

Interstitial Space and the High Himalayan Dispute between China and India

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A border dispute between Indian and Chinese troops, the most dangerous in forty-five years, has roiled relations in the High Himalayan valleys and plateaus separating India (Ladakh) and China (Aksai Chin). Against this barren landscape, ancient pathways connecting Central, South, and East Asia converge, making the area today a key nodal point of commercial and strategic interest to three nuclear powers: India, China, and Pakistan. This article interrogates the historical regard for this area as a no-man's land (terra nullius) and, prompted by the June 2020 clash in the High Himalayan Galwan Valley, emphasizes international law's historical treatment of interstitial space as a means of framing and addressing competing narratives pertaining to the acquisition of territory. The poverty of international legal tools to dissect competing narratives, facilitated in large part by consequences associated with imperial international legal legacies, evidences the continuing and underappreciated importance of spatiality in international law. Competing interpretations of and appeals to historical effectivities (circumstances) to prove possessory title diminish recognition of international law's geospatial limitations. This seemingly frozen Himalayan border dispute is in fact an intertwined territorial dispute involving multiple states. The management of this dispute depends more on a return to the constructed avenues of confidence-building measures, which implicitly recognize dynamic consolidations of power already apparent, than on the re-playing appeals to the international law of territorial acquisition, which never adequately filled the void of interstitial imperial space and projects of post-colonial state-building.

INTRODUCTION

A disputed border separates India and China in the Himalayan Galwan River Valley. This border, situated 17,000 feet above sea level,¹ comprises the westerly 1,000-kilometer stretch of a loosely defined 4,057-kilometer division line called the Line of Actual Control ("LAC").² The LAC is a trun-

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1. See Varinder Bhatia, *Explained: Why High-Altitude Warfare is Challenging, and How Soldiers are Trained*, INDIANEXPRESS (June 23, 2020, 4:35 AM), <https://indianexpress.com/article/explained/india-china-border-dispute-why-high-altitude-warfare-is-challenging-how-soldiers-are-trained-6471532> [<https://perma.cc/4DYT-S5YJ>] (noting the valley rises to 17,000 feet above sea level).

2. The LAC is not to be confused with the Line of Control ("LOC"). The LOC separates Pakistani-administered Kashmir (Azad Kashmir or Azad Jammu and Kashmir) from India-administered Kashmir. Historically, this entire undivided territory was called Jammu and Kashmir. In today's popular press, the area is sometimes simply called Kashmir, which technically means the Vale of Kashmir and not the other five parts, which include Jammu, Ladakh, Baltistan, Poonch, and the Gilgit Agency (Gilgit-Baltistan).

cated line that is interrupted in central portions by Nepal and Bhutan.³ Viewed in its totality, it is the longest contested border in the world.⁴ The eastern extension of the LAC forms the disputed portion of the border separating Tibet and Arunachal Pradesh (the McMahon Line⁵), the 90,000-square-kilometer Indian-controlled state that is entirely claimed by China.⁶ The western extension separates eastern Ladakh from the 33,000-square-kilometer Chinese-controlled territory of Aksai Chin,⁷ historically claimed by India.⁸ It leads to more contested land northeast of Pakistan-controlled areas of Kashmir, which Pakistan ceded to China in 1963,⁹ and which India claims belongs to it (the Shaksam Valley/Trans-Karakoram Tract).

3. See Srinath Raghavan, *Civil-Military Relations in India: The China Crisis and After*, 32 J. STRATEGIC STUD. 149, 152 (2009) (noting the Sino-Indian boundary's truncated portions sectors, the western sector of Ladakh and the disputed Aksai Chin plateau (extending farther east and bordering the Indian states of Himachal Pradesh and Uttarakhand), the eastern sector between Tibet and India's then-named Northeast Frontier Agency (the disputed McMahon Line) and the central sector between Nepal and Bhutan—India's border state with China, Sikkim). In the central sector of the LAC, China and Bhutan are currently enmeshed in a territorial dispute involving the Doklam plateau, which lies at the intersection of China, India's state of Sikkim, and Bhutan. India has supported Bhutan's claim and its forward-based air force stations at Hasimara and Siligur Bagdogra have been counterbalanced by Chinese airbase build-ups at Lhasa Gonggar and Shigatse Peace airports. See Jonathan Marcus, *China-India Border Tension: Satellite Imagery shows Doklam Plateau Build-Up*, BBCNews (Jan. 26, 2018), <https://www.bbc.com/news/world-asia-china-42834609> [<https://perma.cc/5X5Z-29KD>].

4. Shaiba Rather, *India and China Border Briefer: The Shadow of Article 370's Revocation*, LAWFARE (Nov. 23, 2020, 10:38 AM), <https://www.lawfareblog.com/india-and-china-border-briefer-shadow-article-370s-revocation#:~:text=the%20LAC%20is%20the%20nebulous,truce%20after%20a%201962%20war> [<https://perma.cc/BP7R-PHF7>].

5. The McMahon Line is the 890-kilometer line separating the Indian state from Chinese-administered Tibet. China does not recognize this border line. The agreement was drawn up by the Foreign Secretary of the Government of India, Sir Henry McMahon, at the 1914 Simla Convention. It was signed by British and Tibetan representatives to formalize the de facto independence of Tibet and to create a buffer zone between India and China, similar to Russia's 1913 pressure on China to obtain the Inner and Outer regions of Mongolia. China refused to sign the agreement and despite delayed orders from London forbidding McMahon from creating a bilateral agreement with the Tibetans, Britain retrospectively approved McMahon's actions. See generally Karunakar Gupta, *The McMahon Line 1911–45: The British Legacy*, 47 CHINA Q. 521 (1971).

6. See India, *China in spat over Border Dispute*, CHINA DAILY (Nov. 14, 2006, 8:01 PM), https://www.chinadaily.com.cn/china/2006-11/14/content_733133.htm [<https://perma.cc/3JZX-XH7R>] (quoting Chinese Ambassador to New Delhi Sun Yuxi as saying “the whole of what you call the state of Arunachal Pradesh is Chinese territory”).

7. See M. Taylor Fravel, *Why are China and India Skirmishing at their Border? Here's 4 Things to Know*, WASH. POST (June 2, 2020) (noting the length of the disputed sectors, including the western sector called “Aksai Chin”).

8. See Prabhask K. Dutta, *How China Captured Aksai Chin*, INDIA TODAY (June 22, 2020, 6:37 PM), <https://www.indiatoday.in/india/story/how-china-captured-aksai-chin-1691562-2020-06-22> [<https://perma.cc/WRX8-LGAT>] (noting Prime Minister Jawaharlal Nehru's assertion in the late 1950s of India's sovereign right over Aksai Chin).

9. Boundary Agreement, China-India, Mar. 2, 1963, 2 I.L.M. 541 (resulting in Pakistan's cession of 5,180 square kilometers of the Shaksam Valley to China). For an early analysis of the agreement, see W.M. Dobell, *Ramifications of the China-Pakistan Border Treaty*, 37 PAC. AFF. 283 (1964); MUJTABA RAZVI, *THE FRONTIERS OF PAKISTAN: A STUDY OF FRONTIER PROBLEMS IN PAKISTAN'S FOREIGN POLICY* 294-98 (1971).

FIGURE 1: THE DISPUTED AREA OF KASHMIR



Credit: U.S. Central Intelligence Agency. The star denotes the conflict site in the Galwan Valley.

The LAC separating Ladakh and Aksai Chin is poorly demarcated. It overlays a surface of cold desert valleys and plateaus with shifting and variable watersheds, rivers, and lakes that are fed by glacial meltwater. The terrain it divides includes unstable snowcaps, glacial crevasses, and gorges. This topography contributed to the historically “unmarked nature of the international border,”¹⁰ making it something of an assumed no man’s land

10. Shri Prakash, *The Sixth Meeting of the India-China Joint Working Group on the Boundary Question*, 30 CHINA REP. 89, 89 (1994) (describing the often “indeterminate, undemarcated and unmarked nature of the international border”).

in 19th century imperial politics. Today it is a flashpoint of international conflict, in the Galwan Valley, and in nearby areas of the Depsang Plains, Pangong Lake, and the Grogra-Hot Springs.¹¹

Fixing borderlines amid poorly demarcated border points in this region and, indeed, across many stretches of the LAC, proved hugely problematic for British colonial cartographers.¹² Mindful of arbitrary consequences,¹³ diplomats and politicians settled on simplistic ideas of division.¹⁴ However, this western region's "strategic importance lies in the fact that there the frontiers of Tibet, Sinkiang [Xinjiang] and Ladakh" converge,¹⁵ making geopolitics an unavoidable consideration in any demarcation of the landmass separating Central Asia, western China, India, Pakistan, Afghanistan, and Iran. The Galwan Valley is strategically located between steeply sloped mountains, and it is not far from yet another contested area, the 76-kilometer Siachen Glacier and the watchtower heights of its Saltoro Ridge, control over which has provoked pitched battles between Pakistani and Indian troops and the stationing of military bivouacs at altitudes above 20,000 feet.¹⁶

Dominium over the eastern and western theatres of the LAC sparked the month-long 1962 Sino-Indian War. China won that war and settled along the de facto line that now comprises the uneasy LAC.¹⁷ India's international

11. See Rather, *supra* note 4 (noting the troubling spread of confrontation and disputed points along the western Ladakh LAC).

