what is to be represented selects the reader's focus. In contrast to the textual itineraries of the medieval period, the map presents us with a form of non-verbal communication which is still understandable as information. Speaking of art, Luhmann writes that it 'functions as communication although – or precisely because – it cannot be adequately rendered through words'.[711] But this further communication is not entirely open-ended: its form only reveals the distinctions it had already made and the internal sides it has marked as important.[712] Distinctions control which operations can connect with them. Like all ex-communication, it is inherently asymmetrical, or as we could say with Luhmann that the form is created by a 'rupture of symmetry'.[713]

Just as much as the commissioning and creation of the map is not a neutral process; neither is its reading. If we accept the uncontroversial premise that maps are a symbolic medium of communication,[714] this has implications for the map's reader. While the map might present something to be communicated, the onus remains upon the reader to select the relevant information. It begs interpretation, and it is a provocation to find meaning exactly because it does not communicate through the medium of language but symbolically.[715] Their meaning is constructed discursively.[716] Communication through language usually demands a much quicker response and, frequently, impulsive commitment to a specific course of action.

On the contrary, the map is a slower medium. It allows for silent study and, perhaps, flights of imagination. It is not purely didactic like the *mappae mundi*, which expects the observer to be passive and understanding. Rather, they are objects of contemplation that invite, or even demand, new communication. In this sense, the political map is not exactly the final word on a state of affairs but merely a point in time that promises to become something else. It is a

710. Luhmann (n 677), 6.

711. Luhmann (n 677), 19.

712. The vocabulary of Spencer-Brown (n 68), that of the 'internal' side of the distinction that is 'marked' finds a wonderfully literal example in the case of the map.

713. Luhmann (n 677), 28; Latour (n 12), 63.

714. Jacobs also proposes this premise albeit from an entirely different theoretical approach, perhaps more inspired by Marshall McLuhan. See Jacobs (n 676), 8.

715. Luhmann (n 677), 24–25; Worster (n 698), 17.

716. Edney (n 693), 12.

recording of knowledge that allows for new knowledge[717] and instructs how to act next and change the space being presented.[718] Locked inside of it is the tension between the actual and the potential. In its representation of the earth, it creates another imaginary space.

Of course, I do not claim (perhaps as some have been tempted to) that the territorial state is the direct causal outcome of the map. Undermining the role of the map is no less worse than 'over mining' it.[719] The argument is rather that we recognise the place of the map in creating the possibility of new actions to other objects or actors.[720] Its power to excite the imagination makes the map capable of spurring us into action.[721] Their power lies in symbolically and diabolically making observable the unobservable. In representing the world, we compare it with a world that could be and go to work at bringing our dreams about.[722] In this sense, maps can be understood both figuratively and literally to be part of the memory of legal and political systems. For this same reason, they always demand that they are redrawn. The representation of the world within the world and how it makes us aware of the difference between what we have and what we want continuously allows for the distinction to re-enter itself in a feedback loop. As we know, it is exactly the asymmetry of difference that brings systems into being. When this looping re-entry became impossible, it famously drove Alexander the Great to tears.[723]

As alluded to earlier regarding the Berlin Conference, one cannot help but feel that the material form of the map carries significance. Latour admonishes us that '[j]urists always speak of texts, but rarely of their materiality'; thus, let us not fall into the same trap.[724] I do not want to understand the map as merely a pure conduit of information but as an actor in its own right that makes a difference where it goes.[725] In any case, the distinction between medium and form – not to mention that between the material and social – lies in the eye of an observer and is unknown to the map itself. In our case, discarding this distinction in favour of its unity is more useful. The map organises vast spaces so that the observer can hold the entire world in his

717. Jacobs (n 676), 23.

718. Edney (n 693), 28.

719. This is in the vocabulary of Harman (n 14), 41.

720. Latour (n 12), 72; Rajkovic (n 675), 284.

721. 'The role of imagination, [...] is to draw something new from repetition, to draw difference from it.' Deleuze (n 186), 100.

722. 'The map itself changed nothing, other than the ruler's idea of his realm.' Branch (n 678), 1.

723. This is almost certainly not true.

724. Latour, Bruno. *The Making of Law*. Translated by. Marina Brilman and Alain Pottage. Cambridge: Polity, 2010, 71.

725. Latour (n 12), 71; Bennet (n 674), 9.

grasp. The utility of the map greatly lies that the information it contains is so easily at hand.[726]

Further, it carries within it the truth claim that this is the world 'as it is'.[727] We now understand that the map's presentation as scientific truth is in itself a political manoeuvre.[728] What is less noticeable but no less important, however, is that it assigns only a single acceptable position to the observer or reader. Just as the surveyor is led along by the very process of cartography, so is the reader. In this sense, the map as a diabolic medium of communication becomes apparent, for, like power or truth, it shapes the relationship with and the options available to the one observing it.

As we have seen, it will become ever more apparent as we progress, and maps are always something 'for doing' something else. It always references something else. They quite obviously reference back to the territory of that which has been mapped, but they also point their reference forward to future action. In both of these references, the map withdraws itself from notice, even as we stare directly at them. The effect of its handiness withdraws most as we continue to use it unperturbedly, as we fix our observation on our work.[729] This chapter hopes to place a critical distance between the observer and the map because it is exactly its handiness and nearness that places it in a kind of blind spot. But when we fix our gaze on the map, we notice how its references affect us. In keeping with the Heideggerian motif, the map has the effect of de-distancing the world. Navigating and mapping new worlds had the effect of bringing them nearer to the reach of European law. They became environmental communications which the legal system selected to take notice of. Heidegger writes that the relational context in which useful things are assembled forms a 'region'.[730] We could say that the map – in an oblique reference to Chakrabarty's famous book titled *Provincializing Europe* – had the effect of regionalising the whole world. Not only was all space homogenised onto a smooth plane, but it was also brought into a coherent relational context. The map remains to this day, the single most effective visualisation of this – not only as an *ex post facto* representation of the world but also as an agent in its construction.

726. Jacobs (n 676) 11; Edney (n 693) 25.

727. The cartographic revolution and the great governmental mapping projects which resulted from it ran concurrently with the Renaissance, in which painting, increasingly dealing with secular topics as the art system became more differentiated, began to develop greater realism through geometric techniques such as manipulating perspectives and vanishing points. See Luhmann (n 677), 85. See also Jacobs (n 676), 21. The connection between the map and landscape art, and the shared sentiments both intended to convey, is also pointed out in Edney (n 693), 27. See also Maier (n 183), 65.

728. Latour (n 12), 76.

729. Heidegger (n 6), 69, 104. Heidegger uses the example of a pair of glasses which, despite literally touching the observer, goes by practically unnoticed until perhaps they cease to work. See also Berry (n 697), 65.

730. Heidegger (n 6), 107.

There is another reason that I insist on the materiality of the map. Taking on board the insights from actor-network theory, the map provides a vital link in understanding how social systems, law and politics are intimately connected with the material world in which we walk.[731] It is right in the middle of a long chain that starts from the very geography of our planet: its continents and seas, mountains and rivers, which lead through the map and end with the daily political and legal communications we make. We can draw the line from a particular field a cartographer surveys to it ending up in a treaty – even if only retroactively. It dispels the misunderstanding of social systems theory as removed from the material world and shows instead how nested each is within the other. Only through the map can the natural geographic terrain and social and legal territory be assembled.

The use of social systems theory provides us with a different advantage. As we know, observation is not restricted to mere human subjects. All systems can observe.[732] We can keep the theoretical and common sense advantage of knowing that human actors use and observe maps and that it can even excite the subject's imagination for further action. At the same time, we know that humans do not communicate; only communications communicate. That means that as systems, law and politics are systemically capable of observing maps and formulating their communications around and through them. It also shows how the map not only places the material and social together onto a continuous plane but also becomes the connection between the social systems of law, politics and science. How politics and law each communicate about the map will be the objects of investigation in the next two sections.

## Maps and the political system

In this section, when we say that we are looking at the political use of the map, what is meant specifically is the role cartography played and continues to play in the creation and repetitive maintenance of the territorial nation-state. We already established that the political system can observe maps and communicate about and through them as symbolic communication. We also stated earlier that the primary mode of diabolic communication for politics is through power. This should be kept in mind throughout the following paragraphs. It is not the case that the system has to choose between one of the media. Rather, it is clear that they are intertwined. The history of political maps presents a potent mixture of power communications and truth communications on its paper-thin surface. We concur with Maier when he says that maps served as the 'preeminent technology for centralising rule'.[733]

731. Latour (n 691), 10.

732. Luhmann (n 677), 128.

733. Maier (n 183), 107.

The advent of the modern map slightly predates the modern territorial nation-state. This section will show that this is no coincidence.[734] Maps profoundly influenced the political imagination, its subsequent practice and the new types of claims it began to make.[735] It should be obvious, but for the sake of clarity, it bears mentioning that in no way is the claim made that the modern state came about solely because of the Ptolemaic revolution.[736] Naturally, it was one factor within a much vaster assemblage. But just as each of a surveyor's observations tightens his range of subsequent possible observations, the map played its role in blocking certain evolutionary paths while opening others. Nothing ever acts in isolation but through its interaction in concert with other objects. Neither kings nor armies nor cartographers and printing presses alone made the modern nation-state. The locus of agency cannot be concentrated on humans alone but should rather be distributed across the entire assemblage.[737]

We have already discussed several important features of premodern political space to keep in mind. The first thing to remember is that distinct boundaries as we know them today did not exactly exist, and what you rather saw in Europe, as in much of the world, were vague frontier zones. Premodern political power was still very much organised around the centre/periphery distinction, gradually fading as one moved further from the metropole.[738] This might also explain why roadmaps were made in the form of itineraries: human settlements carried exceptionality and privilege over the unremarkable spaces 'in-between'. Spaces distinguish themselves qualitatively rather than quantitatively. We are also familiar with the idea that authority could overlap the same metropoles or villages and be thus rather differentiated around caste or religious and/or secular lines. Jurisdictions were still attached to people rather than to spaces, and claims of sovereignty were complexly interwoven.

The graticule or grid of latitude and longitude meant that the entire surface of the earth became a smooth, uniform and homogenous space. Space reversed course from quantitative, actual human activity to qualitative potentiality. Gradually from the 15th–18th centuries, a paradigm shift occurred towards homogenous, bounded territories enabled by the cartographic imagination. In fact, 'maps depicted linearly bounded, exclusively territorial states *before* such states existed, and thus provided part of the ideational

734. Branch (678); Luhmann (n 677), 160.

735. Berry (n 697), 26.

736. Branch (n 678), 5.

737. Bennet (n 674), 21; Latour (691), 317.

738. Luhmann (n 37), 91; Branch (n 768), 21.

architecture for the eventual consolidation of modern statehood'.[739] In an inversion of the idea that control bled out from the centre to the periphery, one could add that in true systems theoretical fashion, and the political territory was created from the border *inwards*.[740] This was a direct result of the limitations posed on the visual grammar available to the map, which only later became reflected on the ground. The authority that could not be mapped (that is to say, non-territorial authority) came to be eliminated.[741] This was most obviously true of the Church, but it can also be seen in the disappearance of Italian city-states and loose confederacies like the Hanseatic League.[742] The novelty of the modern state is further evidenced by its break from the past, where sovereignty over total territories was the existing object. Through cartography, Europe was cut up anew, and lineal borders rearranged lands into new territorial units.[743] The map imaginatively created the need for sovereignty to be demarcated externally and to be homogenised internally.

However, this instrumental use of cartography was not limited to only European states. At a slightly later period in early modernity, similar developments can be observed as far off as in Japan. Interaction with early traders made Japanese elites more aware of European cartography and shifted the spatial imagination towards a direction where the idea of 'Japan' came to make increasing sense.[744] While the earliest large-scale maps of what we now understand as Japan were made around the turn of the seventh century under the monk Gyōki, meant to portray the relative relations between capital and provinces, large-scale mapping projects hibernated until the 17th century when a sudden frantic mapping of the islands began. Although most of this was under the orders of the booming commercial printing industry, the Tokugawa regime silently approved it.[745] Just as in Europe, this changed the political landscape. In the first place, a kind of 'empirical spirit' began to rise, in which truth claims were supported by direct observation rather than through appeal to literary classics.[746] Secondly, spaces became homogenised

739. Branch (n 678), 81. Emphasis in the original. It is also worth quoting Maier at length: 'The map in short was the uncontested project of expanding empire and ambitious state wedded to the scientific curiosity that impelled European expansion. […] Maps and cadastres alike affirmed the integral connection of public power to the resources of territory'. Maier (n 183), 108.

740. This is in keeping with Luhmann's epistemology, influenced by Spencer-Brown. Or as Rajkovic writes, 'boundary practices are understood to be linked profoundly to knowledge practices'. Rajkovic (n 675), 273; Nail (n 35), 15.

741. Branch (n 678), 88.

742. Spruyt (n 1).

743. Branch (n 678), 94.

744. Berry (n 697), 58.

745. Berry (n 697), 24.

746. Berry (n 697), 18.

through their classification and representation on the new maps. All villages were alike with all others and all cities with one another. The only things that distinguished them were those that could be enumerated: population, harvest yield and distance to the capital. In all other regards, spaces were generic.[747] The final effect this had, as is so common to maps, is that it changed the popular identity and imagination. Through the creation of an outlying border of Japan and filling the space with a timeless history of temples, shrines and spots of national and historical import, common social knowledge was created, presuming the addressed reader to be part of a broader, shared public before an integrated state was a true reality.[748] As Berry echoes our argument, specifically in the context of Japan: while mapmakers worked with empirical tools, they also told a narrative story: that 'Nihon is one'.[749]

A specific case-in-point was the slow incorporation of today's Hokkaido in modern Japan, which followed many of the familiar tropes we have seen thus far. The process also started during the Tokugawa era, comparable to the age of empire in Europe, rather than the much later 'classical' era of the Japanese Empire straddling the 19th- and 20th centuries.[750] Before its official incorporation into Japan in 1869, the territory, formerly known as Yezo, had habitually been depicted as a barbarous space (together with the Ryukyus and Korea) in direct contrast with the civilised mainland.[751] Trade and tributes were expected, placing the region in the same liminal space between inclusion and exclusion that so many colonies find themselves in. This space – and it is also a legal one – that justifies rule, but under different standards than for the metropole.[752] However, Yezo had been increasingly mapped over the centuries and found more space for itself on maps of mainland Japan until it eventually became indistinguishable. As Boyle writes: 'the [Japanese] state mapped itself onto Hokkaido'.[753]

Yet as we know, this process occurred in many places. The political map created new assemblages, with complex new actors, agencies and asymmetries spread across them. For example, frontier zones that had largely been ignored for centuries became hotbeds for conflict over precious metres thanks to

747. Berry (n 697), 39.

748. Berry (n 697), 39.

749. Berry (n 697), 220.

750. Boyle, Edward. "Imperial Practice and the Making of Modern Japan's Territory: Towards a Reconsideration of Empire's Boundaries." *Geographical Review of Japan* 88, no. 2 (2016): 66–79, 68.

