

Netherlands Yearbook of International Law

Volume 47

More information about this series at <http://www.springer.com/series/8913>

Martin Kuijer · Wouter Werner
Volume Editors

Netherlands Yearbook of International Law 2016

The Changing Nature of Territoriality
in International Law



ASSER PRESS



Springer

Volume Editors

Martin Kuijer
Ministry of Security and Justice of
the Netherlands
The Hague
The Netherlands

Wouter Werner
Faculty of Law
VU University Amsterdam
Amsterdam
The Netherlands

and

VU University Amsterdam
Amsterdam
The Netherlands

ISSN 0167-6768 ISSN 1574-0951 (electronic)
Netherlands Yearbook of International Law
ISBN 978-94-6265-206-4 ISBN 978-94-6265-207-1 (eBook)
DOI 10.1007/978-94-6265-207-1

Library of Congress Control Number: 2017944369

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the authors 2017

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Printed on acid-free paper

This T.M.C. ASSER PRESS imprint is published by Springer Nature
The registered company is Springer-Verlag GmbH Germany
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Board of Editors

Willem van Genugten
(General Editor)
Tilburg University

Ramses Wessel
(General Editor)
University of Twente

Fabian Amtenbrink
Erasmus University Rotterdam

Maarten den Heijer
University of Amsterdam

Martin Kuijer
Ministry of Security and Justice

Janne Nijman
University of Amsterdam

Denise Prévost
University of Maastricht

Wouter Werner
VU University, Amsterdam

Harmen van der Wilt
University of Amsterdam

Managing Editor

Bérénice Boutin
TMC Asser Institute
RJ Schimmelpennincklaan 20-22
2517 JN The Hague
The Netherlands

Editorial Assistant

Geneviève Girard

Aims and Scope

The Netherlands Yearbook of International Law (NYIL) was first published in 1970. As a double-blind peer-reviewed publication, the NYIL offers a forum for the publication of scholarly articles of a conceptual nature in a varying thematic area of public international law. In addition, each Yearbook includes a section *Dutch Practice in International Law*. The NYIL is published under the auspices of the T.M.C. Asser Instituut.

T.M.C. Asser Instituut

Located in the ‘international zone’ of The Hague—the City of Justice, Peace and Security, the T.M.C. Asser Instituut is a leading, inter-university research institute operating in the broad field of international law.

Founded in 1965, the Institute’s international community of scholars is engaged in research, postgraduate training and dissemination of knowledge in furtherance of the purposes and principles of international law. This inter-university institute cooperates closely with and supports the Dutch universities’ activities in the relevant disciplines. The academic fields covered by the Institute are Private International Law, Public International Law, Law of the European Union, International Commercial Arbitration, International Humanitarian Law, International Criminal Law and International Sports Law.

The Institute enjoys an excellent reputation at both a national and an international level for its development, organisation and hosting of conferences and academic meetings, demand-driven postgraduate programmes and training. Its ancillary websites and data collections all contribute to a coherent and integral strategy in the area of knowledge transfer.

The Institute has its own publishing house, T.M.C. Asser Press. T.M.C. Asser Press not only serves the publishing needs of the T.M.C. Asser Instituut, but also those of academics and practitioners worldwide in the fields of International and European Law.

T.M.C. Asser Instituut

Institute for Private and Public International Law

International Commercial Arbitration and European Law

Institute Address:

R. J. Schimmelpennincklaan 20–22

2517 JN The Hague

The Netherlands

Postal Address:

P.O. Box 30461

2500 GL The Hague

The Netherlands

Tel.: +3170 342 0300

Fax: +3170 342 0359

Email: NYIL@asser.nl

Internet: www.asser.nl

Contents

Part I The Changing Nature of Territoriality in International Law

1	The Paradoxical Place of Territory in International Law	3
	Martin Kuijer and Wouter Werner	
1.1	Introduction	4
1.2	Reshaping the Notion of Territory in International Law	6
1.2.1	Territoriality and Functionalism.	6
1.2.2	Territoriality and Cosmopolitanism	7
1.2.3	Territoriality and Technology	8
1.3	Overview of Chapters.	9
1.4	Conclusion	14
	References.	15
2	A State Without Territory?	19
	Veronika Bílková	
2.1	Introduction	20
2.2	State as a Territorial Unit?	21
2.2.1	The Montevideo Definition of the State.	22
2.2.2	The Concept of a Deterritorialized State	24
2.2.3	The Functional Theory of the State Territory	25
2.3	Historical Examples of Deterritorialized States?	28
2.3.1	New States Established Without Territory?	28
2.3.2	States Surviving the Loss of Their Territory?	30
2.3.3	The Lack of Historical Precedents.	32
2.4	Recent Examples of Deterritorialized States?	33
2.4.1	The Phenomenon of Disappearing States.	33
2.4.2	Possible Legal Responses to the Phenomenon of Disappearing States	35