12. See Kyle Gardner, *Moving Watersheds, Borderless Maps, and Imperial Geography in India's Northwestern Himalaya*, 62 HIST. J. 149 (2019) (discussing the difficult cartographic problems encountered by imperial geographers in this region).

13. See, e.g., EDMUND HEWARD, *THE GREAT AND THE GOOD: A LIFE OF LORD RADCLIFFE* 42 (1994) (quoting Radcliffe's 1947 letter to Mark Tennant in which Sir Cyril Radcliffe, charged by Lord Mountbatten with partitioning India, noted in private correspondence that his secret line separating what would become Pakistan and India, would leave "roughly 80 million people with a grievance.").

14. Consider the 1893 Durand Line (the 2,640-kilometer division between Afghanistan and Pakistan), the 1897 Ardagh-Johnson Line (a proposed division of Kashmir, East Turkestan [Xinjiang], and Tibet that included Aksai Chin in India), the 1899 Macartney-MacDonald Line (a proposed division of Aksai Chin from the Karkoram Pass), the 1914 McMahon Line (the contested eastern sector boundary separating India's Arunachal Pradesh from China), and the 1947 Radcliffe Line (delineating the border between the newly created states of India and Pakistan). Lord Curzon, who partitioned Bengal in 1905 as the then viceroy of India, and the namesake of the 1920 Curzon Line (proposing an armistice line separating the resurgent Polish state from Bolshevik Russia after the close of World War I), made the following observation about the perils of imperial line-drawing: "Such lines are very tempting to diplomatists, who in the happy irresponsibility of their office-chairs think nothing of intersecting rivers, lakes, and mountains, or of severing communities and tribes. But even in the most favourable circumstances they require an arduous triangulation on the spot, and until surveyed, located, and marked out, have no local or topographical value." LORD CURZON OF KEDLESTON, *THE ROMANES LECTURE, FRONTIERS* 35 (1907). For more on the disputed border separating China and India, see generally Amit Ranjan, *India-China Boundary Disputes: An Overview*, 47 ASIAN AFF. 101 (2016).

15. DOROTHY WOODMAN, *HIMALAYAN FRONTIERS: A POLITICAL REVIEW OF BRITISH, CHINESE, INDIAN AND RUSSIAN RIVALRIES* 66 (1969).

16. See V.R. RAGHAVAN, *SIACHEN: CONFLICT WITHOUT END* 56 (2002) (referring to the Saltoro as "the prime objective of the Siachen conflict").

17. For an Indian Brigadier's account of the civil-military disfunction contributing to India's defeat, see generally J.P. DALVI, *HIMALAYAN BLUNDER: THE CURTAIN-RAISER TO THE SINO-INDIAN WAR OF 1962* (1969).

reputation suffered along with the idea of Asian solidarity within the non-aligned movement, and India has yet to reclaim the 38,000 kilometers of territory lost to China in the war.¹⁸ China insists that the territory never belonged to India.¹⁹ In 2020, the Western Command of China's People's Liberation Army ("PLA") bluntly affirmed that "[t]he sovereignty of the Galwan River Valley has always been ours;" a spokesperson for the Chinese Foreign Ministry warned that "India must not misjudge the current situation or underestimate China's firm will to safeguard its territorial sovereignty."²⁰ Indian External Affairs Minister Subrahmanyam Jaishankar protested "in the strongest terms" and "underlined that this unprecedented development will have a serious impact on the bilateral relationship."²¹ India's former Foreign Secretary and Ambassador to China, Nirupama Rao, personalized the incident as a "taunt" to Indian Prime Minister Narendra Modi. She said the Galwan incident represented "a turning point in India-China relations."²²

A. *The Galwan Valley, Ladakh, and the Long Shadow of Regional Relations*

The Galwan Valley is a largely uninhabited, high-altitude moonscape. It separates Aksai Chin to the east and Ladakh to the west.²³ The track through its valley has long been recognized as "extremely difficult," and yet in relation to its surroundings, it presents one of the best routes to transport troops and supplies.²⁴ Aksai Chin forms part of the troubled Xinjiang

18. See Toqeer Ahmed, *Face-off Between India and China in Galwan Valley: An Analysis of Chinese Incursions and Interests*, 2 ELEC. RSCH. J. SOC. SCI & HUMAN. 38, 41 (2020); NEVILLE MAXWELL, *INDIA'S CHINA WAR 11* (1970) (noting India's "sharply reduced" role and status in world affairs and as a leader in the non-aligned movement).

19. See Aman Thakker, *Sino-Indian Border Clashes: Implications for US-India Ties*, CSIS (July 16, 2020), https://www.csis.org/analysis/sino-indian-border-clashes-implications-us-india-ties?gclid=CJ0KQCjwhb36BRCfARIsAKcXh6Hjfb9fXuCIBICtMXC-EoJoV_sakjUedmv9fK_jlCiQRn6ItmVBD0aAjGcEALw_wcB [https://perma.cc/C9KK-FH3E] (noting China's claim that it always had sovereignty over the Galwan Valley).

20. *'Don't Underestimate Our Firm Will to Safeguard Territorial Sovereignty': China on Ladakh Face-Off*, HINDUSTAN TIMES (June 18, 2020, 1:58 PM), <https://www.hindustantimes.com/india-news/don-t-underestimate-our-firm-will-to-safeguard-territorial-sovereignty-china-on-ladakh-face-off/story-UUgj8L4tjCxkeF9XwWmmJ.html> [https://perma.cc/X2LC-U2RA] (quoting a statement in Mandarin by the PLA's Western Command and a tweet by Chinese Foreign Ministry spokesperson Hua Chunying).

21. Phone Call between Subrahmanyam Jaishankar, Minister of External Affs., India, and Wang Yi, For. Minister, China (June 17, 2020) (transcript available at https://mea.gov.in/press-releases.htm?dtl/32765/Phone_call_between_External_Affairs_Minister_Dr_S_Jaishankar_and_Foreign_Minister_of_China_HE_Mr_Wang_Yi [https://perma.cc/L2UK-BDL6]).

22. Karan Thapar, *Galwan Clash a Personal Message to Modi, a Taunt by China: Former FS Nirupama Rao*, WIRE (June 18, 2020), <https://thewire.in/external-affairs/watch-galwan-nirupama-rao-karan-thapar> [https://perma.cc/NLE9-X27U].

23. See Margaret W. Fisher & Leo E. Rose, *Ladakh and the Sino-Indian Border Crisis*, 2 ASIAN SURV. 27, 27 (1962) (characterizing the region "among the world's bleakest stretches," which India's first Prime Minister Jawaharlal Nehru described as devoid of people and no blade of grass).

24. MAXWELL, *supra* note 18, at 237.

Uyghur Autonomous Region,²⁵ and China began to infiltrate it in 1956 to construct an all-weather road linking Xinjiang and Tibet.²⁶ The construction project caught India by surprise and was not discovered until nearly complete. Prescriptive title to territory is a recognized form of effective occupation, particularly when accompanied by acquiescence.²⁷ However, the remoteness of this area obscured any constructive knowledge of encroachment, according to India.²⁸ The discovery of China's construction activity sparked a series of frontier encounters, diplomatic exchanges, white papers, and the militarization of the frontier. Indian and Chinese troops clashed in 1959 at Longjiu, and at the Kongka Pass near Aksai Chin, foretelling of the outbreak of the 1962 war.²⁹

Ladakh is also one of the most thinly populated regions of Asia, yet it has "strong cultural, linguistic, religious and historical relationships" with Tibet.³⁰ It is a region recently declared to be a Union Territory by India.³¹

25. This region—China's geographically largest—consists of approximately 20 million mostly Muslim people, with Uyghurs constituting the most populous nationality. Uyghur uprisings against Chinese rule date to 1800, but a sustained and coordinated resistance movement took hold in 1990 following the Baran Incident, after Uyghurs were denied permission to build a mosque. Since that time, the region has been subjected to increasing violence, matched since 2017 by a massive Chinese repression (assimilation) campaign that has detained more than one million Muslims and resulted in charges of genocide against the Chinese government. See generally Beth Van Schaack, *Policy Options in Response to Crimes Against Humanity and Potential Genocide in Xinjiang*, JUST SEC. (Aug. 25, 2020), <https://www.justsecurity.org/72168/policy-options-in-response-to-crimes-against-humanity-and-potential-genocide-in-xinjiang> [https://perma.cc/5J4B-ZZAL]; Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOR. RELS. (June 30, 2020, 7:00 AM), <https://www.cfr.org/background/chinas-repression-uyghurs-xinjiang> [https://perma.cc/V92G-27P3].