751. Boyle (750), 73.

752. Boyle (750), 76.

753. Boyle (750), 77.

scientific accuracy.[754] Naval navigation and colonialism found the technological support it required to be made possible and administered. The 'vibrant matter' of the map as both a cause-and-effect of new legal and political possibilities is clear in hindsight. The objects – maps and humans and systems and borders – assembled and created feedbacks that allowed for new phenomena to emerge and self-organise. The legal and political systems had to evolve in this changing environment.

As I have mentioned, one of the interesting intersections between sovereignty and cartography is found in the budding empires of early modernity. Not only did cartography increase the capabilities of naval navigation enabling the ships of state to scatter across the seas, but also the discovery of new lands by Europeans raised questions of sovereignty which in turn were often resolved through recourse to maps. Anderson's earlier-mentioned thesis about colonies being used as testing grounds for new ideas applies in this case, too, as Europeans made cartography-based legal claims in the Americas before they were done at home.[755] Unlike earlier maps that necessarily required first-hand knowledge of a place, it became possible to divide space abstractly and accurately using only coordinates. The medieval *mappa mundi* bordered the known world in such a way that made the inclusion of the outside impossible. It is only with the advent of the Ptolemaic graticule that the whole globe could be projected, and far-flung (both literally and figuratively) claims could be made. A famous first example of this use of the cartographic graticule to claim territory (notwithstanding its practical difficulties) was the *Treaty of Tordesillas* in 1449.[756]

So, it was through the instrumentality of the map that colonialism could thrive, and conquests were made on maps before they were enacted on *terra firma*. From this laboratory, the new technologies of territorial sovereignty could be applied to Europe. This idea has been proposed at least as far back as Schmitt.[757] The great international jurists who wrote about the colonisation of the Americas were aware that their arguments could be applied on home soil in the future and shaped them accordingly.[758] This resonates with the stronger underlying claim of this project. The more we keep digging at the underlying systemic features of the modern nation-state form, the more we

754. Branch (n 678), 98; Benton (n 498), 13.

755. Branch (n 678), 34.

756. It is further interesting to note that the Spanish and Portuguese delegates consisted of nine members, three lawyers, three cartographers and three pilots. While one should not read too much into this, it does show the equal footing that law, cartography and navigation all enjoyed during the treaty negotiations. Branch (n 678), 111.

757. Schmitt (n 599).

758. Branch (n 678), 103.

find its roots buried in the soil of the colonies. These political and legal technologies of rule were implemented in the first instance for extraction and exploitation. However, it turned out that what worked on the barbarians across the sea could work equally well on the civilisations of Europe. Napoleon and Hitler attempted nothing less than trying to colonise the old continent.[759] Although asymmetries continue to exist between different states (while some would claim sovereignty is absolute, others know that it is divisible and that some states are more sovereign than others),[760] the nation-state form was born in the blood of colonialism. It was turned onto the populations of the colonisers themselves. While living conditions, unfortunately, vary greatly, the fact remains that *we are all barbarians now*.

European claims of sovereignty also had to transform during this period. While in Europe, sovereignty was transferred from one ruler to another, this transaction was hardly possible when dealing with barbarians who were wilfully not recognised as sovereign polities, as we saw in an earlier chapter concerning the legal gymnastics practised at the Berlin Conference. In the face of this legal anomaly, claims of sovereignty had to take on a stronger territorial aspect.[761] What happened in Berlin in 1884 was not simply a cruel historical irregularity, nor a novelty. Rather, it represents the crowning culmination of a process that has evolved since the beginning of modernity.[762]

I naturally recognise that the narrative thus far presented reflects a single mode of observation that unavoidably simplifies and homogenises the past. The time has thus come to place the different observations of others under the lens of second-order observation to make our account more nuanced. When speaking of the map, one could easily argue that it functions like any technology: it is an instrument in human hands and can be used for good as much as it can be used for bad. One can hardly lay the charge of imperialism at the feet of the cartographic profession alone. Edney takes this line and writes:

> [*W*]e find that there is little that distinguishes imperial from non-imperial cartographies. Maps have served as a primary technology of governance since the early modern era, regardless of the nature of that governance.[763]

He thus rejects that the adjective 'imperial' can be categorically applied to the practice of mapping. After all, the same cartography was used to map at home

759. Branch (n 678), 115. This is not to forget Napoleon's campaigns in Africa, which also produced a wide-scale mapping project of Egyptian colonial territories in the *Description de l'Egypte*. See Edney (n 693), 16.

760. 'Rather than signifying a quality that a state either possessed or failed to retain, sovereignty could be held by degrees, with full sovereignty reserved for the imperial power.' Benton (n 498), 245.

761. Branch (n 678), 108.

762. Branch (n 678), 118.

763. Edney (n 693), 11.

as well as in the colonies under a universally applied notion of 'spatiality'. The functions of mapping – calculating area, creating legal claims of property and taxation – were applied the same everywhere. In an inversion of the Batesonian terminology, we can say that it is a difference that makes no difference. One could hardly make a case for the imperial nature of cartography any better.

As we have seen from Heidegger and Schmitt – the latter perhaps influenced by the philosopher – we can hardly ever regard technology as being neutral.[764] In the lexicon of Heidegger, science is not only the noble pursuit of knowledge but a theory of what is real, and the real is the domain of work, of doing, *poiēsis*, and of bringing something forth in the world. Science observes the world while simultaneously encroaching upon it. Already he understood that the subject/object distinction made little sense and that they were relationally networked in a wider assemblage that could, at best, only offer a representation. Science, including the science of cartography, cannot make the second-order observation 'to set themselves before themselves'.[765] If Heidegger pointed out that not only is the existence of technology possible because of science, but also science can advance through evolution in the sophistication of technical instruments.[766] Maps and empires share this reciprocal feedback. Cartography is thus not an innocent means to an end but a mode of revealing, and it bears critical questioning of what is being revealed. In Schmitt, we see a similar sentiment, albeit expressed differently.

We further know and accept that the map is a symbolic medium of communication that draws upon the persuasiveness of political power and scientific truth to establish its authority. As a communicative object, its meaning is discursively established. It is precisely within this framework that the map graduates from a simple scientific method to an instrument of imperialism. As much as it is a communicative assembly, it is vastly more a ritual of ex-communication.[767] As mentioned earlier, the mere presence of the regular violence involved in surveying (not to mention the military component) attests to this. Drawing a map is a communication between the few over the many, and the people who lived their lives on the soil had the ground mapped out from under them. Maps of the new world circulated in Europe and were not created nor distributed among native populations. The discourse was thoroughly European. In the political and legal categorisations of civilisation/barbarism, one of the exhibits in proof of barbarism was, in fact, the lack of sophisticated mapmaking by foreigners, which reinforced the European ideal

764. Heidegger (n 521); Schmitt (n 524).

765. Heidegger (n 521), 176.

766. Heidegger (n 521), 14.

767. Edney (n 693), 40.

self-image as civilised, scientific and enlightened.[768] That the same technique was deemed successful enough to be imported back home illustrates the reasoning that there is no difference between imperial mapping and 'mere' mapping because the latter does not exist.

Another proposition that deserves our attention is the thesis advanced by the historian of international law, Lauren Benton. As tempting as it is to regard European territorial expansion as a uniform, all-encompassing force spreading over the map like wet ink, she proposes that colonial powers were more instrumental and nuanced in their aims and that a variety of legal mechanisms and innovations supported this.[769] This can partly be explained by the differing spatial logics among Europeans themselves. We mentioned earlier that at the negotiations for the *Treaty of Tordesillas*, international lawyers enjoyed equal standing with navigators. As practitioners of different social functions, so their spatial logics differed. Where the lawyer looks at space within the grid of homogenous territory, the sea captain looks at the ocean as a network of passages and corridors.[770] The topography of landmasses was differentiated on the possibilities of entry and navigation, or, to put it more concretely, through harbours and rivers. She contests the assertion that no shared spatial conception existed among even European powers.[771] What was, however, more or less shared was a common legal tradition.

The point of highlighting these differing spatial approaches is to emphasise Benton's claim that colonial powers asserted their sovereignty not uniformly but in differentiated, irregular and fragmented spaces. Rather than vast blocs, power was expressed over passages, corridors and enclaves. The reality on the ground was in opposition to the idealistic monochromatic shading of the imperial map.[772] Much of the point of this was for several colonial powers to

768. The map could become a handy representation of the sum of scientific knowledge and political power achieved by colonial states. Edney (n 693), 41–3. The civiliastion/barbarian distinction resurfaced in this era in direct reference to Roman law and empire but was employed flexibly and opportunistically, with proponents of colonialisation painting themselves as the successors of Rome and its laws, while critics focused on the tyranny of Rome. See Benton (n 498), 231.

769. Benton (n 498).

770. This can be nicely illustrated through cartography itself. Even before the Ptolemaic map, navigators relied on Portolan charts that depicted sea routes based on compass directions. They are recognisable by how harbours are connected through networked lines that shoot out in all directions like shining stars toward other harbours. This represents a stark visual contrast with territorial cartography and clearly shows its function for navigation. In this sense, it closely resembles the medieval itinerary or even the road map of today. That these maps were often state secrets underlines cartography's power as a technology of government and empire. This often created tension between wanting to protect 'trade secrets' against needing to proclaim sovereignty over new territories publicly. This practice has persisted to this day with modern governments regarding specific maps as state secrets and is sometimes sent to embassies via diplomatic pouch. Benton (n 498), 106; Worster (n 698), 2.

771. Benton (n 498), 7.

772. Benton (n 498), 2.

operate within the same larger area. Just as mapping created new possibilities, with that came new anomalies and new potential for conflict. What the map did was not merely stabilise legal and political rule but at the same time also introduce new instability. Complexity and systems theory already understands this: we can only answer the question of the effect of cartography on imperial stability in a typically Luhmannian formulation: maps made empires more stable and unstable.

Consequently, the imperial project depended on equally diverse legal constructions of sovereignty, and no general-purpose legal regime was uniformly in power. These differences were not based on the inherent differences of places but instead arose from the contradictions within empires. For this to work, sovereignty had to be imagined as divisible and modular, allowing for slightly different configurations as and when needed.[773]

This mirrors Craven's analysis of the Berlin Conference and its effect on colonial projects in Africa.[774] While the order was projected, it disguised an underlying disorder or instability riddled with contradictions. Colonial territories had to be stable just enough to extract from them, but no more than that. It has been argued that colonial powers were more concerned with protecting routes of extraction and transport rather than controlling tracts of territory as such.[775] Political entities and legal orders had to be created, but not enough to create an identifiable populous that could rebel and demand legal remedy. Writing not of Africa but British exploits in India, Benton says that perpetual legal uncertainty was a matter of policy.[776] Divisible and uncertain sovereignty became a core principle of imperial law (also in part within a strategy of 'divide and conquer'). Through this complex but adaptable patchwork, the ex-communicated excluded could be included in the form.

If the Berlin Conference represented the apex of a long-standing trend in which law, politics and science coalesced around the object of the map, this object remained relevant in the era of decolonisation, too. If one were to roll a world map out at the peak of colonisation, the sovereignty of imperial nations covered more than three-quarters of the globe's territory.[777] It is tempting to point at the artificial boundaries drawn during the Berlin Conference as the cause of many of Africa's postcolonial problems. It must be true in some and even many cases. But perhaps the maps and borders of the continent may deserve a more subtle analysis from us. After all, why did the Organisation of African Unity (OAC) decide to maintain these borders?

773. Benton (n 498), 5.

774. See Chapter 5.

775. Benton (n 498), 281.

776. Benton (n 498), 253–261.

777. Craib (n 661), 11.

One part of the answer is that colonial territories, once created, became legal vessels ripe for re-appropriation by anti-colonial forces. As we saw Anderson argue, the territorial logo became a convenient rallying point for those who wanted to claim sovereignty for themselves. By this point in history, the political and legal systems had evolved down a path where sovereignty and territory, or law and geography, could simply not be separated anymore. This illustrates that while cartography and borders may stay the same, their socially constructed and communicated meaning is not carved in stone.[778] What the creation of nationalism in Europe and Africa both illustrate is that political publics do not exist through eternity but arise in response to particular problems.[779] In this case, international law, bounded territories, and cartography itself created a problem that was addressed recursively through the same means. The map stimulates the imagination of the colonist as much as the freedom fighters. Africa's territories, borders and publics are no more and no less artificial than those of Europe. We are aware of the back-and-forth of political and legal technologies between the old and new worlds that make their creation constructivist rather than through a unidirectional transfer. A new political public was born and created its identity through cartography and legal boundaries through the same mechanisms. In decolonised states, cartography was employed to illustrate the cultural coherence of the new states, and maps were produced on a large scale as a sign of independence, unity and scientific competence.[780]

Craib makes the important point that decolonisation often merely meant a handing over of exploitative and extractive instruments to a new elite.[781] The engine of the state-form continues to growl, unconcerned with who is behind the wheel. Is the territorially sovereign nation-state not just a continuation of colonialism? Or, as Latour phrases it, we might have rid the world of its colonial subjects, but a multitude of colonial objects remain.[782] If we can take anything away from the decision of the OAC's decision in 1966, it is that such an anarchistic position had no place in the Cold War when it was pushed out by the liberal West as well as the communists, both of whom had embraced the nation-state form.[783] The difference created through the civilisation/barbarian distinction and dutifully enacted by international law remained and became entrenched – along

778. Craib (n 661), 17.

779. Bennet (n 674), 100; Schmitt (n 247).

780. Craib (n 661), 22.

781. Craib (n 661), 24. In some cases, the reverse could also be argued to be true. Scheidel cites the comparable inequality levels in India under the Mughal and then British Empires. It is almost as if the identity of the sovereign is not what is at stake but that the very structure of hierarchical political rule based on exploitation and extraction creates inequality. Scheidel (n 221), 103; Maier (n 183), 46.

782. Latour (n 691), 309.

783. Craib (n 661), 29.

with other European legal, political and scientific technologies – but has changed its name within its self-description.[784] If colonisation covered three-quarters of the map, the whole world is now ensnared in the graticule of the cartographic imagination. It might be an evolutionary accident, but it is interesting to observe that the liquid divisibility of sovereignty became bounded and solidified just before it was allowed to be held by all. Different spatial conceptions are rejected as politically invalid and are dismissed by courts as unscientific. The ontological and epistemological frames have been set one-sidedly, and incompatible communications are duly ex-communicated.