2.4.3	Deterritorialized State as a Response to the Phenomenon of Disappearing States	36
2.4.4	Creation of New Deterritorialized States	39
2.4.5	Alternatives to the Concept of Deterritorialized State . . .	41
2.5	Concluding Remarks.	43
	References.	45
3	Territory in the Law of Jurisdiction: Imagining Alternatives	49
	Cedric Ryngaert	
3.1	Introduction	50
3.2	The Centrality of Territory in the Modern Legal Doctrine of Jurisdiction.	53
3.3	Unpacking the Epistemic Bias Toward Territory	56
3.4	Non-Spatial Alternatives to Territory	59
3.4.1	Community	60
3.4.2	Temporality	61
3.4.3	Justice	63
3.5	Reconceptualizing Territory	65
3.6	Acknowledging the Political Nature of the ‘New Territoriality’	68
3.7	Beholding Transnational Human Rights Claims: Donning Spatial and Non-Territorial Lenses	72
3.8	Concluding Observations	77
	References.	78
4	Cartographies of the Present: ‘Contingent Sovereignty’ and Territorial Integrity	83
	Sara Kendall	
4.1	Introduction	84
4.2	Territorial Narratives and Techniques	87
4.3	Drone Warfare, Targeted Killing, and Territorial Incursions	92
4.4	Conclusion: Cartographies of Contingent Sovereignty	100
	References.	102
5	Data Territories: Changing Architectures of Association in International Law	107
	Fleur Johns	
5.1	Territoriality in International Law.	109
5.1.1	Territoriality as a Practice of Bounding	110
5.1.2	Territoriality as a Practice of Distribution	111
5.1.3	Territoriality as a Practice of Placement	112
5.2	The Datafication of Territory and the Rise of Association	114
5.3	The Territorialisation of Data and the Persistence of Juridical Patterns and Precincts.	122

5.4	The Challenge of Data Territories.....	125
	References.....	127
6	‘Spoofed Presence Does not Suffice’: On Territoriality in the Tallinn Manual	131
	Lianne J.M. Boer	
6.1	Introduction.....	131
6.2	Sovereignty and Jurisdiction in the Tallinn Manual.....	133
6.3	The Use of Metaphor in the Tallinn Manual.....	138
6.4	Conclusion.....	143
	References.....	144
7	Cybercrime, Evidence and Territoriality: Issues and Options	147
	Jan Kleijssen and Pierluigi Perri	
7.1	Introduction.....	148
7.2	Challenges.....	151
	7.2.1 Cybercrime and Electronic Evidence: The Globalization of Threats.....	151
	7.2.2 Cloud Computing, Territoriality and Jurisdiction.....	154
7.3	Issues and Recommendations for a Jurisdiction ‘in the Cloud’.....	159
	7.3.1 Issues.....	159
	7.3.2 Recommendations.....	165
7.4	Conclusions.....	169
	References.....	171
8	Reconfiguring Territoriality in International Economic Law	175
	Alessandra Arcuri and Federica Violi	
8.1	Introduction.....	176
8.2	The Transformation of Territoriality in International Law.....	178
	8.2.1 From Modern Territoriality to Functionality.....	179
	8.2.2 Back to the Future: Non-Modern Territoriality.....	180
8.3	Territoriality and the International Trade Regime.....	182
	8.3.1 Multiplication of Territoriality.....	183
	8.3.2 The Territorial Boundaries of Functionality.....	187
	8.3.3 Reconfiguration of Territoriality in the Shadow of the Law.....	190
	8.3.4 Techno-Territoriality.....	192
8.4	International Investment Law and Territoriality.....	194
	8.4.1 The Removal of States’ Regulatory Power over Foreign Direct Investment Activities.....	195
	8.4.2 Investments ‘in the Territory’ of the Host State.....	202
	8.4.3 The ‘Extraterritorial’ Element in Sovereign Investing.....	206
8.5	Conclusions.....	209
	References.....	210