26. CHIEN-PENG CHUNG, *DOMESTIC POLITICS, INTERNATIONAL BARGAINING AND CHINA'S TERRITORIAL DISPUTES* 97 (2004).

27. Fisheries (UK v. Nor.), Judgment, 1951 I.C.J. Rep. 116, ¶ 130 (Dec. 18) (affirming the *possessio longi temporis* principle); Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EURO. J. INT'L L. 25, 55 (2005) (discussing the Roman law origins of prescription).

28. A top-secret CIA report noted that Chinese premier Chou En-lai "went right to the point of realpolitik, arguing that [India's demand of withdraw] would be only 'theoretical' as India had no personnel to [reciprocate China's withdrawal]" and insisted on the areas historical relevance to China as a commercial traffic artery linking Xinjiang and Tibet. India's instruction to its embassies was "to take the line that intrusions cannot give a neighboring country any legal right to an area 'merely because such intrusions were not resisted by us or had not come to our notice earlier'." *The Sino-Indian Border Dispute*, Off. Ser. No. 2, CIA/RSS (Aug. 19, 1963), at ii (declassified and approved for release May 2007).

29. See Fisheries, 1951 I.C.J. Rep. 116, ¶ 101–02 (noting, as well, the added importance of the road to China following the failed Tibetan rebellion in March 1959 and India's granting of political asylum to the Dalai Lama).

30. Martijn van Beek & Fernanda Pirie, *Introduction*, in MODERN LADAKH: ANTHROPOLOGICAL PERSPECTIVES ON CONTINUITY AND CHANGE 1, 8 (Martin van Beek & Fernanda Pirie eds., 2008). Ladakh was an independent kingdom until invaded and incorporated into Jammu and Kashmir in 1834. It was bundled into Kashmir at the time of partition in 1947. In 1979, Jammu and Kashmir was divided into two districts with Leh serving as a Buddhist majority region and Kargil serving as a Muslim majority region. For a short history, see Zainab Akhter, *Union Territory Status for Ladakh: Understanding the Politics*, ASIA DIALOGUE (Sep. 19, 2019), <https://theasiadialogue.com/2019/09/19/union-territory-status-for-ladakh-understanding-the-politics> [https://perma.cc/TGF9-DZ82].

31. See Jammu and Kashmir Reorganisation Act, 2019, § 3 (India). Indian Prime Minister Narendra Modi announced on August 5, 2019, the unilateral and immediate abrogation of Articles 370 and 35-A of the Indian Constitution, which had provided special exemptions and "temporary" special status of the

This declaration more directly incorporates Ladakh into the federated structure of India, although it now is governed under Autonomous Hill Development Councils and not through an elected legislative assembly.³² Until late 2019, Ladakh formed part of the larger region of Jammu and Kashmir,³³ which had a special and autonomous status. This status protected the demographic dominance and identity politics of Kashmiris by precluding Hindus from moving into the region to secure property and employment. The Indian government's unilateral abrogation of Jammu and Kashmir's special status has resulted in "stifling restraints" on human rights³⁴ and created additional uncertainties in an already complicated region. Principally, it has heightened concerns about India's Bharatiya Janata Party (BJP) and its nationalist interests under Prime Minister Narendra Modi.³⁵

India claims Jammu and Kashmir's absorption into Union Territory (including Ladakh) is an unreviewable exercise of its domestic jurisdiction.³⁶ China, however, views the revocation of special status as a form of revanchism to recover lands India claimed but did not possess.³⁷ China claims India's absorption of Jammu and Kashmir into a Union Territory is "null and void" as it "plac[es] part of Chinese territory under Indian administration . . . challeng[es] China's sovereign rights and . . . unilaterally revis[es] domestic law."³⁸ China argues India's change in Jammu and Kashmir's status,

former princely state of Jammu and Kashmir. This special status provided the inducement for the Hindu Maharajah of the princely state to accede to the Union of India in 1947. Modi's announcement "subsumed Muslim-majority Kashmir into India's federal government and converted the border state into Union Territory." He then bifurcated the state by creating another Union Territory out of the mostly Buddhist region of Ladakh. See Christopher R. Rossi, *Blood, Water, and the Indus Waters Treaty*, 29 MINN. J. INT'L L. 103, 116–17 (2020).

32. See *Jammu Kashmir No More a State; Union Territories of J-K and Ladakh Come into Existence*, HINDUSTAN TIMES (July 16, 2020, 6:51 AM), <https://www.hindustantimes.com/india-news/jammu-kashmir-no-more-a-state-union-territories-of-j-k-and-ladakh-come-into-existence/story-Si0Ck82wR5idYkAzVfUCgK.html> [https://perma.cc/EY4D-TRE3].

33. Political parties in Ladakh merged in 2002 to form the Ladakh Union Territory Front and petitioned for Union Territory status due to religious and cultural practices that differed from majority populations in Jammu and Kashmir. See Tarun Upadhyay & Aurangzeb Naqshbandi, *Union Territory Status is Ladakh's Sole Agenda*, HINDUSTAN TIMES (Nov. 17, 2008, 12:29 AM), <https://www.hindustantimes.com/india/union-territory-status-is-ladakh-s-sole-agenda/story-KeKk55VstM0at1KcpJA5zK.html> [https://perma.cc/VEW4-ZXHD].

34. See *India: Abuses Persist in Jammu and Kashmir*, HUM. RTS. WATCH (Aug. 4, 2020, 9:00 AM), <https://www.hrw.org/news/2020/08/04/india-abuses-persist-jammu-and-kashmir#> [https://perma.cc/U7W5-VU9U] (quoting Meenakshi Ganguly, the organization's South Asia director).

35. See Samantha Subramanian, *How Hindu Supremacists are Tearing India Apart*, GUARDIAN (Feb. 20, 2020, 6:00 AM), <https://www.theguardian.com/world/2020/feb/20/hindu-supremacists-nationalism-tearing-india-apart-modi-bjp-rss-jnu-attacks> [https://perma.cc/4DJF-AZ93].

36. Article 2(7) of the UN Charter prohibits the UN from intervening in "matters which are essentially within the domestic jurisdiction of any state."

37. Carnegie India, *Assessing the Sino-Indian Border Confrontation*, YOUTUBE (June 16, 2020), <https://www.youtube.com/watch?v=GiISAJm1kUI> (Ashley J. Tellis recalling but not agreeing with this assessment at time mark: 2:57).

38. *Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference*, MINISTRY OF FOREIGN AFF. (PRC) (Oct. 31, 2019), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1712371.shtml [https://perma.cc/3M4G-XBM9] [hereinafter PRC Foreign Ministry Press Release].

together with other infrastructural developments in the disputed Galwan area, disrupts the status quo and infringes on the pledge to support and strengthen various confidence building measures to promote mutual border security.³⁹ China has recently clarified its position, noting that disputes in the region now rise to the level of U.N. Security Council review,⁴⁰ where China wields veto power over threats to international peace. India's former ambassador to China said the escalated violence cast a "long shadow" in bilateral relations.⁴¹

Suspicious also have been cast against Chinese intentions in the region. Violence in the Galwan Valley has been described as a way for China to channel internal tensions mounting in relation to the global COVID-19 pandemic and the human rights situation in Xinjiang Autonomous Region.⁴² A perceived Chinese diversionary strategy holds that China advances territorial claims and establishes strategic footholds under the camouflage of peripheral piecemeal encroachments that do not provoke a *casus belli*. International relations specialists categorize China's strategy as salami-slicing⁴³ or cabbage-peeling.⁴⁴ China's strategic objective is thought to incrementally secure neighboring borderlands in order to restore China's traditional suze-

39. See J.P. Yadav, *When Shab Thundered on Aksai Chin: 'Iske liye jaan de denge,'* TELEGRAPH ONLINE (June 18, 2020, 1:05 AM), <https://www.telegraphindia.com/india/india-china-clash-when-amit-shah-thundered-on-aksai-chin-iske-liye-jaan-de-denge/cid/1781717> [<https://perma.cc/28AL-3H88>] (recounting a closed-door informal UN Security Council session where the Chinese Permanent Representative to the United Nations allegedly protested that India's abrogation of Article 370 "challenged the Chinese sovereign interests and violated bilateral agreements . . . in the border area"). See also ¶ 4, *India-China Informal Summit at Wuhan*, GOVERNMENT OF INDIA MINISTRY OF EXTERNAL AFFAIRS (Apr. 28, 2018) (presenting a summary of support for enhancing confidence building measures to promote border security) [hereinafter *Wuhan Summit*].