## Maps and cartography in international law

As we saw in previous chapters, history does not only flow forward teleologically, despite what the map and the nationalist state want us to believe. Nor does it only or simply repeat. In the spiralling out of time, it does repeat, but each return comes back with a difference. This is as much a feature of time as it is the product of time. This insight prompted the historian Koselleck to refer to the sediments of time,[785] a change that accrues so slowly that it is hardly noticeable but leaves traces of difference layered upon the riverbank. Just like evolution and with a long-enough view, history can also appear as long stages of equilibrium suddenly interrupted by the new: '[t]he continuum between previous experience and the expectation of coming events is breached and needs to constitute itself anew'.[786]

One summer night in 1355, Bartolus de Saxoferrato experienced a dream that compelled him into action. He was returning to his post at the University of Perugia from Pisa and had contemplated the boundary implications of moving river sediments on the Tiber for a few days. What are the border implications should a river change its course or if sediments create a new island within the river? Despite his rumination, he was not compelled to record his thoughts until a figure in his dream visited him one night. 'Look, I brought you a reed pen for writing, a compass for measuring and drawing circular figures, and a ruler for drawing straight lines and making the figures'.[787] The next morning, he furiously began to write what would become the *Tiberiadis*.

This tract represents an interruption in the intellectual history of law. It is the first case of legal geography and environmental issues in what we would today call interdisciplinarity.[788] While it was written before the rediscovery of

784. Craib (n 661), 30; Luhmann (n 432).

785. Koselleck (n 156), 3.

786. Koselleck (n 156), 7.

787. *Tiberiadis*, lines 21–23, quoted from Cavallar (n 653), 67; Elden (n 181), 228.

788. Cavallar (n 653), 32.

Ptolemy, the jurist applied Euclidean geometry to practical legal problems. The tract came with Bartolus's hand-drawn sketches, which display the river and other natural features in one colour from a bird's-eye view. At the same time, the geometrical lines and shapes were superimposed in another, a clear attempt to visually encode the separation of nature and culture.[789] Bartolus believed that other disciplines, in this case, geometry, could help lawyers reach legally just results.[790] Bartolus and the other Commentators had taken a decisive break from the Glossators that preceded them. While the latter believed that Roman law was eternal and that facts had to be interpreted to fit, the younger generation of jurists, inspired by Greek philosophy, recognised that the law had to adapt to evolving realities.[791] This is even though, to return to Koselleck, the law depends on its repetitive applicability, spanning over longer temporal durations than singular processes.[792]

We see at the bed of *Tiberiadis* one of Bartolus's recurring concerns, namely, the distribution of power over space (or perhaps, the distribution of space among powers). This tract was not simply concerned with technical questions of delimitation but had an eye firmly on broader political implications.[793] The question at stake was how to claim new land, *nullius*, that had been created through a natural process. Further, he argued clearly over the distinction between *dominium* and jurisdiction. While the former inhered in a person and applied to the things he owned, jurisdiction was seated in an office and applied to a *territorium*. This argument was an early shift in emphasis from rule over persons towards the modern notion of rule over territory we have today.[794] Bartolus traces the etymology of territory back to *terrendo* to terrify.[795] The rule is understood to be justified in force. An army, even an occupying force, is, through their terror, understood to control territory. While it was too early to speak of sovereignty as we understand it today, Bartolus set the course for territorial sovereignty, as the surface of the earth is the

789. Cavallar (n 653), 40.

790. Brett, Annabel S. *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. Princeton: Princeton University Press, 2011, 222.

791. Elden (n 181), 218.

792. Koselleck (n 156).

793. Cavallar (n 653), 57.

794. Elden (n 181), 220; Brett (n 790), 201.

795. This etymology should perhaps be taken rather as an insight into Bartolus's mindset rather than sound philology. Despite being the preeminent jurist of his time, his talents did not extend to language. Although not with this specific example in mind, Cavallar writes that Bartolus borrowed many faulty etymologies from other authors and that his own writing sometimes 'sounds like Latin spoken by a farmer'. Cavallar (n 653), 42–3. This definition originated with Siculus Flaccus. Cicero offers an alternative etymology, connecting *territorium* with *teritur*, to turn or tread on land. See Elden (n 181), 63.

object of rule.[796] It is not difficult to extrapolate from the new, unclaimed object created by the Tiber, waiting to be territorialised, to the discovery of new lands that would arise later. In a jurisprudence that established a relation between humankind and lands through work (as if these two entities were distinct in the first place and only encountered each other later as if the relationship was not always already there), how are humanity meant to understand their relationship with the land that had not existed or was not known to them before?[797]

## Maps in European treaties

It took several centuries for Bartolus' compass and ruler to appear in international treaties. As we well know, the medieval jurist was writing very much in the time of the textual itinerary – which is part of the point of what makes his work so remarkable. Even after the introduction of the Ptolemaic map, lawyers were slow to catch on as sovereignty was still understood topographically over objects and persons rather than territorially. Over time, however, a shift did occur.

It is a deeply ingrained tradition to date the birth of the modern nation-state from the *Treaties of Westphalia of 1648*. As of late, the significance of the treaties signed in Münster and Osnabrück has come under scrutiny. My argument follows in this critical vein, but by taking a seemingly contradictory position: looking back, I have, up to this point, consistently argued that, in its essence, the political rule has not changed since the first complex societies millennia ago. On the contrary, looking forward, I argue that the current evolutionary incarnation of the modern nation-state started after the *Treaties of Westphalia*, even if we observe it specifically from the vantage point of the international law system. Let us take the current paradigm in which political power is expressed as the distinctly bordered, territorial sovereign state, which the map makes visually and mentally imaginable. We see it is a much more recent construction.

Branch argues convincingly that the treaties of Westphalia much rather belong to the spatial grammar of the medieval period than modernity.[798] That is to say; it conforms more with the travel itinerary than the cartographic map. This is despite the map already being used for political claims in the Americas.[799] In Westphalia, we do not find any maps and no sharp border distinctions. Any search for cartographically sophisticated maps that were certainly within the

796. Elden (n 181), 223; Cavallar (n 653), 61.

797. Cavallar (n 653), 62; Latour (691), 315.

798. For support of this position (with some reservations), see Maier (n 183), 72.

799. Branch (n 678), 125.

realm of possibility by then would be in vain. Instead, the treaties are characterised by breathlessly long lists of towns, cities, categories of people and different buildings. Even geographical markers are sparse. The emphasis is not so much on the ground itself as on the things 'on top' of it, such as vassals, peoples, houses and abbeys.[800] We simply do not see uniform sovereignty blocs but rather complex jurisdictions assemblages, although this complexity has been greatly reduced. Like all historically great events, they are created not in the moment but in retrospect.[801] It might be splitting hairs, but Hobbes' *Leviathan* was first released three years after the treaties were signed. What we see in Westphalia was still rooted in the non-territorial political theory of Bodin. The political units that were signatories to the *Treaties of Westphalia* had certain elements of sovereignty – like the right to have armies and raise taxes – but they were understood as being subjects within the Holy Roman Empire.

Westphalia was not, however, inconsequential. First, it did drive out at least some competitors to the state. The Hanseatic League was not recognised at the treaties, and it consequently spiralled into its slow death. On the contrary, city-states remained feasible for a few centuries more, as they differed from the state more in scale than in nature.[802] The second consequence that Westphalia represents is a moment in the differentiation of the political and religious systems through diminishing the authority of the pope in favour of the monarch rather than concerning the spatiality of the state.[803] And it is perhaps worth remembering that while it promoted religious peace between the Catholics and Protestants, absolute religious freedom was not extended to the Orthodox Christians, nor the Jewish and Muslims.[804]

Thus, in speaking of spatial ordering of power, Westphalia was not the decisive moment we are looking for. However, suppose we maintain our thesis that cartographic, spatial and legal experiments were conducted in the colonies and were only later reflected in Europe. In that case, we could do worse than to pause at the *Peace of Utrecht of 1713*. The treaty dealt with territories in both Europe as well as in the colonies. For the latter, all sides not only used maps freely but also 'fundamentally structured' negotiations.[805] The treaty still relied on the textual list but, for the first time, used geographic

800. Branch (n 678), 127; Rajkovic (n 675), 284.

801. Craven calls the singling out of Westphalia as 'arbitrary'. Craven (n 159), 9. See also Žižek (n 596).

802. Spruyt (n 1), 177.

803. Elden (n 181), 300, 309; Koselleck (n 254), 44.

804. Elden (n 181), 312.

805. Branch (n 678), 131. Grewe points to the slightly later *Treaty of 1718* between the Holy Roman Emperor and the Netherlands States-General as the first example of a map being signed and taken up within a treaty. Grewe (n 174), 326.

language as a descriptor for territories. The treaty also appointed for the first time a Boundary Commission to survey the disputed colonial territories for a more exact future division. As for the European territories under dispute, it is also clear that maps formed part of the *travaux préparatoires* of the negotiations.[806] However, the final text pertaining to those territories is still much more reminiscent of Westphalia. Thus, the development that we see between Westphalia and Utrecht is a slow encroachment of the map into international law, albeit mainly behind the scenes. Maps had gained legitimacy in legal claim-making. In their final expression, we also see the tension between the colonies and the new world. Colonies were described in the natural language of geography and were still to be set upon by surveying. At the same time, European territory was still dealt with in the old way of naming the achievements of civilisation upon it. But, this was also headed for change.

Napoleon's colonial experiments in Europe called for colonial solutions. In 1814, European powers gathered at the Congress of Vienna to stabilise peace in Europe after the disruptions of the French Revolution and Napoleon's wars. European states were described and defined entirely by their geographic and cartographic borders for the first time in history.[807] The sharp cut of the line distinguished territories, and everything inside was the object of full and undivided sovereignty. The time of the list was seemingly over. Among the various treaties signed at the congress, cartographic thinking shines through. Maps were not only referenced but also mandated. They ordered maps to be made, and where it was not possible, surveys were commissioned to make mapping possible. Any remaining non-territorial authorities in Europe have also been swept away.[808] The territorially sovereign nation-state had finally emerged. Unfortunately, the decision was made for a state-form that was not equipped to deal with the shifting energies of the coming Industrial Revolution and instead opted to reaffirm existing inequalities.[809]

Considering this, it makes more sense to speak today of a Viennese system rather than a Westphalian one. On the one hand, sovereignty's absoluteness and pure territoriality, not to mention the homogeneity of political forms, belong to Vienna more than it does to Münster and Osnabrück. On the other hand, in political theory, the interim period produced a shift in the self-description of authority. While the medieval sovereign had to appeal to the skies above for legitimacy, the increasingly secular post-Westphalian sovereign had to claim legitimacy from his subjects below.[810] We cannot deny that this

806. Branch (n 678), 131.

807. Branch (n 678), 135.

808. Branch (n 678), 137.

809. Maier (n 183), 186.

810. Koselleck (n 254).

process was naturally a complex thread that intertwined, *inter alia*, the functional differentiation of society, advances in political and legal theory inspired by the Enlightenment, and innumerable material conditions. However, our focus on cartography displays a distinctive miniature of this evolution. It shows us that scientific advances had practical implications for how polities imagined themselves and eventually expressed themselves legally. The international law system observed changes in its environment originating from the science system. Because it carried the persuasive force of political power and scientific truth behind it, it evolved structurally to accommodate these new objects. In this complex interplay, international law evolved to the point where it recognised only one unit of political organisation (at least in Europe) and arranged its lexicon around this ideal-form subject.

However, the story of the nation-state form remains a complex one. Simplistic accounts of a unidirectional export to the rest of the world, or in reverse as a colonial import, has no place here. The transfer of known territories among known enemies was at stake from Westphalia to Vienna. How is international law supposed to impose order when 'new' land is discovered with inhabitants who are neither friends nor enemies but absolute strangers? How this question was answered is the focus of the next section.

## Colonisation

The relevance of this tract is that it hints at how the pen and the compass – Roman law and cartography – could solve the problem of appropriating new land into new territory. Within the constructive loop of cartography and navigation, Europeans discovered new territories. These new observations called for new distinctions, and the international law system quickly created new categories for these geographies. The connection between these terms of art and the material world cannot be regarded as purely abstract legal categories. As Mickelson and Benton have shown, they are intrinsically tied with both the social and natural worlds, as international law attempted a scientific ordering of geographic knowledge.[811] Again, this was not science for science's sake, but because these lands had other polities living upon them, it was instead thoroughly seeped in political motivation. As we saw in Berlin, the Empire was constructed as an international legal system, and after colonisation, these constructs have remained by analogy.[812] None of these constructs is more notorious than the mentioned *terra nullius*, originally unknown to Roman

811. Mickelson identifies the categories of *res nullius*, the *res communis* and the 'common heritage of mankind' as examples of legal encoding of space. Mickelson, Karin. "The Maps of International Law: Perceptions of Nature in the Classification of Territory." *Leiden Journal of International Law* 27 (2014): 621–639.

812. Benton (n 498), 239.

law but repurposed from the ancient property law concept of the *res nullius*.[813] As we saw, native cultures usually found themselves on the wrong side of the civilisation/barbarian distinction for their so-called lack of cartography ('so-called' because current scholarship has done much to dispel this notion).[814] However, the distinction also set upon another relation that natives had with their natural geography: the *res nullius* concept could be extended to the territory because natives did not practise intensive agriculture.[815] This was land still left to nature, not yet claimed by the different coloured lines of civilisation.

Colonial powers did their best to establish this relationship between new lands and civilising human activity in various ways: by placing markers, establishing towns and, importantly, through mapping.[816] Despite their level of resources and complexity differing, these can all have a legal character and can be recognised as methods of bordering.[817] Today, we have concluded that all space, whether part of the territory of an individual nation-state or not, falls under the control of international law. We cannot point our finger at any spot on a map that is not a 'treatied space'.[818] However, we also saw that, in practice, imperial international law, in contrast to the perfectly ordered world of the map, was a terrain of indeterminacy and contradiction. Sovereignty was a matter of degree and purposely left vague, and the suspension of law was integral rather than exceptional.[819] Legal and political powers, rather than being absolute, should rather be understood as a flow from the centre to the periphery, where the capitol could increase or decrease its supply to the colonial administrators as and when their functioning required it.

It reveals an element of Bartolus's concerns on the Tiber that have remained with society to this day: to what extent is nature available, to be worked and to the benefit, for and of humans?[820] International law has always been an instrument in this anthropocentric setting of nature. The *res nullius* is the to-be-exploited, and the *res communis* is the to-be-exploited-by-all (only because

813. Benton cites Pagden, who reveals that the term *terra nullius* only came into use in the 19th century. Benton (n 498), 58.

814. Amanda Briney, "The History of Cartography," ThoughtCo, October 07, 2019, accessed May 25, 2020, https://www.thoughtco.com/the-history-of-cartography-1435696.