9	Extraterritorial Obligations and the Obligation to Protect	217
	Sigrun Skogly	
9.1	Introduction	218
9.2	The Concept of Extraterritorial Obligations in Human Rights Law and the Obligation to Protect	219
9.3	Interpretation of Human Rights Treaties by International Human Rights Bodies	224
9.3.1	Background	224
9.3.2	Obligations Terminology in Human Rights Treaties	224
9.3.3	The Evolution of Extraterritoriality in International Human Rights Practice	228
9.3.4	The United Nations Bodies	236
9.4	Impact on the New Treaty on Business and Human Rights	241
9.5	Conclusions	243
	References	243
10	Citizenship at Home and Across Borders	245
	Ernst M.H. Hirsch Ballin	
10.1	Introduction	246
10.2	From Subjects to Citizens	247
10.3	The Relation Between Territory and Citizenship	249
10.4	Three Major Trends in the Understanding of Citizenship	253
10.4.1	From Nationality to Citizenship	254
10.4.2	Rising Importance of Extraterritorial Citizenship	254
10.4.3	Necessity to Avoid Intraterritorial Non-Citizenship	256
10.5	A Human Rights Approach to Citizenship	256
10.6	Reconsideration and Recommendations	257
10.7	Evaluation and Conclusion	259
	References	260
11	Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses	263
	Hemme Battjes	
11.1	Introduction	264
11.2	On the Territory	266
11.2.1	At the Border	266
11.2.2	Redefined Jurisdiction	272
11.2.3	Concluding Remarks	274
11.3	Beyond the Border	275
11.3.1	Human Rights Treaties and Extraterritorial Jurisdiction	276

11.3.2	The High Seas	279
11.3.3	Foreign Territory	280
11.3.4	Conclusion	284
11.4	Concluding Remarks	284
	References	285
12	Schrödinger’s Cake? Territorial Truths for Post-Brexit Britain . . .	287
	Ciarán Burke, Ólafur Ísberg Hannesson and Kristin Bangsund	
12.1	Introduction	288
12.2	Brexit—The Solution to a Very British Problem	292
12.3	A Twist in the Tale? Brexit and the Dynamics of Economic Interdependence	295
12.4	A Leap into the ... Known?	299
12.5	The EEA Alternative	301
12.6	Territorial Implications	304
12.6.1	Law of the Sea	305
12.6.2	Free Movement of Persons	307
12.7	Conclusion	310
	References	311

Part II Dutch Practice in International Law

13	The Dutch Contribution to the Armed Coalition Against ISIS	315
	Gelij n Molier and Martijn Hekkenberg	
13.1	Introduction	316
13.2	The October 2014 Parliamentary Debate	318
13.2.1	Article 100 Letter of 24 September 2014	318
13.2.2	Parliamentary Reactions	320
13.2.3	The Advice of the External Advisor on International Law of 24 September 2014	323
13.2.4	The Parliamentary Debate Regarding the Situation in Kobani	324
13.3	The June 2015 Parliamentary Debate	326
13.3.1	Article 100 Letter of 19 June 2015	326
13.3.2	The Advice of the External Advisor on International Law of 23 June 2015	327
13.3.3	Parliamentary Reactions	328
13.4	The February 2016 Parliamentary Debate	330
13.4.1	Article 100 Letter of January 2016	330
13.4.2	Parliamentary Reactions	331
13.5	Conclusion and Outlook: Towards a More Extensive Interpretation of the Rules on the Use of Force?	332
	References	335

14	The Dutch Referendum on the EU-Ukraine Association Agreement: Legal Implications and Solutions	337
	Guillaume Van der Loo	
14.1	Introduction	338
14.2	Mixed (Association) Agreements	338
14.3	The Current Legal Status of the EU-Ukraine Association Agreement	340
14.4	Legal Consequences of the Referendum	342
14.5	The Way Out	345
14.5.1	The Decision of the Heads of State or Government, Meeting Within the European Council	345
14.5.2	Alternative Options	348
14.6	Conclusion	349
	References.	350
15	The Netherlands: A Tax Haven?	351
	Eric C.C.M. Kemmeren	
15.1	Introduction	352
15.2	Why Are Tax Havens a Problem?	353
15.3	What Is a Tax Haven?	354
15.3.1	OECD and Tax Havens.	355
15.3.2	Broader Concepts of the Term ‘Tax Haven’	358
15.4	Is the Netherlands a Tax Haven?	362
15.4.1	Participation Exemption.	363
15.4.2	Non-Existence of Withholding Taxes on Interest and Royalties	364
15.4.3	Dutch Tax Treaty Network	366
15.4.4	Dutch ATR and APA Practice.	369
15.4.5	Dutch Exchange of Information Rules and Practice.	372
15.5	Conclusions	373
	References.	374
16	Recent Developments Regarding the Direct and Indirect Application of Treaties by Dutch Courts: Fresh Approaches to Self-Executing, Non-Self-Executing and Non-Binding International Law	377
	Joseph Fleuren	
16.1	Introduction	378
16.2	(Previous) History and Development of the Concept of Direct Effect in Dutch Constitutional Law.	378
16.2.1	Origin of the Concept	378
16.2.2	Approaches to the Question of Direct Effect	382
16.2.3	The Supreme Court’s Turn to a Contextual Approach.	386

16.3	International Soft Law	388
16.4	Treaty-Consistent Interpretation and Application of National Law	390
16.5	Epilogue	391
	References.	392
	Table of Cases	395
	Index	405