40. PRC Foreign Ministry Press Release, *supra* note 38.

41. Saheli Roy Choudhury, *Border Clash Between India and China Was a 'Turning Point' in Their Relationship, Ambassador Says*, CNBC (June 24, 2020, 3:53 AM), <https://www.cnbc.com/2020/06/24/border-clash-a-turning-point-in-india-china-relations-ambassador-says.html> [<https://perma.cc/5WWF-6RNZ>] (quoting Nirupama Rao, former Indian Ambassador to China).

42. See *Why Ladakh Standoff Could Be Part of Xi Agenda to Divert Attention from China's Local Issues*, PRINT (Aug. 20, 2020, 12:39 PM), <https://theprint.in/opinion/why-ladakh-standoff-could-be-part-of-xi-agenda-to-divert-attention-from-chinas-local-issues/485646/> [<https://perma.cc/46TD-GPQS>] (presenting the diversionary thesis of Shekhar Gupta); see also Lily Kuo, *China Withheld Data on Coronavirus from WHO, Recordings Reveal*, GUARDIAN (June 2, 2020, 11:58 AM) (detailing World Health Organization complaints about China's suppression of pandemic information during critical early days of the outbreak); Louis Charbonneau, *Countries Blast China at UN over Xinjiang Abuses*, HUM. RTS. WATCH (Oct. 30, 2019, 7:11 PM), <https://www.hrw.org/news/2019/10/30/countries-blast-china-un-over-xinjiang-abuses#> [<https://perma.cc/P6KG-JLPW>] (relating to the repression of ethnic Uyghurs in Xinjiang).

43. See Robert Haddick, *Salami Slicing in the South China Sea*, FOR. POL'Y (Aug. 3, 2012, 2:25 PM), <https://foreignpolicy.com/2012/08/03/salami-slicing-in-the-south-china-sea/> [<https://perma.cc/87GM-HSJN>] (discussing China's patient approach to dominating Asian waters); Brahma Chellaney, *China's Salami-Slice Strategy*, JAPAN TIMES (July 25, 2013), <https://www.japantimes.co.jp/opinion/2013/07/25/commentary/world-commentary/chinas-salami-slice-strategy/> [<https://perma.cc/44LB-L9LH>] (broadening the strategy to the mountainous borderlands with India).

44. See, e.g., Richard Javad Heydarian, *China's Economic Cabbage Strategy*, CSIS (Mar. 11, 2019), <https://amti.csis.org/chinas-economic-cabbage-strategy/> [<https://perma.cc/48VD-8MDC>]; Harry Kazianis, *China's Expanding Cabbage Strategy*, DIPLOMAT (Oct. 29, 2013), <https://thedi diplomat.com/2013/10/chinas-expanding-cabbage-strategy/> [<https://perma.cc/YT8J-MR9A>].

rainty (the “Middle Kingdom thesis”⁴⁵). This broader explanation accounts for the military activism of Chinese President Xi Jinping⁴⁶ against Hong Kong and Taiwan, in the East and South China Seas,⁴⁷ and in the trijunction disputed area of the Doklam plateau involving China, India, and Bhutan.⁴⁸ Legitimizing ill-gotten gains by such means violates the international legal principle of *ex injuria jus non oritur*—legal rights cannot arise from wrongdoing.⁴⁹ And yet, once secured, it paradoxically reinforces international law’s *ex factis jus oritur* principle—law arises from the facts.⁵⁰ The complementarity of these opposing norms presents one of the great antinomies of international law. It has long complicated the legal regulation of interstitial space.

Jammu and Kashmir is routinely called the most dangerous and heavily militarized place on Earth.⁵¹ It harbors the conflicting territorial claims of three nuclear powers, India, China, and Pakistan. It spawns active terrorist organizations and attacks that have claimed more than 70,000—mostly ci-

45. For more on the tribute system of the Han dynasty and the Middle Kingdom thesis, see generally TONGDONG BAI, *CHINA: THE POLITICAL PHILOSOPHY OF THE MIDDLE KINGDOM* (2012); J.L. Cranmer-Byng, *The Chinese Perception of World Order*, 24 INT’L J. 166 (1968/69).

46. See, e.g., Alyssa Ayres, *The China-India Border Dispute: What to Know*, COUNCIL ON FOR. AFF. (June 18, 2020, 8:00 AM), <https://www.cfr.org/in-brief/china-india-border-dispute-what-know> [https://perma.cc/ATQ6-BTX5] (addressing possible causes of the violence).

47. M. Taylor Fravel, *China’s Sovereignty Obsession*, FOR. AFF. (June 26, 2020), <https://www.foreignaffairs.com/articles/china/2020-06-26/chinas-sovereignty-obsession> [https://perma.cc/575C-UARY].

48. See PRAKASH MENON & ANIRUDH KANISSETTI, *THE DOKLAM IMBROGLIO* 10 (2018) (noting China’s “salami slicing tactics” against Bhutan). A two-month standoff between China and India arose in 2017 when China started building a road in the Doklam region, which Bhutan claims as its territory. Bhutan turned to its ally India, which deployed army units, prompting a close confrontation with China’s PLA. China eventually stopped its construction activity but maintains its claim to the disputed area. See Sumit Ganguly & Andrew Scobell, *The Himalayan Impasse: Sino-Indian Rivalry in the Wake of Doklam*, 41 WASH. Q. 177 (2018). See Nayanima Basu, *India Wants Bhutan to Settle China Border Issue So It Can Define Trijunction Area Near Doklam*, PRINT (Nov. 30, 2020, 5:13 PM), <https://theprint.in/diplomacy/india-wants-bhutan-to-settle-china-border-issue-so-it-can-define-trijunction-area-near-doklam/554740/> [https://perma.cc/YT84-NV99] (referencing official Indian concerns that Beijing is problematizing the Doklam border issue “to harass New Delhi due to the ongoing border dispute at the Ladakh sector”).

49. See James Wilford Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 AM. J. INT’L L. 421 (1938) (discussing *ex injuria*’s applicability to Germany’s 1938 take-over of Austria (the Anschluss)).

50. For a discussion of the uneasy interface between the two principles, see Christopher R. Rossi, *Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine*, 25 TUL. J. INT’L & COMP. L. 143 (2015). It is worthwhile to recall that Robert Jennings, Whewell Professor of International Law at Cambridge University, former President of the International Court of Justice, and the author of the hallmark treatise, *The Acquisition of Territory in International Law*, (1963), reminded readers that the *ex factis* principle was one that “no law can ignore save at its peril.” R.Y. Jennings, *Nullity and Effectiveness in International Law*, in *CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR* 64, 74 (1965).

51. See, e.g., Waheguru Pal Singh Sidhu, *Introduction to KASHMIR: NEW VOICES, NEW APPROACHES 1* (Waheguru Pal Singh Sidhu et al. eds., 2006) (associating the region with “the most sustained level of violence anywhere in the world since the end of the Cold War.”).

vilian—lives in the last three decades.⁵² It motivates nationalist Kashmiri claims of self-determination,⁵³ stokes the strong Islamophobia of the Hindu Hindutva nationalist ideology,⁵⁴ rekindles Pakistan's founder Muhammad Ali Jinnah's "Two Nations Theory," which holds that Muslims and Hindus should have separate homelands,⁵⁵ and intersects with China's commercial and strategic pursuits into Pakistan-controlled Kashmir, Afghanistan, Iran, and western India. These pursuits also heavily invest toward the creation of an economic corridor to the port city of Gwadar, Pakistan, thereby allowing China to access the Arabian Sea opposite the Sultanate of Oman, and the Persian Gulf.⁵⁶ This expanding infrastructure network is one of the five main projects of China's global development strategy, known as the Belt and Road Initiative.⁵⁷

Control over Jammu and Kashmir has launched or involved four major wars and numerous cross-border attacks.⁵⁸ Through it flows the precious headwaters of the gigantic Indus River system, which feeds six major rivers, hydrates upwards of 300 million people in India and Pakistan, and irrigates most of Pakistan's agriculture sector.⁵⁹ Although Jammu and Kashmir projected for decades a bilateral dispute between India and Pakistan, Kashmir via Ladakh has suddenly become a triangular geopolitical dispute with imposing security concerns for India now that recent clashes with Chinese

52. Rebecca Ratcliffe, *India Set to Withdraw Kashmir's Special Status and Split It in Two*, GUARDIAN (Aug. 5, 2019, 12:07 PM), <https://www.theguardian.com/world/2019/aug/05/india-revoke-disputed-kashmir-special-status> [https://perma.cc/Y6R8-TGEQ]. Two major terrorist organizations operating in Jammu and Kashmir are Lashkar-e-Taiba and Jaish-e-Mohammed, both asserted to have connections to Pakistan. See, e.g., *Four Associates of Lashkar-e-Taiba Militants Arrested in Jammu and Kashmir*, ECON. TIMES (May 24, 2020, 11:39 AM), <https://economictimes.indiatimes.com/news/defence/four-associates-of-lashkar-e-taiba-militants-arrested-in-jammu-and-kashmir/articleshow/75936587.cms> [https://perma.cc/QHV9-6G6L]; *Army Arrests 2 Jaish-e-Mohammed Terrorists in J&K's Kupwara*, NDTV (Sept. 11, 2020, 9:36 AM), <https://www.ndtv.com/india-news/army-arrests-2-jaish-e-mohammed-terrorists-in-j-k-kupwara-2293693> [https://perma.cc/C2SH-WASH].