815. Mickelson (n 811), 626.

816. Benton (n 498), 56. Latour quips that 'land-grabbing' could just as well be relabelled as 'land-drawing'. Latour (691), 309.

817. Nail (n 35).

818. To borrow a term from a research cluster on North American treaties between native peoples and colonisers at the University of Hull.

819. Benton (n 498), 276.

820. Mickelson (n 811), 637.

it is inexhaustible). This is the map that international law (by no means alone, by no means exempt from singling out) has drawn of the globe.[821] It is in this anthropocentric light that Latour distinguishes the globe and the earth.[822] This imperial mode of legal and political mapping of the natural world is preventing us from seeing the planet differently.

## The ensnarement of the legal imagination

To the hardened lawyer, the connection between international law and maps may seem accessory at best and, at worst, a fanciful flight of imagination. However, even just a little bit of closer scrutiny reveals that maps share an intrinsic connection beyond the appendices of treaties. We have seen that maps serve as a scientific description of the world. The Ptolemaic revolution and its broader context of the Enlightenment are commonly regarded as the advent of the reason that made the shift to functionally differentiated modernity possible. But the ancient discipline of law superseded the modern sciences in distinguishing events and facts by evidence to make truth claims.[823] Law has always been concerned with the diabolic medium of truth and aspired to observe and map the world through its precious distinctions. The age of discovery prompted geographers and lawyers equally to find distinctions and differences to create knowledge of the natural world.[824] Law and cartography use the same operation in their distinctions and selections of what is important. But we also know well that law does not stop there but launches itself from the proven facts to prescribe back to its environment normatively. The legal system also has an imagination of its own.[825] Just as the presentation of geographical reality by the map calls us to action, so does the law command us after it has surveyed the facts before it. Inevitably the moment of *krisis* arrives.

International law and the world map share, both in how it observes and what it presents for future observation, a similar scale to that of the nation-state.[826] Despite being applicable on the same territory, the difference between international and domestic law can be said to be essentially one of scale, much like the national versus the world map. Scale creates the phenomenon, and as a position of observation, it also creates its objects (or, legally speaking, its subjects). What sprouts from this are the different legal possibilities that

821. Mickelson (n 811), 639.

822. Latour (n 691), 307.

823. Benton (n 498), 27.

824. Mickelson (n 811), 622.

825. De Sousa Santos (n 685), 281.

826. De Sousa Santos (n 685), 287.

are opened up or shut down. What is legitimate to be relevant and to be regulated? The kind of precious distinctions the law creates is thus influenced by the scale at which it operates. This distinction is made even though the ontological objects in question remain the same. Today, one of the greatest blind spots caused by the scale of international law is that it has been too small, a structural problem that helps cause and continues to hamper meaningful progress on the climate crisis. The boundaries of the state forced our perspective to see small units inside a bigger whole rather than everything woven into the same fabric.[827]

After cartographers have collected the necessary scientific data at the scale they chose to operate at, the data must present itself as a map through projection. While the modern map can theoretically project any point on the globe in the centre of a given flat surface, imperial maps usually replaced Jerusalem as the centre with its territories. Critics of the popular Mercator projection persistently point out that the Global North continues to be displayed as a centre, with the Global South depicted in the periphery. Thus, colonial legal and political forms could undergo a 'symbolic transfer of technology' into peripheries where they made little sense (even though, as we have seen repeatedly, this process had been much more dynamic and multidirectional).[828]

Just like cartography, the spread of legal science has lost its innocence. We know that they are expressions of interests and power relations that include some objects and excommunicate others. But how do maps practically do this within the international law system? One of the more common cases is that maps are used as evidence, but it is not restricted to that.[829] Maps themselves can be legal facts, which can create law in their own right.[830] As evidence, maps are often used in establishing a geographic location, concerning others, to the Court. Quite obviously, this would be the case in proving the location of boundaries during a territorial dispute, but we have seen many other examples employed. Courts are generally aware of the pitfalls of mapping, and the International Court of Justice (ICJ) recognises the politics behind mapmaking and even that cartography had played an important part in colonialism.[831] Therefore, restrictive approaches which consign maps to the status of secondary evidence tend to be the norm, and while maps are not specifically treaties, the rules of the *Vienna Convention on the Law of Treaties* have been analogously applied to the interpretation of maps by both the ICJ and the

827. Latour (n 691), 317.

828. De Sousa Santos (n 685), 292.

829. Worster (n 698), 1.

830. Worster (n 680), 1.

831. Worster (n 680), 5; (n 698), 8.

Special Tribunal for Lebanon.[832] Courts also have relied on the findings of Court-appointed mapping commissions to establish the facts of a case.[833] Worster argues that the material map itself could be construed as unlawful conduct, and states could interpret each other's cartographic practices as unfriendly acts if interpreted as a threat to peace, sovereignty or territory.[834] He also argues that even though the ICJ has expressly stated that maps are not in themselves legal instruments that can create legal obligations (although they can form part of a treaty's text), there are nonetheless several possibilities of how maps can be regarded and understood as legal acts.[835] It remains possible that maps can express the will of a state and can be read as a binding unilateral statement or that repeated copying and use of a certain feature on maps can prove consistent conduct.[836]

It is also interesting that the United Nations (UN) has its own Geospatial Information Section (GIS) that creates its maps and grants commissions. The maps produced are meant to serve as references for all official UN documents. The benefits of such a section are as many as they are obvious. But as complexity teaches us, anything new can simultaneously mean 'more good and more bad', and we would be sleeping at our post if we did not question the full consequences of a project as political (certainly *as* political as it is scientific) as this. While the ambitious International Map of the World Project failed, we should still ask the question of what it means to have a map that is sanctioned by the international organisation called the UN. As we know, the authority of a map is granted communicatively through media such as power and truth, and its diabolic nature is at work exactly as an 'international map' attempts to undermine this critique. The GIS could easily claim that the maps it produces are pure scientific instruments untainted by political bias and are, therefore, more scientifically true and authoritative. We know that maps have a dark past in Empire and the homogenisation of international law, political structure and even spatial understanding. What does it mean when all states jointly sanction and commission the increased accuracy and precision of this technology of control while appealing to its legitimacy in a new-but-old way? Where could states exclude other polities on the civilisation/barbarian distinction through their superior cartographic capabilities? What happens when all people are theoretically included in a mapping project?

832. Worster (n 698), 18.

833. Worster (n 698), 4.

834. Worster (n 680), 10.

835. Worster (n 680), 11.

836. Worster cites the *Nuclear Tests* and the *Eritrea–Ethiopia* cases as examples. It is also for this reason that many states provide an express disclaimer on many of the maps that they issue, or protest against maps created by private parties such as Google. Worster (n 680), 15–16; Worster (n 698), 7.

One result of state mapping and the mapping of its genetic offspring, the UN, is Agnew's territorial trap that we discussed earlier.[837] This conversation is also surfacing within international law and has taken shape in various solutions offered, such as world law, global administrative law and informal law.[838] Traditional public international law, however, remains undeniably bound to the state-centred mode of observation. This position has been referred to as methodological territorialism,[839] which correlates with the notion of methodological nationalism.[840] Given its appeal to scientific truth, one cannot help but feel that falling into this trap has been a natural consequence of a naïve belief in narratives of teleological progress since at least the Enlightenment, although the thorough critique of it is well-known. To reiterate, my purpose is not to deny the utility or even desirability of further cartography but to probe at the consequences and implications this holds for our legal and political futures.

The well-known territorial map has played a trick on us in that it has rendered the distinctive territories of today timeless.[841] Rajkovic calls this the eternalised world map,[842] but I hasten to add that it is also internalised. It depicts the difference between territories rather than the passages and corridors that connect them. Where it had opened up the horizon of man in early modernity, postmodern society's imagination is smothered by it. What makes the international lawyer's task even more difficult is that his discipline shaped this map and was shaped back by it in return. This is even though territory seems inadequate for containing contemporary authority. One could argue that an interesting reversal had taken place from the medieval age to now. Where territorial sovereignty could claim a material groundedness over the abstract patchwork structure of before, it is now territorialism and nationalism that seem to be abstracted from material realities on the ground. One possible explanation for the continued appeal of this construct lies in the requirement of all systems to reduce environmental complexity. Territorial sovereignty undoubtedly had this advantage over earlier and competing forms,[843] and in today's vastly more complex society, it provides something comfortably understandable, no matter how disconnected from social reality

837. See the section titled 'Sovereignty' in Chapter 4.

838. Rajkovic (n 675), 276.

839. Rajkovic (n 675), 268.

840. Wimmer, Andreas and Glick Schiller, Nina. "Methodological Nationalism and beyond: Nation-state building, Migration and the Social Sciences." *Global Networks: A Journal of Transnational Affairs* 2, no. 4 (2002): 301–334, 301.

841. Agnew (n 259), 59.

842. Rajkovic (n 675), 269.

843. Spruyt (n 1).

it might be.[844] Has the modern scientific map returned to the function of only symbolic instruction on the order of creation, as the *mappa mundi* did? Another medieval object, the textual list, is also said to have been resurrected in our current age in the form of digital data.[845] In this case, we can only repeat one of our mantras: an increasingly complex society requires and creates more lists and maps.

## Conclusion

This chapter attempted to focus on the role of the cartographical map as it relates to the discipline of international law: how the law reflects scientific ideas but also leans on its discourse for legitimacy. Concretely, this relationship is quite apparent, but it is also important. Attaching maps to certain types of treaties has become common practice. In disputes, most obviously territorial or boundary clashes, parties use maps to make their claims. Their disagreement can be extremely succinctly summarised as an argument about where a line on a map should go. Perhaps for this reason, international judicial organs have been cautious in their approach to maps and are obviously aware of how manipulatable they are by political interests. We have also seen, however, that maps can take the form of legal acts or even norms in themselves. As a medium of communication, their function is as diverse for legal observation as one could imagine.

Yet, the other focus was to analyse the map's legal communication more abstractly. The second part of our research question enquires to the extent that maps in particular, but science in general, can stimulate or trap the legal imagination, meaning the decisions it can project as plausible. The map as a medium creates a direct pipeline of communication between the legal system, politics, and science. Symbolic communication media such as power or truth are references to the external world that make communications much more likely to be accepted. Cartography's employment of these has been stunning. Through harnessing claims to scientific truth, any other way of depicting or understanding space has been squeezed out. This is even despite the many problems contained within the surveying and the problems inherent in projection. Although we know this, we struggle to break free from the territorial logo that has been printed in our minds since our childhood. Besides, maps carried the force of state power behind them from their earliest days. We have been convinced that those people within the border silhouette are of the same polity as me and that we carry interests distinct from those born outside it. It conveniently disregards the (scientific!) fact that these borders, identities

844. Luhmann, Niklas. "Territorial Borders as Systems Boundaries." In *Cooperation and Conflict in Border Areas*, edited by Raimondo Strassoldo and Giovanni Delli Zotti, 237–244. Milan: F. Angeli, 1983.

845. Rajkovic (n 675), 287.

and cultures have been shaped only a handful of generations ago. On an international level, it has homogenised all other communities into species of the same genus. Those policies that were not strictly territorial fell off the map of evolution. The result of this one-two combination is that the current nation-state system seems natural and immemorial, despite being so recent and artificial, and it does not depict the bloodshed that was required to make it a reality.

This has implications for how we do international law today. The system has evolved to a point where the state is the privileged subject, and we prefer to look at our discipline as the law between these subjects. This image may have come about in part because of the map. It has locked our imaginations onto a single track that seems insufficient to effectively answer the challenges our planet and society pose us with. Despite any advances that have been made, methodological nationalism has become a constraint. The answer to this problem is not one of more hierarchies, and extending the prevailing logic to that of a global Leviathan seems like adding fuel to the fire. I would propose that a return to first principles could be a more fruitful avenue than relying on the exploitative, extractive and exclusionary forms and algorithms that got us here to begin with. Scaling colonial objects up seems not only unimaginative but also dangerous.

Cartography also changed society's spatial relationship with nature. We saw that international law was deployed scientifically to new lands that were discovered as an instrument of knowledge and meaning creation. Humans exhibited their tendency to project their rationality onto nature to order it.[846] An opposite movement, yet no less insidious, also occurred: norms in general and laws, more specifically, were deduced from what was observed to be nature. It allowed for the diabolical rhetoric distinctions, paraded as scientific truth, like civilisation/barbarism and culture/nature to emerge, with clear implications within the legal and political systems as they were translated into the operating languages of both.

Humans still personify norms onto nature today. How tempting is it not to imagine the climate crisis as nature's revenge on humanity for pushing the equilibrium of this self-regulating system into instability?[847] If we only atone for our sin of burning fossil fuels by reducing them below specified levels, our damnation will be spared. The climate scientist will scoff at such sophistry of the humanities or social scholar and say that these are simply the laws of nature. The purpose is, of course, not to dispute the truthfulness of the scientist's recommendations. I merely want to point out that it is the same rhetorical guile that has been employed for centuries when exclusion was

846. Daston (n 213), 6.

847. Daston (n 213), 20.

justified on the natural barbarity of other lands and their political communities. We need to challenge not the veracity of the climate crisis (which is not worthy of even a dunce's time) but the legal and political choices that seem to naturally flow from it. As Daston points out, the rhetorical goal of such a move is to make a given norm seem timeless. Nature is so varied (it is, after all, the most complex thing we know) to find any example to fit a given argument. Beware the restoration of 'natural order'.[848] We can never be sure whose 'nature', and whose 'order' is being talked about.

848. Daston (n 213), 68.

Chapter 7

# A 'legacy of excess': The nation-state as an ideological artefact

## Introduction

We began this study by asking to what extent international law, as employed by states, gave expression to political and scientific communications during the age of colonialism. We always knew that despite being a distinct system that follows its internal logic, it has never been free from the influence of other spheres of society. However, we identified several reasons why this question remains important for further study. Arguing that the nation-state is a vital boundary object between various systems, and the scaffolding that made colonialism even sensible, the interplay between the law, politics and science is certainly a complex formation. Thus, even having a robust theoretical understanding of how these different communications interact is an important question. This is important for international law as it directly shaped the doctrine of sovereignty. We saw that it was not only a legal construction of a political ideal but that it has always assumed certain Enlightenment or rationalist ideologies from the scientific system too. The idealistic notions of progress and the betterment of humanity through knowledge became an important part of international law and an important justification for colonialism.

**How to cite:** Buitendag, N 2022, 'A "legacy of excess": The nation-state as an ideological artefact', in *States of exclusion: A critical systems theory reading of international law*, AOSIS Books, Cape Town, pp. 187–199. https://doi.org/10.4102/aosis.2022.BK319.07

In this chapter, we will begin by summarising our research results, showing the conclusions we reached and how we could answer the research questions we set ourselves in Chapter 1.

After that, we will consider the broader implications of our research findings and, more specifically, what it means to study international law today. Having argued throughout this work that international law has structural deficiencies that have been present for a long time, it is worthwhile asking if it is still useful to use international law as is to solve the scale of our current problems. It is suggested that international law is standing in front of a true crisis, meaning a moment of decision and time for self-reflection is called for. Finally, we point out the direction of possible future research.

## Summary

In this study, we sought to investigate the historical role of international law and the legitimisation and justification of colonialism in conjunction with the political and scientific systems. The hope was to do this by looking at its principal subject, the state, and how it is represented legally through the doctrine of sovereignty. It started with the suspicion that while the modern state might be manifesting today in novel ways, underlying it is an ages-old structure. Therefore, whatever changes may occur in future, we can expect certain core elements to remain present. When the objects of analysis are so broad, also in temporal span, a robust grand theory of society is required. In this light, autopoietic systems theory, especially as developed by Luhmann, was selected as the most suitable candidate for framing such an expansive endeavour into a single coherent picture. Additionally, the intent was that as Luhmann's work has rarely been applied to international law, new insights could arise.

However, the sense that systems theory could not be applied as if it had been in hibernation for the last two decades and that the theory had to be adapted. Thus, Chapter 2 wished to make the theory slightly more accessible to those not versed in such a vast and oft-impenetrable oeuvre. Additionally, applying a theory would be of little interest if it could not highlight shortcomings within the *status quo*. Therefore, while systems theory was embraced in its fundamentals, the choice and emphasis on theoretical concepts were carefully chosen to expose the critical potential of the theory, which is too easily dismissed as a conservative one. Thus, hopefully, the interaction between systems theory and international law has had a mutually beneficial outcome in that both come out the other side slightly different than previously observed.

Systems theory is explicitly not a normative but a descriptive theory of society. Without changing its descriptive nature, it was hoped that it would be possible to turn it into a critical theory by underlining the perhaps unsavoury side effects of the processes it describes. This meant that one could remain within the spirit of systems theory while making it productive. One method to

achieve this was to take familiar theoretical concepts and shift their emphasis without changing them fundamentally. For a theory that revolves around communication, the emphasis can be shifted to cases where communication is coercive, deceptive, exclusionary, or basically breaks down completely. Another example, while all knowledge is based on observation, we should not forget the fact that observations are fallible, rest on biases and can always be questioned. It is important to avoid the all-too-easy pitfall of assuming that any given knowledge is common sense or even natural. These two points can be illustrated in the final concept of symbolic media, those unspoken values that silently travel along with all communications, affecting their chances of being accepted – or not. Even international law is persuaded and continues to persuade by and with these media. Two, in particular, were highlighted for further scrutiny: power arising from the political system and truth arising from the science system.

In Chapter 3, it was argued that the state was made possible, and international law was influenced to its core by the feedback between the systems of law, politics and science. So, to do this, a historiography of the rise of the state and international law had to be done. Breaking away from traditional accounts of the history of international law, we searched for the origins of the state in the first ancient complex societies. This was made possible at first through the technological development of agriculture to capture greater energy yields for human consumption. This soon gave rise to hierarchical political orders and legal regimes that could control the lives of people and the setting of nature. One of the first important legal developments was that of the border, which became an essential state feature right from the beginning. It was also already apparent in these early days that political identities were not only emerging but also actively encouraged.

These relations gained in complexity through the medieval period but hit a bottleneck regarding how much they could grow in complexity. This was caused by energy yields not increasing significantly enough for further growth. This was smashed dramatically with the discovery of steam power and the consumption of fossil fuels. Modernity saw a violent increase in social complexity and a great leap in the capability of those states that could harness that power. This led to their expansion across the globe and the development of an international law fundamentally based on entrenching the sudden advantage these states enjoyed. The newfound energy quickly translated into unified states that could use their power and scientific expertise to create and enforce asymmetrical and exploitative relations with the inhabitants of other parts of the world. In doing so, international law was instrumental in the process. International law created its standards so that it reflexively applied outside of its borders to legitimise the state's hunger for more power. Rather than curbing the power of states, international law created ever-newer categories and classifications for why other populations could not be allowed into the system.

This historical exposition proved necessary to prove that these asymmetries are still nestled within the core of international law today. Therefore, in Chapter 4, we had to stop and look more carefully at the state as it exists today within the broader international sphere. We saw that during this period, especially when European states had expelled the influence of the Church and could coalesce into powerful units (thanks in no small part to new technologies), attention decisively shifted outwards. Sovereignty, initially developed to claim exclusivity within Europe, was turned inside-out to justify colonisation abroad. International law created ever-newer categorisations upon which sovereignty could be granted or not, based mainly on European criteria of rationality/civilisation. This left European states legally, morally and politically open to doing with foreign territories as they pleased.

We argued that these international law categories were made particularly convincing by relying on two specific symbolic media. The first is the well-known medium of political power. International law had to serve and obey the interests of the European states that had created it. The power of states had to be enshrined legally, giving states the rhetorical firepower and peace of mind to exert their power uninhibited. Thus, it was claimed that because of the lack of European-style states in other parts of the world, such peoples could not enter into full international subjecthood. In conjunction with the lack of state apparatuses (or even in the cases where these existed, as in Asia), the relative lack of technological ability served as a justification for the apparent lack of civility. However, a vulgar display of power would have been unnerving for many during the modern period. To that end, another symbolic medium, namely, truth, was employed to legitimise colonial legal doctrines. In an age of so-called rationality, scientific rhetoric could be deployed to great effect in the juridification and legitimisation of colonialism. Instead of claiming foreigners were barbarians fundamentally different from ‘us’, they could now be philanthropically regarded as ‘not yet’ civilised. Entrance into the family of nations was thus not barred but could be deferred on the condition that people adopt European-style state structures.

From there, two particular cases of the interplay between law, power and truth were studied in detail. In Chapter 5, the first case looked at is the notorious Berlin Conference of 1884. On the one hand, the power interests of the participants were apparent – that Africans had a say or could even resist this division of ownership and sovereignty was not even considered. It was a conference and a conversation among the powerful only. It could, however, not happen unapologetically. The political ambition was still compelled to act legally, and the law had been persuaded to invent complex gradations of sovereignty to make it possible. As a complement to this, scientific truth was harnessed to paternalistically depict the decisions of the Berlin Conference as enlightened progress, abolishing the barbarism of slavery, and as a civilising mission. In hindsight, we know this was empty rhetoric, a mere

veneer to disguise unbelievably exploitative and exclusionary practices on the continent.

While our emphasis at the Berlin Conference was skewed towards the intercommunication between law and power, Chapter 6 emphasises the role of scientific truth in international law while keeping the whole triad in mind. Instead of focusing on a single legal or political event, we scrutinised the development of a particular science that of cartography. Advances in cartography had significant implications for both states and international law. It cemented the notion of territory as a legal concept, and subsequently, borders became increasingly precise, rigid and important. It also became politically crucial for the formation of the nation-state that was predicated on largely fictitious national identities. These became justified and assumed in the sciences and as an operating premise for international law and sovereignty. Maps also enabled further imperial expansion, and one could hardly imagine the Berlin Conference happening without the use of modern cartography.

Today, maps are an inextricable part of certain branches of international law. While courts and tribunals are aware and cautious of the political pitfalls that are part-and-parcel of maps, belief in the scientific accuracy or veracity of the map still exists. Further, the traditional world map of nations might convince through its scientific truth but obscures the political power behind its depiction. Again, the current order of nation-states is normalised and naturalised, and it ensnares international lawyers' imaginations to think beyond 'methodological nationalism'. It provides the unspoken, assumed framework within which the entire endeavour of international law is practised. Thus, we must recognise that even the most scientific maps obscure a normative and political agenda. As useful or beautiful as they can be, maps and borders are inseparably linked to political power, statism, imperialism and colonialism. This cannot be avoided when the law engages with maps, and international law is an accomplice in maintaining the legal and geographic status quo in its very structure.

## Practical implications

Many of the historical problems that were discussed in this work, because of their structural nature, are still relevant for international lawyers today. We find ourselves in a world society where nation-states have become a relic of modernity. Inequality is at a high point, and the doctrine of sovereignty and political nationalism is still used to bracket external problems, such as migrant and refugee crises, in an unprecedented way. Other problems cannot be so quickly contained. Environmental crises, a feedback loop that struggles to find its halting mechanism,[849] have shown that states are too caught up in

849. Dehm, Julia. "International Law, Temporalities and Narratives of the Climate Crisis." *London Review of International Law* 4, no. 1 (2016): 167–193, 169.

their extractive algorithms and self-interest to address the problem genuinely. When the recent virological pandemic struck, states were disorganised and eclectic in their response when a uniform approach would perhaps have been better. It is argued that these are not minor bugs that can be tinkered with and fixed but are features of the international system hardcoded into its structure from the very beginning. If humanity is to thrive in the coming years, international law will have to be developed that can exceed the exploitative, exclusionary and colonial construct of statism. Because of the scale, intensity and high stakes of world society's problems, it is time for international law, among many other institutions, to act to its maximum extent while keeping its current structural integrity. The global crises we face have bought international law to its moment of *krisis*.

This realisation has already surfaced in different guises among international lawyers. It is not uncommon to hear that international law is experiencing a crisis. Some have described it as a 'discipline of crisis',[850] while others consider it a discipline *in* crisis.[851] Others have noted that it is exactly during times of crisis (whether economic,[852] environmental[853] or humanitarian[854]) that international law can develop.[855] It is the constant negotiation of norms that leaves the law in this permanent state of crisis.[856] Identifying new phenomena such as the fragmentation of law, soft law, informal law and global power shift is seen as a challenge to international law itself. That the notion of crisis occupies the thoughts of lawyers is further evidenced by the theme of the 2016 Annual Conference of the European Society of International Law, namely, 'How International Law Works in Times of Crisis'.

While we might not all agree on the nature of the crisis, two things seem to stand out: first, that international law is amidst some kind of crisis, and second, it is doubtful that international law will disappear. It is, however, clear that it will have to change and structurally.[857] Is it possible that the law's very

850. Charlesworth, Hilary. "International Law: A Discipline of Crisis." *The Modern Law Review* 65, no. 3 (2002): 377–392.

851. Tractman, Joel P. "The Crisis of International Law." *Case Western Reserve Journal of International Law* 44, no. 1 (2011): 407–421.

852. Bilchitz, David. "Socio-economic Rights, Economic Crisis, and Legal Doctrine." *International Journal of Constitutional Law* 12, no. 3 (2014): 710–739.

853. Dehm (n 849), 167–193.

854. Stahn, Carsten. "Between Law-breaking and Law-making: Syria, Humanitarian Intervention and 'What the Law ought to be'". *Journal of Conflict & Security Law* 19, no. 1 (2014): 25–48.

855. Stahn (n 854).

856. Sur, Serge. *International Law, Power, Security and Justice: Essays on International Law and Relations*. London: Bloomsbury, 2010, 151.

857. Burke-White, William W. "Power Shifts in International Law: Structural Realignments and Substantive Pluralism." *Harvard International Law Journal* 56, no. 1 (2015): 1–79.

foundation, the assumptions of the modern paradigm, has turned to sand, threatening the law as we know it to collapse?[858]

However, we would prefer to optimistically argue that these global changes should not only be considered a threat to international law. Perhaps the prophecies of doom tell us more about the observations of the prophets than it does about the future of law itself. If one can shift this paradigm, for example, realising that discipline *in* crisis and one *of* crisis are two sides of the same coin, it might turn out that the state of crisis is, in fact, necessary for international law's success. As we have learned by now, it is usually a matter of observation and how we draw our distinctions. Just like systems theory has shown us that the law, politics and science are structural and procedural phenomena, so too, are crises. They are irritations in the system environment that force us to abandon old distinctions and draw new ones. Thus, the crisis should be neither lamented (nor celebrated) but should be understood as the fuel necessary for international law to maintain its evolution.[859]

Writing about the nature of law during crises, Bilchitz points to three kinds of crises, namely, personal, structural and foundational structural.[860] As one should guess by now, we are primarily concerned with the final type.

Unfortunately, it is not always easy to focus on underlying causes during times when solutions need to be found quickly. As Charlesworth points out, crisis events are always open to selective understanding and precious distinctions that, more often than not, 'diverts attention from structural issues of global justice'.[861] She goes on to add that 'it is difficult to observe any real progression of thought or doctrine' and that lawyers can tend 'to miss the larger picture'.[862] As with picking relevant facts, this has political implications, and lawyers do not reflect on their exercise of power. This means that the causes of crises of justice are treated in a symptomatic fashion seeing that:

> [/]nternational lawyers [...] are preoccupied with great crises, rather than the politics of everyday life. In this way international law steers clear of analysis of longer-term trends and structural problems.[863]

One of the underlying premises of this work is that international lawyers should not miss the forest for the trees when looking at their discipline. That is why the study's scope had been cast so wide; for a while, it will naturally always be selective and reductive. A macro-historiography as a wide array of

858. Tractman (n 851).

859. See Sur (n 856), also Charlesworth (n 833), 377; Stahn (n 854).

860. Bilchitz (n 852), 717.

861. Charlesworth (n 833), 382.

862. Charlesworth (n 833), 384.

863. Charlesworth (n 833), 389.

research objects can bring us closer to understanding the structural problems that have concrete effects on international law today.

Tractman echoes another sentiment of this project in that the nation-state paradigm has run its course and is now a crisis for the legal system.[864] For him, there are simply too many contradictions appearing in the system to suggest that it is still suitable for a complex, functionally differentiated world and that it is time for a paradigm shift.

Whichever way one approaches it, it seems that enough international lawyers feel uneasy that our tool might not be the best suited to the job anymore. In this sense, I concur, given all the evidence we have seen so far in this work, that international law is standing at a '*krisis*'. The ancient Greek root of the term – from *krino*, to cut, just as one draws a distinction or a boundary – represented a moment when a firm decision must be taken. In legal proceedings, this was the moment where the judgement was spoken, and in medicine, it was where a doctor had to declare whether a patient would survive or succumb.[865] Thus, when we speak of international law and crisis, we can see it as saying no more than that international law is finding itself in a situation that demands a decision. As Spencer-Brown would say, 'draw a distinction!', and as we remember, it is exactly this distinction that imparts identity.[866] What should be at stake here is the very self-reflexive, self-redefinition of international law.