53. See Kunal Mukherjee, *Comparing China and India's Disputed Borderland Regions: Xinjiang, Tibet, Kashmir, and the Indian Northeast*, 32 E. ASIA 173, 183 (2015) (noting Kashmiri Muslim nationalism and its adherents' calls for separation from the Indian state).

54. See Shakri Kak, *Hindutva, the Crisis of the State and Political Mobilisation in Jammu and Kashmir*, 3 HIST. & SOCIO. S. ASIA 14 (2009) (noting the influence of the Hindutva movement in Jammu and Kashmir). For an alarmist Pakistani perspective on Hindutva, see Anees Hafiz, *Kashmir Government in Exile, Countering Modi's Hindutva and Pakistan's Aggressive Foreign Policy*, 23 DEF. J. 44 (2019).

55. See Abdul Majid et al., *Genesis of the Two Nations Theory and the Quaid-e-Azam*, 15 PAK. VISION 180, 181 (2014).

56. Parjanya Bhatt, *Revisiting China's Kashmir Policy*, ORF ISSUE BRIEF (Nov. 2019), https://www.orfonline.org/wp-content/uploads/2019/11/ORF_IssueBrief_326_China-Kashmir.pdf [https://perma.cc/BNT9-KDWP] (discussing Kashmir as a platform for China's hegemonic pursuits).

57. The five projects include construction of railways to London, Iran, and Kazakhstan (the Khorgos Gateway), the construction of an Asian gas pipeline, and the development of a super link to Gwadar Port in Pakistan's Baluchistan province. See *The Five Main Projects of the Belt and Road Initiative*, S. CHINA MORNING POST (May 2017), <https://multimedia.scmp.com/news/china/article/One-Belt-One-Road/pakistan.html> [https://perma.cc/J3VB-T4MM].

58. The Indo-Pakistani Wars of 1947, 1965, 1971, and the 1999 Kargil conflict directly involved territorial disputes over Kashmir.

59. See generally Rossi, *supra* note 31 (discussing political, historical, and hydrological complexities of the region).

troops in the eastern Kashmiri region of Ladakh have created a “two-front battlespace for India.”⁶⁰ Jammu and Kashmir remains at the intersection of historical turmoil, and now once relatively quiet Ladakh appears likely to assume its colonial mortgage with a compounding interest and an ‘indeterminable date of retirement.’⁶¹

B. *The Galwan Incident*

On June 15, 2020, Chinese and Indian soldiers clashed in the western theatre in the Galwan Valley of Ladakh, the ironic result of a high-level de-escalation process that military leaders had agreed to in early June.⁶² It was the fourth and most serious confrontation between the two countries since 2013.⁶³ An Indian patrol, reconnoitering precarious and steep ridge lines in a mountain section above the Galwan Valley—from which they believed the PLA had decamped per the early June disengagement agreement—encountered and fought PLA troops.⁶⁴ For six hours, and in almost total darkness, hand-to-hand fighting took place.⁶⁵ Soldiers bludgeoned each other with nail-studded rods and wooden planks, bamboo poles wrapped in barbed wire, and stones.⁶⁶ At least twenty Indian soldiers of the 16th Bihar Regiment died in the battle, including the regiment’s commanding officer, who plunged to his death after being pushed off the mountain ridge.⁶⁷ China did

60. Kamran Bokhari, *China Joins India and Pakistan in the Kashmir Battlespace*, NEWLINES INST. FOR STRATEGY & POL’Y (June 18, 2020), <https://cgpolicy.org/articles/china-joins-india-and-pakistan-in-the-kashmir-battlespace/> [https://perma.cc/U98U-ZV32].

61. I borrow the phrase from historian David Schoenbaum. See *The Israel Lobby and U.S. Foreign Policy Roundtable Review*, 8 H-DIPLO 15, 21 (Dec. 15, 2007) (focusing on the similarly unending problem of Palestine).

62. See Nayanima Basu, *India, China Agree to Implement 6 June ‘Disengagement Understanding’ to Ensure Peace at LAC*, PRINT (June 17, 2020, 7:28 PM), <https://theprint.in/diplomacy/india-china-agree-to-implement-6-june-disengagement-understanding-to-ensure-peace-at-lac/443521/> [https://perma.cc/2KMK-C5V7] (noting the “de-escalation and disengagement” agreement of the Chinese and Indian Senior Military Commanders’ meeting of June 6).

63. Laney Zhang, *Past Bilateral Border Agreements Between China and India and the June 15th Clash*, IN CUSTODIA LEGIS (July 17, 2020), <https://blogs.loc.gov/law/2020/07/past-bilateral-border-agreements-between-china-and-india-and-the-june-15th-clash/> [https://perma.cc/Y9CP-HH4M].

64. Preceding reports and intelligence from May 22 indicated the Chinese had established a camp in the Galwan Valley on disputed land.

65. See Rupam Jain & Sanjeev Miglani, *Indian Soldiers, Unarmed and Caught by Surprise in China Clash, Families Say*, REUTERS (July 5, 2020, 6:38 PM), <https://www.reuters.com/article/us-india-china-military-families-insight/indian-soldiers-unarmed-and-caught-by-surprise-in-china-clash-families-say-idUSKBN2460YB> [https://perma.cc/4HWX-APN5] (detailing the battle).

66. *Galwan Valley: Image Appears to Show Nail-Studded Rods Used in India-China Brawl*, BBCNEWS (June 18, 2020), <https://www.bbc.com/news/world-asia-india-53089037> [https://perma.cc/VV4H-XMD8]; IndiaToday, *India-China LAC Faceoff: Full Details of Brutal Brawl at the Galwan Valley Near the LAC*, YOUTUBE (June 16, 2020), https://www.youtube.com/watch?v=OKeIHCH_7Eo (at 0:48).

67. Michael Safi et al., *Soldiers Fell to Their Deaths as India and China’s Troops Fought with Rocks*, GUARDIAN (June 17, 2020, 10:22), <https://www.theguardian.com/world/2020/jun/17/shock-and-anger-in-india-after-worst-attack-on-china-border-in-decades> [https://perma.cc/XTR4-SWQG].

not release casualty figures,⁶⁸ but the Indian news agency ANI reported forty-three Chinese injuries or deaths.⁶⁹

Amid performative and mutual displays of outrage and recrimination,⁷⁰ complicated by an anonymous leak of a U.S. intelligence assessment directly identifying China as the aggressor,⁷¹ both countries agreed to handle the incident in a “responsible manner.”⁷² Although the incident marked the first combat deaths on the border between India and China in forty-five years,⁷³ the states emphasized the unarmed nature of the violence as no fire-arms were employed. Adhering to terms of a 1996 confidence building agreement, both countries agreed to not “hunt with guns or explosives within two kilometers from the [LAC].”⁷⁴

68. See *China Confirms PLA Soldiers Were Killed In Galwan Valley Clash; Claims India Suffered More*, EURASIAN TIMES (Sept. 18, 2020) <https://eurasianimes.com/china-confirms-pla-soldiers-were-killed-in-galwan-valley-clash-claims-india-suffered-more/> [<https://perma.cc/2JF8-FSFH>] (noting that China belatedly admitted casualties without reporting the number).

69. Vishnu Som, *20 Indian Soldiers Killed; Over 40 Chinese Casualties, Say Sources*, NDTV (June 16, 2020, 11:28 PM), <https://www.ndtv.com/india-news/20-soldiers-killed-in-face-off-with-chinese-troops-in-ladakh-sources-2247351> [<https://perma.cc/KZW9-R36U>]. An outlet of China's state-run media did admit that the border clash “led to casualties on both sides.” Cao Siqi et al., *India Should be Cautious about West Instigation*, GLOB. TIMES (June 18, 2020, 10:08:40 PM), <https://www.globaltimes.cn/content/1192120.shtml> [<https://perma.cc/K95P-BZWV>].