The contribution this study pursued was to draw a much longer and deeper history of international law than is traditional. It showed that certain international legal constructs were millennia-old, and they built up and relied upon unjust structures from the beginning. Much of the broader society is implicated in this. As embodied by the state, the political system was able to use the law and science systems instrumentally for exploitation and extraction. This has had a devastating effect on millions of people and the fauna, flora and ecosystems of our planet. Yet, today we find international law's reliance on the discourse of climate science to prescribe norms falling on deaf ears. Again, the legal and scientific systems are being employed to justify a new carbon colonialism.[867]

We tried to show that states arose from the very first complex societies that could extract a surplus border and coerce others to work. These surpluses were always distributed unequally and had to be defended against others labelled

864. Tractman (n 851).

865. Agamben, Giorgio. *Pilate and Jesus*. Translated by Adam Kotsko. Stanford: Stanford University Press, 2015, 13.

866. Spencer-Brown (n 68).

867. Dehm, Julia. "Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective." *Windsor Yearbook of Access to Justice* 33, no. 3 (2016): 129–161, 135.

as barbarian. The abundance of new energy meant that societies could grow more complex, and technological advances in science and law soon arose. Law quickly came to regulate the relations with barbarians. These early states had to expand their borders and influence through increasingly sophisticated means continually. This took a slightly different form in each epoch, although the fundamental structure remained the same. The need for energy kept increasing, and states had to use more sophisticated science and law to capture and maintain this stability, usually at the cost of external zones of instability.

Even in the modern era, this characteristic did not fundamentally change. After an explosion in energy capability in Europe, modern international law became vital in legitimising and justifying the colonial expansion of the new nation-states. Significantly, the doctrine of sovereignty and the borders that made it possible played an essential part in imposing and maintaining inequality around the globe. This only changed after the Second World War (WWII). While international law has undoubtedly developed and changed in the intervening decades, millennia-old structural elements cannot be discarded that quickly. Inequality is at near-maximum levels, and even the choice of how to politically organise is prescribed. It is a paradigm still nested within the friend–enemy distinction, especially when we consider that the distinction does not preclude honest competitors or even those we admire. We saw that we could get stuck in territorial traps, or cartographic imaginations, that prevent us from thinking in novel paradigms.

One of the more general contributions this study hopes to make is to compel international lawyers to look at their discipline through a wider lens. While the doctrinal matter of law will always remain the important focus of those in practice, the assumption in the background is that the blind spots of observation need addressing. Changing how we see international law in its historical development and its interdisciplinary and inter-societal relations must influence the details of positive law practised. The practice, the history, the theory or the sociology of international law is not set in stone. There are different stories we can tell about international law, and here we attempted a novel one that hopefully inspires practitioners and theorists of international law to look at their work in a new light.

Although it would, of course, be a gigantic task, and in many respects an idealistic one, to change the fundamental structures of old systems, we may not have much choice. The overwhelming complexity that global crises and catastrophes are bringing upon us, which every individual can by now feel, demands systemic evolution from international law too. The nation-state, borders and sovereignty have reached their limit. The time has never been riper for international lawyers to look at the tools of their trade and ask whether they can still fix the problems they were very often instrumental in causing in the first place. How this can be done is naturally not easy and requires much more thinking and researching. That is the subject of the next section.

## Suggestions for the future

As we mentioned, the aims of this project are high and beyond the scope of a single author or research piece to explore to its full extent. If anything, what is hoped here is to inspire others to look at and approach international law from a fresh perspective. That means there are many directions in which further research can develop.

The first of such research would hopefully be to further build upon a systems theory understanding of international law. This could collaborate with the movement in global law research, which already relies on Luhmannian elements. However, systems theoretical analyses of international law are still marginal, and international lawyers and theorists could hopefully do more to expand the scholarship in this terrain. Hopefully, this work has proved, along with those that exist already, that such projects can be fruitful.

The history of international law is experiencing a sharp rise in interest, but we believe this should continue and evolve into ever-newer directions. Critical histories are both welcome and important and help us redefine modern discipline. However, the systems theory historiography and intellectual history attempted here, focusing on structures and concepts over a vast temporal stretch, attempt to show how far these limits can yet be stretched. There is no reason, arguably even arbitrary, to begin only with the classic authors of early modernity. Strictly imposed ‘births’ and ‘deaths’ of epochs are almost always observer-dependent and should remain open to contestation. It is also not enough to study the history of international law through its canonical texts alone. The material environment of international law needs to be incorporated into its history, and a greater openness to sources would be encouraging.

Finally, how international law interacts with other social systems today still has much potential. Although we attempted to look at international law and political power in a novel way, the question is a classic one. However, international law touches nearly every aspect of social life, and the communication between international law and other social systems can be instructive. During the recent pandemic, the legal and health care systems face challenges in communication that are poorly understood. This also raises the question of science again, which is relevant to international law on many matters, the climate not being the least of them.

## Conclusion

More broadly, this work has spoken extensively about the ‘legal imagination’. It is, of course, hard to be very precise in this regard, but international lawyers are urged to keep pushing the boundaries of what international can and could mean beyond the state and borders. Fortunately, there is work on this that can serve as inspiration, and I beg forgiveness for a final historical detour.

During the Berlin Conference, dissenters were already against the grandiose catechising of civilising missions. Within the international law community, there was Charles Salomon.[868] While Von Bismarck and other leered over their sophisticated maps, anarchist geographer Élisée Reclus was publishing his *magnum opus*, the *Nouvelle Géographie Universelle*.[869] In his deeply political geographical work, Reclus rejected the superiority of one culture over another and insisted on unified humanity with its centre everywhere and its periphery nowhere.[870] Far removed from the attitude of Leopold II and others at the Berlin Conference, Reclus writes of Europe:

> [*T*]he smallest tribe, the smallest group of men in the natural state, claims to be the true centre of the universe, imagines itself to be the most perfect representative of humankind.[871]

This stands as a stark contrast. Reclus could not accept the binary of civilisation/barbarity[872] in that it denied the contribution of Africans to world civilisation and that it was European slavery that had indeed worsened their lot. He understood that despite what came to be claimed in Greenwich, the globe had no one centre or circumference.[873]

The contemporary scholar Ferretti has made numerous studies on anarchist geographers and highlights the work of prominent Italian figures in that era.[874] One such figure whom Reclus inspired was Arcangelo Ghisleri. He attacked the European intelligentsia for the idea that non-Europeans had no history and inverted the binary of barbarity/civility: 'We were the Vandals, the Visigoths, and the Tartars, the ferocious and ignorant murderers of these peoples'.[875] It proves that there were radically critical voices contemporaneous to the Berlin Conference whose plea for unity was more than mere pretension. It shows that the scientific discourse was not monolithic nor heterodox. Sophisticated criticism of imperialism, civilisation and politics of difference did indeed exist.[876] Perhaps it might have been a small voice, but some on the

868. Koskenniemi (n 259), 106.

869. Ferretti, Frederico. "They Have the Right to Throw Us Out: Elisée Reclus' New Universal Geography." *Antipode* 45, no. 5 (2013): 1337–1355.

870. Reclus (n 569), 5.

871. Ferretti (n 869), 1340.

872. This line of thinking in international law is pointed out by Schmitt, when he highlights that the standard textbooks on international law in each of the European states (as well as in Central and South America), at the time, still classified societies as civilised/semi-civilised/barbarian. See Schmitt (n 271), 228.

873. Ferretti (n 869), 1351.

874. Ferretti, Frederico. "Arcangelo Ghisleri and the 'Right to Barbarity': Geography and Anti-colonialism in Italy in the Age of Empire (1875–1914)." *Antipode* 48, no. 3 (2016): 563–583.

875. Ferretti (n 874), 572.

876. Ferretti (n 874), 579.

left, particularly the anarchists, proved themselves to be on the right side of history.

It is also interesting that these dissidents of geography also reflected their politics in their cartography. In what he calls 'unorthodox' maps, Boria highlights certain unique aspects of Reclus' maps in the *Nouvelle Géographie Universelle.* These maps denied the principality of the sovereign state, creating other forms of territoriality and global spatiality. Reclus recognised that political borders were artificial and disregarded natural features in most cases. In the many maps of his voluminous work, borders (notably including those of colonial territories) are mostly omitted except where they are the object of dispute among peoples, and borders indicating cultural regions are preferred.[877] Where political borders are indicated, they are usually accompanied by contextual information such as past disputes and shifts. The natural features of the terrain overshadow them and, within this background, serve only to show how political groups and subject to change always contest boundaries.[878] Their artificial impermanence is placed in contrast with the silent perpetuity of nature.

The significance of mentioning Reclus is important and more than a mere footnote. My purpose is to demonstrate that the choices and attitudes of the great men of Europe are not simply products of their time but of structure, and criticism should not be waved away or curtailed by saying that this was how people were. Reclus and his contemporaries show that there *were* vocal dissenting opinions on colonialism at the time. What happened at the Berlin Conference resulted from a conscious decision and a deliberate outlook that the world could be divided and how it should be done, as well as international law. As Reclus wrote:

> Man measures the strictness of his principles of liberty by his share of personal benefits from the outcome. He is strict when it is a question of events that occur on the other side of the world. But when it is a question of his own country or caste, he compromises slightly by mixing his mania for authority with conceptions of human rights.[879]

Despite the liberal rhetoric, the attendees represent a conservative force that chose to ignore existing radical left critique for its gain. Everyone who observes the world does not do so straightforwardly but saddles himself – like Leopold II or Von Bismarck or Reclus – with his own values. The implication of this is not that an individual's outlook is unavoidably flawed. However, rather it means

877. Boria, Edoardo. "Representing the Politics of Borders: Unorthodox Maps in Reclus, Mackinder and Others." *Geopolitics* 20, no. 1 (2015): 142–170, 150.

878. Boria (n 877), 152.

879. Reclus (n 569), 188.

that the individual must, at the end of the day, be answerable for his choices in values and observations within a certain structure of sense-making.

The important question is, how do we change territories from agonistic spaces to emancipatory ones that embrace plurality and voluntary association? Is it possible for us to move beyond the binaries of inside/outside?[880] Transnational thinking and solidarities must be fostered, both spatially and legally. It would have to be an international law that is not merely horizontal among states but delves down to a lower sediment, a horizontality among peoples. Our machines and assemblages must be continually disassembled, redesigned and reconstructed.[881] As we said earlier, the current loops and algorithms must be halted and replaced with new procedures. Designing an entirely new order is nearly impossible, but redesigning new, non-hierarchical, non-exclusionary and non-exploitative procedures can allow shifts to unfold over time.

880. Springer, Simon. *The Anarchist Roots of Geography: Toward Spatial Emancipation*. Minneapolis: University of Minnesota Press, 2016, 98.

881. Springer (n 880), 151.

# Appendix A: Concluding notion

The research question at the heart of this project is to what extent states gave expressed political and scientific discourses through international law norms during the age of colonialism. It is argued that international law was inextricably shaped not only by the political ideas of modernity but also by the burgeoning developments – as a result of the Enlightenment – within the scientific system. It is known that international law was and continues to be shaped by the political ambitions of states and how they project their power interests. However, this insight is supplemented by the idea that new ideas in the science system were cynically employed to legitimise and justify doctrinal changes within international law. Thus, the project attempts to look holistically at how the legal, political and science systems communicated inter-systemically, through the border-object of the state, to maintain the structural conditions that supported colonialism.

The study is aware that its scope incorporates a broad range of research objects that, at first glance, defy comparison. Therefore, it is argued that an abstract and robust grand theory is necessary to speak meaningfully of the communications between varied social systems. The candidate proposed as best suited for this task is the autopoietic systems theory of Niklas Luhmann. Even though it has not found broad popularity within international legal scholarship, many arguments are made for its desirability. It is a theory that allows for comparing law, politics and science within the same conceptual framework. It provides many theoretical concepts at hand for describing the processes studied. However, autopoietic systems theory has existed for some years now, and it would be a mistake to apply it as is mere. Further, one of the aims of this project is to provide a critical account of international law's relationship with colonialism, and autopoietic systems theory can, at times, be too conservative or descriptive. Therefore, an attempt is made to update the theory somehow, somewhat more directly relevant to the research question, and open the theory to its critical potential. In this spirit, the book presents its reading of Luhmann's theoretical contribution.

The first substantial chapter argues that this inquiry's primary object of interest should be the nation-state. The reasons for this are multiple: it is the primary subject of international law; colonialism, as traditionally understood, was a project undertaken principally by states; and the state-forms a nexus for communication between social systems such as international law, politics and science. However, the study does not simply accept these propositions but attempts to determine how such a high contingency had historically come to

be. It is argued that colonialism, as enacted by states and made possible through the intercommunication between law, politics and science, only makes sense as a project when certain sense-making and decision-making structures are already in place. In a sense, cause and effect have to be reversed. Thus, the chapter presents a systems theory historiography of the state and international law critical to traditional histories. Drawing on a wide array of evidence, it is argued that from the first complex societies, the political rule had relied on technologies, whether abstract (the law) or concrete (borders), to capture increasing energy yields. With each shift between segmentary, stratified and functionally differentiated societies, the legal control of territory became increasingly sophisticated. This created power structures that, over centuries, encouraged political expansion and international law that necessarily had to rely on asymmetrical legal relations, such as the infamous civilisation/barbarism distinction. The autopoiesis of these structures has continued into modernity, creating the environment in which colonialism was possible as a viable strategy in international law and relations.

The next chapter is explicitly contemporary and recognises that despite some historical variations in political forms, today, only the nation-state enjoys prominence and is narrowly defined and recognised by international law. The chapter thus asks the question of the implications of enforcing such a narrow understanding of sovereignty and whether the homogenisation of political organisation is desirable or only a product of colonialism. It is shown how international law has contributed to this standardisation of political form. This is particularly problematic because we have already established that the nation-state is inherently and structurally an exploitative assemblage. It remains based on exclusion and competition mechanisms and draws boundaries based on asymmetric relations, even though the exact semantic form might have changed. It is argued that the nation-state gained this dominance because of, among other things, two crucial symbolic communication media: power from the political system and truth from the scientific system. A theoretical excursus is made to explain these two systems' theoretical concepts but can be succinctly defined as values that increase the persuasiveness of other communications. Thus, it is argued that the nation-state could gain prominence through structural coupling between international law and power and the rationalisation of scientific discourses that made ethnic polities seem 'natural'.

Having arranged all the theoretical tools, objects of study, their contingent historical emergence and their underlying structural foundations bare, the next chapter employs these insights to a concrete international legal event in the history of colonialism. The event under question is the Berlin Conference of 1884, in which major European powers vied for territorial control over the African continent. At first, an account of the complicated international legal manoeuvring that took place is given, especially concerning the

sovereignty doctrine. The point is to show that political power over territory was the foremost concern and that the law served a mere legitimising function. On the contrary, the humanitarian rhetoric around the Berlin Conference is also highlighted, rooted in modernistic notions of Enlightenment, civilisation and progress. It is argued that these ideas came directly from the optimistic spirit that prevailed in the science system of the time and that this became codified into legal norms to justify the colonial ambition of European states. It then turns to the writing of perhaps the most well-known intellectual historian of international law at the Conference, Carl Schmitt. His analysis of the Berlin Conference and its effects is widely known for its emphasis on its spatial impact on international legal thinking. However, from the perspective of autopoietic systems theory, Schmitt's reading is criticised. In the first place, it is argued that he built his argument on a (perhaps wilful) misreading of the famous *nomos*. While he does have specific valuable insight into the relationship between power and space, his thought is not without contradiction or even his nationalism. It is argued that this is evidence of Schmitt being caught too much in his own friend/enemy distinction and that his critique will always be trapped within a certain methodological nationalism. Instead, we should view the Berlin Conference as a further sophistication in the process of colonialism and territorial control, which could function more smoothly in an increasingly functionally differentiated society of social systems.

The final substantive chapter examines the relationship between legal and scientific communication and the role that the so-called 'truth' can play in political and legal projects and ambitions. To focus the discussion concretely, we pay special attention to the scientific discipline of cartography and the material object of the map. It is argued that with the advent of cartography, legal and political imaginations acquired a new horizon of possibilities to expand their states, leading to increased sophistication in the application of borders and law over territory. For example, the partition of Africa seems almost unimaginable without the aid of the modern map. However, it is also argued in conclusion that the standardised world map also serves as a limit to contemporary international legal imagination. Its neutral-seeming presentation locks our thinking into a methodological nationalism or 'global linear thinking' that is at odds with the functionally differentiated society in which we find ourselves. It is thus argued that international lawyers need to collaborate on broadening the horizon of what international law could be, hopefully making it more reflexive towards non-bordered threats such as the climate crisis, migration and global pandemics. It is hoped that the research project has made the case that in such a pursuit, autopoietic systems theory has a valuable contribution to make.

# Bibliography


Agamben, Giorgio. *Pilate and Jesus.* Translated by Adam Kotsko. Stanford: Stanford University Press, 2015.

Agamben, Giorgio. *Stasis: Civil War as a Political Paradigm.* Translated by Nicholas Heron. Stanford: Stanford University Press, 2015.

Agamben, Giorgio. *The Highest Poverty: Monastic Rules and Form-of-Life.* Translated by Adam Kotsko. Stanford: Stanford University Press, 2013.

Agnew, John. *Globalization & Sovereignty: Beyond the Territorial Trap*. New York: Rowman & Littlefield, 2018.

Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso, 2016.

Anebo, Lantera. "The Fallacy of Virtual Demarcation as a Primary Scheme of International Land Boundary Setting: Why the Eritrea/Ethiopia Boundary Conflict Remains Unresolvable?" *Willamette Journal of International Law and Dispute Resolution* 24, no. 2 (2017): 257–295.

Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law.* Cambridge: Cambridge University Press, 2007.

Bartelson, Jens. *Sovereignty as Symbolic Form.* New York: Routledge, 2014.

Barth, Fredrik. *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*. Long Grove: Waveland Press, 1998.

Bennet, Jane. *Vibrant Matter: A Political Ecology of Things.* Durham: Duke University Press, 2010.

Benton, Lauren. *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*. Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511988905

Berry, Mary Elizabeth. *Japan in Print: Information and Nation in the Early Modern Period.* Berkeley: University of California Press, 2006.

Bilchitz, David. "Socio-economic rights, economic crisis, and legal doctrine." *International Journal of Constitutional Law* 12, no. 3 (2014): 710–739. https://doi.org/10.1093/icon/mou044

Boria, Edoardo. "Representing the Politics of Borders: Unorthodox Maps in Reclus, Mackinder and Others." *Geopolitics* 20, no. 1 (2015): 142–170. https://doi.org/10.1080/14650045.2014.964861

Boyle, Edward. "Imperial Practice and the Making of Modern Japan's Territory: Towards a Reconsideration of Empire's Boundaries." *Geographical Review of Japan* 88, no. 2 (2016): 66–79. https://doi.org/10.4157/geogrevjapanb.88.66

Branch, Jordan. *The Cartographic State: Maps, Territory, and the Origins of Sovereignty*. Cambridge: Cambridge University Press, 2014.

Brett, Annabel S. *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. Princeton: Princeton University Press, 2011.

Briney, Amanda. "ThoughtCo." *ThoughtCo. Lifelong Learning.* 07 October 2019, accessed May 25, 2020, https://www.thoughtco.com/the-history-of-cartography-1435696#:~:text=Ancient%20Greeks%20created%20the%20earliest,one%20of%20the%20first%20cartographers.

Buitendag, Nico & Van Marle, Karin. "*Afriforum v Malema*: The Limits of Law and Complexity." *Potchefstroom Electronic Law Journal* 17, no. 6 (2014): 2893–2914. http://dx.doi.org/10.4314/pelj.v17i6.20

Buitendag, Nico. "Power and International Law: Towards an Autopoietic Framework." *Westminster International Law & Theory Centre Online Working Papers* 1 (2014): 1–26.

Burke-White, William W. "Power Shifts in International Law: Structural Realignments and Substantive Pluralism." *Harvard International Law Journal* 56, no. 1 (2015): 1–79.

Cavallar, Osvaldo. "River of Law: Bartolus's Tiberiadis (De alluvione)." In *A Renaissance of Conflicts: Visions and Revisions of Law and Society in Italy and Spain*, edited by John A. Marino and Thomas Kuehn, 31–82. Toronto: Centre for Reformation and Renaissance Studies, 2004.

Charlesworth, Hilary. "International Law: A Discipline of Crisis." *The Modern Law Review* 65, no. 3 (2002): 377–392.

Clark, Christopher. *Time and Power: Visions of History in German Politics, from the Thirty Years' War to the Third Reich*. Princeton: Princeton University Press, 2019. https://doi.org/10.2307/j.ctv5cg9bs

Craib, Raymond B. "Cartography and Decolonization." In *Decolonizing the Map: Cartography from Colony to Nation*, edited by James R. Akerman, 11–61. Chicago: The University of Chicago Press, 2017.

Craven, Matthew. "Introduction: International Law and its Histories." In *Time, History and International Law*, edited by Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi, 1–26. Leiden: Martinus Nijhoff, 2007.

Craven, Matthew. "Theorizing the Turn to History in International Law." In *The Oxford Handbook on the Theory of International Law*, edited by Anne Orford, Florian Hoffmann, and Martin Clarke, 21–37. Oxford: Oxford University Press, 2016.

Crawford, James. *The Creation of States in International Law.* Oxford: Oxford University Press, 2007.

Critchley, Simon. *Infinitely Demanding: Ethics of Commitment, Politics of Resistance*. London: Verso, 2012.

Culp, Andrew. "Control after Cybernetics: Governmentality as Navigation by Homeostasis and Chaos." *Symplokē* 28, no. 1–2 (2020): 1–26. https://doi.org/10.5250/symploke.28.1-2.0117

Culp, Andrew. *Dark Deleuze.* Minneapolis: University of Minnesota Press, 2016.

Daston, Lorraine. *Against Nature.* Cambridge: MIT Press, 2019.

Davies, Martin L. *Historics: Why History Dominates Contemporary Society*. London: Routledge, 2006.

Dehm, Julia. "Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective." *Windsor Yearbook of Access to Justice* 33, no. 3 (2016): 129–161. https://doi.org/10.22329/WYAJ.V33I3.4893

Dehm, Julia. "International Law, Temporalities and Narratives of the Climate Crisis." *London Review of International Law* 4, no. 1 (2016): 167–193. https://doi.org/10.1093/LRIL%2FLRW006

Deleuze, Gilles. *Difference and Repetition.* Translated by Paul Patton. London: Bloomsbury Academic, 1994.

Derrida, Jacques. *The Beast & The Sovereign.* Vol. I. Chicago: The University of Chicago Press, 2011.

De Sousa Santos, Boaventura. "Law: A Map of Misreading. Toward a Postmodern Conception of Law." *Journal of Law and Society* 14, no. 3 (1987): 279–302. https://www.doi.org/10.2307/1410186

Edney, Matthew H. "The Irony of Imperial Mapping." In *The Imperial Map: Cartography and the Mastery of Empire*, edited by James R. Akerman, 11–45. Chicago: The University of Chicago Press, 2009.

Elden, Stuart. *The Birth of Territory.* Chicago: The University of Chicago Press, 2013.

Engels, Friedrich. *The Origin of the Family, Private Property and the State*. London: Penguin, 2010.

Erwig, Martin. *Once Upon an Algorithm: How Stories Explain Computing*. Cambridge: MIT Press, 2017.

Evrigenis, Ioannis D. *Images of Anarchy: The Rhetoric and Science in Hobbes's State of Nature*. Cambridge: Cambridge University Press, 2014. https://doi.org.10.1017/S1537592716003479

Fassbender, Bardo & Peters, Anne. *The Oxford Handbook of the History of International Law.* Oxford: Oxford University Press, 2012.

Ferretti, Frederico. "Arcangelo Ghisleri and the 'Right to Barbarity': Geography and Anti-colonialism in Italy in the Age of Empire (1875–1914)." *Antipode* 48, no. 3 (2015): 563–583. http://dx.doi.org/10.1111/anti.12206

Ferretti, Frederico. "They have the right to throw us out: Elisée Reclus' New Universal Geography." *Antipode* 45, no. 5 (November 2013): 1337–1355. https://doi.org/10.1111/ANTI.12006

Feyerabend, Paul. *Against Method.* London: Verso, 2010.

Förster, Stig, Wolfgang Justin Mommsen & Robinson Ronald Edward. *Bismarck, Europe, and Africa. The Berlin Conference 1884–1885 and the Onset of Partition.* Oxford: Oxford University Press, 1988.

Foucault, Michel. "Nietzsche, Genealogy, History." In *Language, Counter-Memory, Practice: Selected Essays and Interviews*, edited by Michel Foucault and Donald F. Bouchard, Translated by Sherry Simon, 139–164. Ithaca: Cornell University Press, 1980. https://doi.org/10.1515/9781501741913-008

Galloway, Alexander R. "Love of the Middle." In *Excommunication: Three Inquiries in Media and Mediation*, edited by Alexander R. Galloway, Eugene Thacker, and McKenzie Wark. Chicago: The University of Chicago Press, 2013.

Goodrich, Peter. *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance*. Cambridge: Cambridge University Press, 2014.

Graeber, David & Sahlins, Marshall. *On Kings.* Chicago: HAU Books, 2017.

Graeber, David. "The Divine Kingship of the Shilluk." In *On Kings*, edited by David Graeber and Marshall Sahlins, 137. Chicago: HAU Books, 2017.

Graeber, David. "Notes on the Politics of Divine Kingship: Or, Elements for an Archeology of Sovereignty." In *On Kings*, edited by David Graeber and Marshall Sahlins, 377–466. Chicago: HAU Books, 2017.

Gray, Christine. "The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?" *The European Journal of International Law* 17, no. 4 (2006): 699–721. https://dx.doi.org/10.1093/ejil/chl023

Grewe, Wilhelm G. *The Epochs of International Law.* Translated by Michael Byers. Berlin: Walter de Gruyter, 2000. https://doi.org/10.1515/9783110902907

Han, Byung-Chul. *What Is Power?* Translated by Daniel Steuer. Cambridge: Polity, 2019.

Hardt, Michael, & Negri, Antonio. *Empire.* Cambridge: Harvard University Press, 2001.

Harman, Graham. *Object-Oriented Ontology: A New Theory of Everything*. London: Pelican Books, 2018.

Heidegger, Martin. *Being and Time.* Translated by Joan Stambaugh. Albany: State University of New York Press, 2010.

Heidegger, Martin. *The Question concerning Technology, and other Essays.* Translated by William Lovitt. New York: Harper, 2013.

Hohmann, Jessie & Joyce, Daniel. *International Law's Objects*. Edited by Jessie Hohmann and Daniel Joyce. Oxford: Oxford University Press, 2018.

Hui, Yuk. *Recursivity and Contingency.* London: Rowman & Littlefield International, 2019.

Jacobs, Christian. *The Sovereign Map: Theoretical Approaches in Cartography throughout History*, edited by Edward H. Dahl, translated by Tom Conley. Chicago: The University of Chicago Press, 2005.

Jessop, Bob. *The State: Past, Present, Future.* Cambridge: Polity, 2016.

Karatani, Kōjin. *History and Repetition*. Edited by Seiji M. Lippit. New York: Columbia University Press, 2012.

Karatani, Kōjin. *Nation and Aesthetics: On Kant and Freud.* Translated by Jonathan E. Abel, H. Darwin Tsen, and Hiroki Yoshikuni. Oxford: Oxford University Press, 2017.

King, Michael, & Thornhill, Chris. *Niklas Luhmann's Theory of Politics and Law.* Hampshire: Palgrave MacMillan, 2003.

Kompridis, Nikolas. *Critique and Disclosure: Critical Theory between Past and Future*. Cambridge: MIT Press, 2006.

Koselleck, Reinhart. *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society*. Cambridge: MIT Press, 2000.

Koselleck, Reinhart. *Futures Past. On the Semantics of Historical Time.* Colombia: Colombia University Press, 2004.

Koselleck, Reinhart. *Sediments of Time: On Possible Histories.* Translated by Sean Franzel and Stefan-Ludwig Hoffman. Stanford: Stanford University Press, 2018.

Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*. Cambridge: Cambridge University Press, 2009.

Koskenniemi, Martti. "Carl Schmitt and International Law." In *The Oxford Handbook of Carl Schmitt*, edited by Jens Meierhenrich and Oliver Simons, 592–610. Oxford: Oxford University Press, 2016.

Latour, Bruno. *Reassembling the Social.* Oxford: Oxford University Press, 2007.

Latour, Bruno. *The Making of Law.* Translated by Marina Brilman and Alain Pottage. Cambridge: Polity, 2010.

Latour, Bruno. "*Onus Orbis Terrarum*: About a Possible Shift in the Definition of Sovereignty." *Millennium: Journal of International Studies* 44, no. 3 (2016): 305–320. https://doi.org/10.1177/0305829816640608

Latour, Bruno. *Facing Gaia.* Cambridge: Polity, 2017.

Latour, Bruno. *Down to Earth: Politics in the New Climate Regime*. Cambridge: Polity Press, 2018.

Lenski, Gerhard E. *Power & Privilege: A Theory of Social Stratification.* Chapel Hill: University of North Carolina Press, 1984.

Lévi-Strauss, Claude. *Tristes Tropiques.* Translated by John Weightman and Doreen Weightman. London: Penguin, 2011.

Luhmann, Niklas. "Kommunikation über Recht in Interaktionssystemen." *Alternative Rechtsformen und Alternativen zum Recht* 6 (1980): 99–112.

Luhmann, Niklas. "Communication about law in interactions systems." In *Advances in Social Theory and Methodology: Toward an Integration of Micro-and Macro-Sociologies*, edited by K. Knorr-Cetina and V. Cicourel. London: Routledge, 1981.