70. See Anirban Bhaumik, *India, China Blame Each Others but Agree to Adhere to June 6 Agreement for Disengagement*, DECCAN HERALD (June 17, 2020, 10:35 PM), <https://www.deccanherald.com/national/india-china-blame-each-other-but-agree-to-adhere-to-june-6-agreement-for-disengagement-850734.html> [<https://perma.cc/E2A5-5N7T>] (noting Chinese and Indian claims that the others forces crossed the LAC).

71. See Paul D. Shinkman, *U.S. Intel: China Ordered Attack on Indian Troops in Galwan River Valley*, U.S. NEWS & WORLD REP. (June 22, 2020, 1:06 PM), <https://www.usnews.com/news/world-report/articles/2020-06-22/us-intel-source-china-ordered-attack-on-indian-troops-in-galwan-river-valley> (claiming General Zhao Zongqi, head of the PLA's Western Theater Command pre-approved the operation).

72. See Nayanima Basu, *supra* note 62 (noting Chinese Foreign Minister Wang Yi's request that India “punish those responsible” and Indian External Affairs Minister S. Jaishankar's demand that the Chinese side “take corrective steps”).

73. See *India-China Clash: 20 Indian Troops Killed in Ladakh Fighting*, BBCNEWS (June 16, 2020), <https://www.bbc.com/news/world-asia-53061476> [<https://perma.cc/W5A4-3R5A>] (noting the incident was “the first deadly clash in the border area in at least 45 years”).

74. Agreement Between the Government of the Republic of India and the Government of the People's Republic of China on Confidence-Building Measures in the Military Field Along the Line of Actual Control in the India-China Border Areas, art. 6, UN PEACEMAKER (Nov. 29, 1996), https://peacemaker.un.org/sites/peacemaker.un.org/files/CN%20IN_961129_Agreement%20between%20China%20and%20India.pdf [<https://perma.cc/S8VZ-P49B>]. The spirit and intent of this prohibition may recently have been circumvented. In August 2020, following the Galwan Valley incident, violence along the LAC resulted in disputed reports that China directed electromagnetic pulses against Indian troops to force them off established positions by turning “the mountain tops into a microwave oven.” See Didi Tang, *China Turns Ladakh Battleground with India into a ‘Microwave Oven’*, TIMES (Nov. 17, 2020, 12:00 AM), <https://www.thetimes.co.uk/article/china-turns-ladakh-battleground-with-india-into-a-microwave-oven-6tlwtrtz#:~:text=China's%20military%20used%20microwave%20weapons,that%20has%20emerged%20in%20Beijing.&text=the%20professor%20said%20that%20Chinese,tops%20into%20a%20microwave%20oven%E2%80%9D> [<https://perma.cc/UPN2-N9SP>] (quoting Renmin University international relations professor Jin Canrong); ‘Baseless, Fake’: Indian Army on Reports that China Used ‘Microwave Weapons’ in Ladakh, INDIAN EXPRESS (Nov. 18, 2020, 8:14:54 PM), <https://indianexpress.com/article/india/india-china-border-standoff-ladakh-microwave-weapons-7055948/> [<https://perma.cc/PHG9-SP9D>] (reporting that the Indian Army called the Times' report baseless). Tense confrontations between Indian troops and the PLA resulted in 100-200 warning shots fired along the LAC's south bank of Pangong Tso

C. *Provocation as a Function of Infrastructural Upgrades*

The Galwan River originates on the Chinese side of the LAC and it flows from the east into Ladakh, where it joins the Shyok River on India's side of the line. From around the Shyok-Galwan confluence, India has been improving its infrastructure, connecting and extending a strategic all-weather road (the Darbuk-Shyok-DBO road connecting to Ladakh's capital city, Leh) to points near the LAC and the Karakoram Pass, the ancient caravan route that portaged silk, jade, hemp, salt, and wool to peoples of modern-day India, Pakistan, and China.⁷⁵ It has been suggested that China may one day seek to divert the waters of the Shyok to arid Aksai Chin.⁷⁶ Infrastructural development in this area promotes India's resolve to upgrade road capabilities in the High Himalayas to counter Chinese advantages secured by the 1962 war and ongoing perceived threats.⁷⁷ Since that time, "[c]lose to sixty-one roads along the India-China border totaling 3,346 km have been constructed,"⁷⁸ with an aim of completing this wider network by 2022.⁷⁹ In November 2019, India completed the "first phase" of road construction to bolster patrols of the Sino-Indian border.⁸⁰ This long-delayed road network, supervised by the Border Roads Organization of India's Ministry of Defense, grew out of a plan developed by a 1999 Cabinet Committee on Security report with the specific purpose of moving troops quickly along the disputed border.⁸¹ The extension of the DBO road from the Shyok-Galwan confluence near the LAC toward the forward base Patrol Point 14 ("PP14") provided a "back door" means into Aksai Chin,⁸² heightening Chinese suspicions and contributing to the combat incident in the Galwan Valley.⁸³ Additionally,

Lake (Chushul sector) in September 2020, which may have constituted a breach of the 1996 agreement. See Ananth Krishnan, *China Accuses India of 'Firing Warning Shots' and 'Serious Military Provocation'*, HINDU (Sep. 8, 2020, 8:22 AM), <https://www.thehindu.com/news/national/china-accuses-india-of-firing-warning-shots-and-serious-military-provocation/article32547538.ece> [<https://perma.cc/F7BR-TRJQ>] (reporting on China's allegation).

75. See MAXWELL, *supra* note 18, at 27 (noting the route's importance between Xinjiang and Tibet).

76. P. Stobdan, *The Ladakh Drift*, INDIAN EXPRESS (Apr. 20, 2013, 12:29 AM), <http://archive.indianexpress.com/news/the-ladakh-drift/1107668/> [<https://perma.cc/M8JB-CD3T>].

77. See Surabhi Shaurya, *Atal Tunnel: PM Modi Inaugurates Strategically Important All-Weather World's Longest Highway Tunnel in Rohtang*, INDIA.COM (Oct. 3, 2020, 12:18 PM), <https://www.india.com/news/india/atal-tunnel-pm-modi-inaugurates-strategically-important-all-weather-worlds-longest-highway-tunnel-in-rohtang-4160852/> [<https://perma.cc/KL26-8PM4>] (announcing Prime Minister Modi's inauguration of the strategically important tunnel in Himachal Pradesh while accompanied by India's defense minister).

78. Ameya Pratap Singh, *Why Another Sino-Indian War is Unlikely*, DIPLOMAT (June 1, 2020), <https://thediplomat.com/2020/06/why-another-sino-indian-war-is-unlikely/> [<https://perma.cc/P8Q6-QQBH>].

79. See Fravel, *supra* note 47 (on India's aim to complete the road network to match China's infrastructural developments).

80. Singh, *supra* note 78.

81. Ananya Bhardwaj, *India Catches up with China, Builds over 3,000 km of Roads Along Border in 20 Years*, PRINT (Nov. 21, 2019, 10:30 AM), <https://theprint.in/defence/india-catches-up-with-china-builds-over-3000-km-of-roads-along-border-in-20-years/323777/> [<https://perma.cc/6ZQC-YBD8>].

82. Fravel, *supra* note 47.

83. See Manu Pubby, *Sino-Indian Talks Reach Critical Patrol Point 14*, ECON. TIMES (June 11, 2020, 7:13 AM), <https://economictimes.indiatimes.com/news/defence/sino-indian-talks-reach-critical-patrol->

the Indian military secretly reactivated the nearby Daulat Beg Oldi airstrip in 2008,⁸⁴ provoking a major standoff with the Chinese military in 2013 when it test landed a C-130J Super Hercules Lockheed Martin cargo transport aircraft at the airstrip,⁸⁵ which “at nearly 17,000 feet . . . is the highest military airstrip” in the world.⁸⁶ The airstrip had been constructed during the 1962 war, but had remained non-operational between 1965 and 2008. Infrastructural developments on both sides of the LAC contribute as a major destabilizing factor in the increasingly problematic nature of the dispute.