Luhmann, Niklas. "The Improbability of Communication." *International Social Science Journal* 33, no. 1 (1981): 122–132.

Luhmann, Niklas. "World-Time and System History." In *The Differentiation of Society*, edited by Niklas Luhmann, translated by Stephen Holmes and Charles Larmore, 308. New York: Columbia University Press, 1982. https://doi.org/10.7312/luhm90862

Luhmann, Niklas. "Territorial Borders as Systems Boundaries." In *Cooperation and Conflict in Border Areas*, edited by Raimondo Strassoldo and Giovanni Delli Zotti, 235–244. Milan: F. Angeli, 1983.

Luhmann, Niklas. *A Sociological Theory of Law.* London: Routledge, 1985.

Luhmann, Niklas. *Ecological Communication.* Chicago: The University of Chicago Press, 1989.

Luhmann, Niklas. "Speaking and Silence." *New German Critique* 61 (1994): 25–37. https://doi.org/10.2307/488619

Luhmann, Niklas. *Social Systems.* Stanford: Stanford University Press, 1995.

Luhmann, Niklas. "On the Scientific Context of the Concept of Communication." *Social Science Information* 35, no. 2 (1996): 257–267.

Luhmann, Niklas. "Globalization or world society? How to Conceive of Modern Society." *International Review of Sociology* 7, no. 1 (1997): 67–79. https://doi.org/10.1080/03906701.1997.9971223

Luhmann, Niklas. "Die Funktion des Rechts: Erwartungssicherung oder Verhaltenssteuerung?" In *Ausdifferenzierung des Rechts*, edited by Niklas Luhmann, 73–91. Frankfurt: Suhrkamp, 1999.

Luhmann, Niklas. "What Is Communication?" *Communication Theory* n.d.: 251–259.

Luhmann, Niklas. *Ausdifferenzierung des Rechts: Beitrage zur Rechtssoziologie und Rechtstheorie.* Frankfurt am Main: Suhrkamp Verlag, 1999.

Luhmann, Niklas. *Art as a Social System.* Translated by Eva M. Knodt. Stanford: Stanford University Press, 2000.

Luhmann, Niklas. *Law as a Social System.* Oxford: Oxford University Press, 2004.

Luhmann, Niklas. "Are There Still Indispensable Norms in Our Society?" *Soziale Systeme* 14, no. 1 (2008): 18–37. https://doi.org/10.1515/sosys-2008-0103

Luhmann, Niklas. *Warum haben Sie keinen Fernseher, Herr Luhmann? Letzte Gespräche mit Niklas Luhmann*, edited by Wolfgang Hagen. Berlin: Kulturverlag Kadmos, 2011.

Luhmann, Niklas. *Theory of Society*, Vol. 1. Stanford: Stanford University Press, 2012.

Luhmann, Niklas. *Theory of Society*, Vol. 2. Stanford: Stanford University Press, 2013.

Luhmann, Niklas. *Introduction to Systems Theory.* 1st ed. Cambridge: Polity Press, 2013.

Luhmann, Niklas. "Beyond Barbarism." *Soziale Systeme* 14, no. 1 (2016): 1–38. https://doi.org/10.1524/9783050064925

Luhmann, Niklas. *Systemtheorie der Gesellschaft.* Edited by Johannes F.K. Schmidt & André Kieserling. Berlin: Suhrkamp Verlag, 2017.

Luhmann, Niklas. *Trust and Power.* Cambridge: Polity, 2017.

Luhmann, Niklas. *Organization and Decision.* Translated by Rhodes Barret. Cambridge: Cambridge University Press, 2018.

Maier, Charles S. *Once Within Borders: Territories of Power, Wealth and Belonging Since 1500*. Cambridge: Harvard University Press, 2016.

Malm, Andreas. *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming*. London: Verso, 2016.

Massey, Doreen. *For Space.* London: Sage, 2005.

Medina, Eden. *Cybernetic Revolutionaries: Technology and Politics in Allende's Chile*. Cambridge, MA: MIT Press, 2011.

Mezzadra, Sandro & Neilson, Brett. *Border as Method, or, the Multiplication of Labor.* Durham, NC: Duke University Press, 2013.

Mickelson, Karin. "The Maps of International Law: Perceptions of Nature in the Classification of Territory." *Leiden Journal of International Law* 27 (2014): 621–639.

Miers, Suzanne. "Humanitarianism at Berlin: Myth or Reality?" In *Bismarck, Europe and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition*, edited by Stig Förster, Wolfgang Justin Mommsen and Ronald Edward Robinson. Oxford: Oxford University Press, 1988.

Miéville, China. *Between Equal Rights: A Marxist Theory of International Law*. Chicago: Haymarket Books, 2005.

Moeller, Hans-Georg. *The Radical Luhmann.* 1st ed. New York: Columbia University Press, 2012.

Mouffe, Chantal. "Agonistics. Challenge of Carl Schmitt." In *Oxford Handbook of Carl Schmitt*, edited by Jens Meierhenrich and Oliver Simons. London: Oxford University Press, 2013.

Nail, Thomas. *Theory of the Border.* Oxford: Oxford University Press, 2016.

Pakenham, Thomas. *The Scramble for Africa.* London: Abacus, 2015.

Pasquinelli, Matteo. "Arcana Mathematica Imperii: The Evolution of Western Computational Norms." In *Former West*, edited by Maria Hlavajova et al., 281–293, Cambridge: MIT Press, 2017.

Pasquinelli, Matteo. "Three Thousand Years of Algorithmic Rituals: The Emergence of AI from the Computation of Space." *e-flux* 101 (2019): 1–12.

Permanent Court of Arbitration, "Decision Regarding Delimitation of the Border between Eritrea and Ethiopia", April 13, 2002, https://pca-cpa.org/en/cases/99/.

Philippopoulos-Mihalopoulos, Andreas. "Critical Autopoiesis: The Environment of the Law." *Law's Environment: Critical Legal Perspectives* (University of Westminster School of Law Legal Studies Research Paper Series) 11–17 (2011): 45–62.

Pirsig, Robert M. *Zen and the Art of Motorcycle Maintenance: An Inquiry Into Values*. New York: HarperTorch, 2006.

Pitts, Jennifer. *Boundaries of the International: Law and Empire.* Cambridge: Harvard University Press, 2018.

Poulantzas, Nicos. *State, Power, Socialism.* Translated by Patrick Camiller. London: Verso, 2014.

Pratt, Martin. "A Terminal Crisis? Examining the Breakdown of the Eritrea-Ethiopia Boundary Dispute Resolution Process." *Conflict Management and Peace Science* 23 (2006): 329–341.

Rajkovic, Nikolas M. "The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis." *Leiden Journal of International Law* 31 (2018): 267–288.

Reclus, Elisée. *Anarchy, Geography, Modernity: Selected Writings of Elisée Reclus.* Edited by John Clark and Camille Martin. Oakland: PM Press, 2013.

Ricoeur, Paul. *Time and Narrative.* Translated by Kathleen McLaughlin and David Pellauer. Vol. 1. Chicago: The University of Chicago Press, 1990.

Roth-Isigkeit, David. *The Plurality Trilemma: A Geometry of Global Legal Thought*. Cham: Palgrave Macmillan, 2018.

Sabloff, Paula L.W. & Sabloff, Jeremy A. *The Emergence of Premodern States.* Santa Fe: Santa Fe Institute Press, 2018.

Sassen, Saskia. *Losing Control? Sovereignty in an Age of Globalization.* New York: Columbia University Press, 1996.

Sassen, Saskia. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Princeton: Princeton University Press, 2006.

Scheidel, Walter. *The Great Leveler: Violence and the History of Inequality from the Stone Age to the Twenty-first Century*. Princeton: Princeton University Press, 2017.

Schmidt, Johannes. "Krisen und Katastrophen—kein Thema für Niklas Luhmann?" *Sozusagen* 2012/2013 (2012/2013): 25–27.

Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty.* Translated by George Schwab. Chicago: The University of Chicago Press, 2005.

Schmitt, Carl. *The Nomos of the Earth.* Candor: Telos, 2006.

Schmitt, Carl. *The Concept of the Political.* Chicago: The University of Chicago Press, 2007.

Schmitt, Carl. *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol.* Translated by George Schwab and Erna Hilfstein. Chicago: The University of Chicago Press, 2008.

Schmitt, Carl. *Dialogues on Power and Space.* Cambridge: Polity, 2015.

Scott, James C. *Against the Grain: A Deep History of the Earliest States*. New Haven: Yale University Press, 2017.

Shaw, Malcolm N. "Title, Control, and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission." *The International and Comparative Law Quarterly* 56, no. 4 (2007): 755–796. https://doi.org.10.1093/iclq/lei201

Sloterdijk, Peter. *Not Saved: Essays After Heidegger.* Cambridge: Polity, 2016.

Smil, Vaclav. *Energy and Civilization: A History.* Cambridge: The MIT Press, 2018.

Soja, Edward W. *Postmodern Geographies: The Reassertion of Space in Critical Social Theory*. London: Verso, 1989.

Spencer-Brown, George. *Laws of Form.* Leipzig: Bohmeier Verlag, 2010.

Springer, Simon. *The Anarchist Roots of Geography: Toward Spatial Emancipation.* Minneapolis: University of Minnesota Press, 2016.

Spruyt, Hendrik. *The Sovereign State and Its Competitors: An Analysis of Systems Change*. Princeton: Princeton University Press, 1994.

Stahn, Carsten. "Between Law-breaking and Law-making: Syria, Humanitarian Intervention and 'What the Law ought to be'." *Journal of Conflict & Security Law* 19, no. 1 (2014): 25–48. https://dx.doi.org/10.2139/ssrn.2343582

Stanchevici, Dmitri. *Stalinist Genetics: The Constitutional Rhetoric of T.D. Lysenko*. New York: Baywood Publishing, 2012.

Stollberg-Rilinger, Barbara. *Der Staat als Maschine.* Berlin: Duncker & Humblot, 1986.

Strayer, Joseph R. *On the Medieval Origins of the Modern State.* Princeton: Princeton University Press, 2005.

Sur, Serge. *International Law, Power, Security and Justice: Essays on International Law and Relations*. London: Bloomsbury, 2010.

Teubner, Gunther. *Law as an Autopoietic System.* Translated by Anne Bankowska. Blackwell Publishing, 1993.

Thacker, Eugene. "Dark Media." In *Excommunication: Three Inquiries in Media and Mediation*, edited by R. Alexander Galloway, Eugene Thacker, and McKenzie Wark. Chicago: https://dx.doi.org/10.2139/ssrn.2343582 University of Chicago Press, 2013.

Thomä, Dieter. "Symbolisches und Diabolisches: Eine neue Deutung der Krisen moderner Gesellschaften in sozial- und sprachtheoretischer Perspektive." *Leviathan* 34, no. 3 (2006): 419–439. https://doi.org/10.1007/s11578-006-0023-x

Tractman, Joel P. "The Crisis of International Law." *Case Western Reserve Journal of International Law* 44, no. 1 (2011): 407–421.

Von Foerster, Heinz. *The Beginning of Heaven and Earth Has No Name: Seven Days with Second-Order Cybernetics.* Edited by Albert Müller and Karl H. Müller, translated by Elinor Rooks and Michael Kasenbacher. New York: Fordham University Press, 2014.

Wagner, Gerald. "Signaturen der Wissensgesellschaften – ein Konferenzbericht." *Soziale Welt* 47 (1996): 480–484.

Wallerstein, Immanuel. *European Universalism: The Rhetoric of Power.* New York: The New Press, 2006.

Watts, Joseph, Greenhill, Simon J., Atkinson Quentin D., Currie Thomas E., Bulbulia, Joseph & Gray Russel D. "Broad Supernatural Punishment but Not Moralizing High Gods Precede the Evolution of Political Complexity in Austronesia." *Proceedings of the Royal Society B* 282, no. 1804 (2015): a2556. http://dx.doi.org/10.1098/rspb.2014.2556

Whitehouse, Harvey, et al. "Complex Societies precede Moralizing Gods throughout World History." *Nature*, no. 568 (2019): 226–229. https://doi.org/10.1038/s41586-019-1043-4

Wimmer, Andreas, & Schiller Glick, Nina. "Methodological Nationalism and Beyond: Nation-state Building, Migration and the Social Sciences." *Global Networks: A Journal of Transnational Affairs* 2, no. 4 (2002): 301–334. https://doi.org/10.1111/1471-0374.00043

Worster, William Thomas. "Maps Serving as Facts or Law in International Law." *Connecticut Journal of International Law* 33, no. 2 (2018): 279–302. https://doi.org/10.2139/SSRN.3073565

Worster, William Thomas. "The Frailties of Maps as Evidence in International Law." *Journal of International Dispute Settlement* 9, no. 4 (2018): 1–20. https://dx.doi.org/10.2139/ssrn.3089117

Yanagihara, Masaharu. "Some Thoughts on the Concept of Territory in the Late Edo and Early Meiji Periods." *The Japan Institute for International Affairs* (2012): 1–27, https://jiia.repo.nii.ac.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=70&item_no=1&page_id=13&block_id=21

Zartaloudis, Thanos. *The Birth of Nomos.* Edinburgh: Edinburgh University Press, 2019.

Žižek, Slavoj. *Event: A Philosophical Journey Through a Concept*. Melville House, 2014.

# Index

It is not easy to reverse political history rationally, convincingly and theoretically compellingly. Yet, this is precisely what this book manages: if national sovereignty is but an evolutionary regression rather than the culmination of the concerted political, anthropological and legal narratives we have been led to think so far, then how do we imagine this post-sovereign world? With a thoroughly decolonial reading of Niklas Luhmann's systems theory, Buitendag employs 'power' and 'truth' as the main vectors around which he builds the critical autopoietic theory needed to comprehend not only what is but also what could and still can become of the nation-state. The book ends with a tour-de-force discussion of mapping as a technique of imperialist establishment but also a much-needed delimiting of power. This book could potentially revolutionise our way of thinking not only about systems theory but profoundly too, about international relations, history and global politics.

**Prof. Andreas Philippopoulos-Mihalopoulos, Director of the Westminster Law and Theory Lab, University of Westminster, London, United Kingdom**

As the beautifully concise and ambiguous title of Nico Buitendag's monograph suggests, the modern vision of an international community of states is not without contradictions. While providing a framework for all-inclusive globalisation, an international order still operates with the notion of a plurality of mutually exclusive nations. On the solid ground of social systems theory, *States of exclusion: A critical systems theory reading of international law* traces this fundamental contradiction in modern law and politics.

**Prof. Hans-Georg Moeller, Department of Philosophy and Religious Studies, University of Macau, Macau Special Administrative Region (SAR), China**

AOSIS
aosis.co.za

Open access at
https://doi.org/10.4102/
aosis.2022.BK319

ISBN: 978-1-77995-239-4