The Karakoram Pass is now a critical chokepoint that implicates the nearby Galwan Valley. It serves as the commercial artery for the newly constructed China-Pakistan Economic Corridor, a sixty-billion-dollar energy, highway, and transport project that links to Xinjiang and China’s global Belt and Road Initiative.⁸⁷ The Galwan Valley’s eastern stretch is also close to China’s vital 2,342-kilometer National Highway 219,⁸⁸ which connects two areas of troubled yet vital Chinese national interest, Xinjiang, home to indigenous Muslim and Turkic-speaking Uyghur populations, and Tibet, the spiritual locus of Vajrayana Buddhism and the exiled Dalai Lama.⁸⁹ China’s majority ethnic group, the Han, and China’s government have been accused of rapidly and forcibly assimilating these regions. This highway, one of the highest roads in the world, is the essential link connecting China’s southwestern border to Lhatse, Tibet.⁹⁰ Control over the Galwan Valley mountain ridges provides military vantage points pertaining to the highway and to the disputed Pangong Tso High Himalayan Lake, which also strad-

point-14/articleshow/76312423.cms?from=mdr [https://perma.cc/T8ZH-FZF6] (noting major general-level meetings between Chinese and Indian brigadier and colonel-level officers regarding disengagement from PP14 shortly before the violence erupted).

84. See IAF Reactivated World’s Highest Airstrip at Daulat Beg Oldie near LAC in 2008 Without Center’s Permission, TIMESNOWNEWS (June 7, 2020), <https://www.timesnownews.com/india/article/iaf-reactivated-worlds-highest-airstrip-daulat-beg-oldie-near-china-border-without-centres-permission/602900> [https://perma.cc/3ZUN-KPXQ] (quoting former Indian Air Force Vice Chief Air Marshal Pranab Kumar Barbora).

85. See Deldan Kunzes Angmo Nyachu, *The Depsang Standoff at the India-China Border Along the LAC View from Ladakh*, 17 HIMALAYAN & CENT. ASIAN. STUD. 171 (2013).

86. *Id.* at 181.

87. Diaa Hadid & Abdul Sattar, *Life Along Pakistan’s Mountain Highway Where China Is Investing Billions of Dollars*, NPR (Dec. 14, 2019, 9:00 AM), <https://www.npr.org/2019/12/14/787220664/life-along-pakistans-mountain-highway-where-china-is-investing-billions-of-dolla> [https://perma.cc/G2R9-6TY4].

88. Pranab Dhal Samanta, *Galwan River Valley: An Important History Lesson*, ECON TIMES (June 29, 2020, 9:35 AM), <https://economictimes.indiatimes.com/news/defence/galwan-river-valley-an-important-history-lesson/articleshow/76669849.cms?from=mdr> [https://perma.cc/CLZ5-X4ZC] (noting the length of China’s National Highway 219).

89. CHUNG, *supra* note 26, at 121 (noting the highway is “the only all-weather road” allowing for quick deployment of troops and materials between the adjoining PLA commands in Tibet and Xinjiang).

90. The Tibet-Xinjiang Highway is 2,086 kilometers long; its highest elevation above sea level, at Qieshan La, is 5,392 meters. Dangerous gale-force winds, subzero temperatures, and hundreds of kilometers of unmonitored roadway with hairpin turns and precipitous embankments characterize stretches of this engineering masterpiece. *China National Highway 219, One of the Highest Roads on Earth*, DANGEROUSROADS, <https://www.dangerousroads.org/asia/china/3219-china-national-highway-219-219.html> [https://perma.cc/DLM4-XBVD].

dles the LAC.⁹¹ Such control also exposes an adjoining road system on the Indian side of the lake and Chinese fortifications on the lake's southern shore.⁹² India's perceived infrastructural improvements suggest an attempt to gain a military advantage for portaging troops and supplies as a means of threatening the overland China-Pakistan Economic Corridor and Chinese sovereignty claims to Aksai Chin. China perceives these outlays as evidence of India's irredentist intentions that have the potential to also interrupt vital trade routes between Tibet and Xinjiang. India's perception of Chinese interests projects inverse characterizations of encirclement and annexation, much to the benefit of China's all-weather friend, Pakistan.

Intertwined oppositional interests in the High Himalayas, now converging on the Galwan Valley, reinforce mutual caricatures of mugger and victim. The Galwan Valley, like the LAC itself more broadly, is a metaphor about the status of the state, the power of respective militaries, and national honor. Any perceived alteration of control over this microdot rises to the level of international concern. Less appreciated is the historical genesis of this metaphor, which rises from the underappreciated spatial topography covering clashing histories, peoples, and imperiums.

D. *The Poverty of Narrative; The Power of Ex Factis*

Complicated historical circumstances fuel competing narratives about this disputed borderland. While border disputes raise questions associated with the delimitation, demarcation, and enforcement of boundary lines, this case raises larger questions of sovereignty over more than 100,000 square kilometers of territory.⁹³ Commingled and contested storylines splice together historical narratives which, while legally significant, sometimes demonstrate the impossibility of establishing presumptions of title (*à titre de souverain*).⁹⁴ Moreover, international courts and tribunals have long "been satisfied with very little" evidence to establish the exercise of territorial rights—provided "that the other State could not make out a superior claim."⁹⁵ This self-

91. Approximately one-third of the lake is on the Indian side of the LAC, the remainder is on the Chinese side. Eight mountain spurs ("Fingers 1-8") running along the lake's northern bank have led to tense standoffs, most recently at Fingers 2 and 4. The area is close to the Chusul Valley, a battlefield during the 1962 war. See Prabhask K. Dutta, *India-China Border Dispute: Importance of Pangong Tso and Why its Fingers are much Sought After*, INDIA TODAY (June 5, 2020, 5:00 PM), <https://www.indiatoday.in/news-analysis/story/india-china-border-dispute-pangong-tso-fingers-1685382-2020-06-04> [https://perma.cc/2M6V-CSAC].

92. See Akrita Reyar, *What Is China's Gameplan? Five Top Reasons for the Galwan Valley Violence-Explained*, TIMESNOWNEWS.COM (June 19, 2020, 3:39 PM), <https://www.timesnownews.com/columns/article/what-is-china-s-gameplan-five-top-reasons-for-the-galwan-valley-violence-explained/608836> [https://perma.cc/A8S3-TL8L].

93. JUNWU PAN, TOWARD A NEW FRAMEWORK FOR PEACEFUL SETTLEMENT OF CHINA'S TERRITORIAL AND BOUNDARY DISPUTES 1-2 (2009) (noting the entire Sino-Indian border dispute).

94. See Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment (Mar. 16), 2001 I.C.J. Rep. 40, 100 (discussing potentially controversial acts that nevertheless can be legally relevant in determining sovereignty) [hereinafter Qatar v. Bahr.].

95. Legal Status of Eastern Greenland (Nor. v. Den.), P.C.I.J., Ser. A/B, No. 53, 46.

acknowledged low standard of proof aimed to favor the swift extinguishment of confusing or competing claims to territory. It intended to promote the ideal of certainty and reward the expansive economic interests of powerful countries. It attempted to preempt the question of *terra nullius*,⁹⁶ which negated indigenous claims and has become a post-colonial dark alley into which international courts and tribunals may prefer not to tread.⁹⁷ And it sought to avoid the problem of *non liquet* (the law is not clear), a complaint that attacks the integrity of international courts and tribunals when they seek to fill spatial voids.⁹⁸ However, none of this evidentiary review will result in third party dispute settlement absent the will of the parties. Sovereign states may abjure settlement forums when outcomes are not clear and impartial review is suspect.⁹⁹ If this stalemate is a prerogative of sovereign equality and the lack of compulsory jurisdiction to impose a judgment, it is also partly due to the inadequacy of international legal tools wrought in an age of imperial and inconsistent application.

To support competing claims of sovereignty, international law has relied on a review of historical *effectivités*, which are the factual circumstances that “play an essential role in showing how” title to territory develops in state practice.¹⁰⁰ These circumstantial descriptions of fact (as opposed to rights) help to determine the intentional exercise of state functions in a territory. In terms of proof, they assume a subordinate role to the presence of clear title.¹⁰¹ But because title to territory is so often itself in dispute, historical *effectivités* retain their legal significance. However, international law, tightly bound to its colonial heritage, evidences an inability to apply tools of sovereign determination (for instance, valid treaties, *uti possidetis*, effective occupation, estoppel¹⁰²) to interstitial space, nowhere more apparent than in the high-altitude peaks and planes of the Himalayas. A concordant international

96. See generally Christopher R. Rossi, ‘A Unique International Problem’: *The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History*, 15 WASH. UNIV. GLOB. STUD. L. REV. 93 (2016) (investigating the historical problem of *terra nullius* in claims pertaining to the High Arctic archipelago of Svalbard (Spitzbergen)).

97. See Sookyeon Huh, *Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipandan (2002) and Pedra Branca (2008)*, 26 EUR. J. INT’L L. 709, 724 (2015) (arguing that international law’s traditional disregard for indigenous claims of sovereignty is not as easily dismissed by the ICJ in the post-colonial age).

98. On the problem of *non liquet*, see generally LUCIEN SORAT, *LE PROBLÈME DES LACUNES EN DROIT INTERNATIONAL: CONTRIBUTION À L’ÉTUDE DES SOURCES DU DROIT ET DE LA FONCTION JUDICIAIRE* [THE PROBLEM OF LACUNAE IN INTERNATIONAL LAW: CONTRIBUTION TO THE STUDY OF SOURCES OF LAW AND OF THE JUDICIAL FUNCTION] (1958).

99. See generally Eric A. Posner, *The Decline of the International Court of Justice* (John M. Olin Program in Law and Economics Working Paper No. 233, 2004) (examining the causes of the relatively light caseload of the preeminent international court, the International Court of Justice); Eric A. Posner & Miguel F.P. de Figuerido, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005) (empirically testing hypotheses of impartiality and the International Court of Justice).

100. Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, 587 (Dec. 22).

101. See Qatar v. Bahr., *supra* note 94, at 285 (Torres Bernárdez, J., dissenting) (“The legal primacy of title is unquestionable in international law. When the *effectivités* are contrary to the title, they lose the legal value that they may possibly have”).

102. See PAN, *supra* note 93, at 5 (listing, *inter alia*, state-sponsored tools to claim territorial title).

law has taken hold in these areas, a law reflective of the *ex factis* principle and the artful but dangerous practice of the *fait accompli*, which both countries' fervent high altitude construction projects seek to secure.

Until the historical problem of interstitial space is duly recognized,¹⁰³ the international legal tools resorted to or referenced to fill this void will prove unsatisfactory. The result is that international legal contributions, at best, can only facilitate often unsatisfactory and piecemeal confidence building measures, which are intended to shift embedded suspicions incrementally toward more predictable and trustworthy patterns of non-threatening behavior.¹⁰⁴ China and India have constructed a course of discursive dealing that surpasses the mechanisms of third-party international settlement. It will be up to them to operationalize and adhere to their construct if border peace is to be achieved.

E. The Path of this Article

In addition to this introduction, this Article reviews in Part I the idea of interstitial space as an evolving construct of international law. Part II situates the conflict within the historical framework of imperial interests over the subcontinent and Central Asia. Part III reviews the relevance of confidence building measures pursued to manage the historical problem and the Article concludes with a reassertion of the constructivist avenues needed to limit future conflict, while acknowledging colonialism's continuing challenge to international law as presented by the ongoing yet underappreciated problem of interstitial space.

I. INTERSTITIAL SPACE AS AN EVOLVING CONSTRUCT

Interstitial space is a shadowland that separates secured and undisputed territorial and geospatial divisions among states. Entering into it can present challenges, like the scaling of a rickety, tenebrous spiral staircase. Such staircases may lead to uncertain if not contested international legal futures. Interstitial space problematizes the larger and evolving category of legal geography.¹⁰⁵ It disrupts the idea of fixity and spatial permanence. It ques-

103. In philosophy, the problem of interstitial space contrasts Newtonian and Cartesian conceptions of space, which view space as an objective and absolute phenomenon, with Leibnizian projections of space, which regard space as a relational, processual surface. Modern presentations of Leibniz's view (such as David Harvey, Henri Lefebvre, and Doreen Massey) have discarded geography's Euclidean embrace of distance, and the simplistic overlaying of grid-like boundaries and territorial divisions as means to spatially fill the void and construct sovereignty. For a general discussion of international law's difficulty with Euclidean geometrics and proofs of possessory title in interstitial areas, see CHRISTOPHER R. ROSSI, REMOTENESS RECONSIDERED: THE ATACAMA DESERT AND INTERNATIONAL LAW (Univ. of Mich. Press, forthcoming).

104. On the purpose and scope of confidence building measures, see generally Johan Jørgen Holst, *Confidence-Building Measures: A Conceptual Framework*, 25 GLOB. POL. & STRAT. 1 (1983).

105. On the evolving field of legal geography, see generally, Katherine Brickell & Dana Cuomo, *Feminist Geolegality*, 43 PROGRESS HUM. GEOGRAPHY 104 (2019) (integrating legal geography and femi-

tions “the ‘closure’ of law as a discreet, formalistic set” of institutions and emphasizes instead the political, social, and power pragmatics of law-making.¹⁰⁶

International legal discourse has tended to foreground a Westphalian conception of space, which presents a tightly-fitted European conception of statehood shaped by generalized ideas about sovereignty.¹⁰⁷ Although sometimes described as the epiphenomenal outcome of the Thirty Years’ War (1618–48),¹⁰⁸ it actually took many years for the modern concept of sovereignty to grow into its spatial container of statehood.¹⁰⁹ The sovereign state became supreme in Europe and throughout the Christian world, but important exceptions, particularly imperialism, made it anything but a hard and fast rule elsewhere.¹¹⁰ The Galwan Valley dispute shows the necessity of foregrounding dynamics pertaining to sovereignty’s nettlesome interstices and conceptualizing sovereignty as a product of geo-social relations, thereby pivoting away from horizontal, static, and grid-like depictions of spatiality.

The European conception of statehood chiefly depended on the concept of territory, producing what political geographer John Agnew called a theoretical trap. This “territorial trap” was based on three distinctive geographical assumptions.¹¹¹ The first assumption both limited and legitimized the state by associating sovereignty with territory, an assumption that overlooked the effectiveness of the state or other wide-ranging public and private non-state actors.¹¹² It can be added that this first assumption formed on the basis of the tightly fitted European conglomeration of states, which minimized interstitial areas between those states in that region. The second assumption

nist geopolitics); Irus Braverman et al., *Introduction*, in *THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY 1* (Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar eds., 2014) (describing legal geography as studying “interconnections between law and spatiality, and especially their reciprocal construction”); ANDREAS PHILIPPOPOULOS-MIHALOPOULOS, *SPATIAL JUSTICE: BODY, LAWSCAPE, ATMOSPHERE* (2015) (developing the neologism of lawscape and the interstitial area between the material and spatial); Joshua Barkan, *Law and the Geographic Analysis of Economic Globalization*, 35 *PROGRESS HUM. GEOGRAPHY* 589 (2011) (noting the absence of law in geographic accounts of neoliberal state structuration); DAVID DELANEY, *THE SPATIAL, THE LEGAL AND THE PRAGMATICS OF WORLD-MAKING* (2010) (developing neologisms of nomosphere and nomoscape to a critical theorization of legal geography); DOREEN MASSEY, *FOR SPACE* (2005) (reconfiguring the flatness of space in terms of social dimensions); Henry Wai-chung Yeung, *The Limits to Globalization Theory: A Geographic Perspective on Global Economic Change*, 78 *ECON. GEOGRAPHY* 285 (2002) (emphasizing economic globalization as a geographic phenomenon); NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* (1994) (rethinking the fixity and objectivity of space); HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* (1991) (emphasizing the dialectical relationship between social relations and space).

106. Tayanah O'Donnell et al., *An Australasian and Asia-Pacific Approach to Legal Geography*, in *LEGAL GEOGRAPHY: PERSPECTIVES AND METHODS*, 3, 4 (Tayanah O'Donnell et al. eds., 2020).

107. See Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2508 (2005).

108. Cf. Richard Falk, *Some Thoughts on the Decline of International Law and Future Prospects*, 9 *HOFSTRA L. REV.* 399, 408 (1981) (describing the rise of Westphalian sovereignty as a Grotian moment).

109. See CHRISTOPHER R. ROSSI, *SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY* 16–20 (2017) (reviewing literature on sovereignty’s ontological development).

110. Raustiala, *supra* note 107, at 2508–09.

111. John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 *REV. INT’L POL. ECON.* 53 (1994).

112. See *id.* at 59.

viewed the territorial state as a singular actor, which unduly squeezed other actors (in modernity's parlance, multinational businesses, for instance) into territorialized containers.¹¹³ The third assumption construed the territorial state as the strict container of society, which overlooked the socio-cultural factors that transcended the "simple parallelism between social boundaries and state borders."¹¹⁴ Taken together, these assumptions projected a static or unchanging understanding of the territorial state that accompanied the rise of European imperial encounters. Only a broader, historical-geographical consciousness of spatiality could release historiography from the dead hand grip of the territorial trap.¹¹⁵

Migration, capital mobility, ecological interdependence, and the expanding information flow today additionally complicate the geographical interstices of international law,¹¹⁶ while prying loose the dead hand fingers of the territorial grip. Vaughan Lowe interpreted these factors as acting independently of geography to "push[] and pull[]" the boundaries of primary norms "when they threaten to overlap or conflict with each other."¹¹⁷ His normative characterization of interstitiality presents emerging spatial challenges in the globalizing world even as international law attempts to account for or comprehend the historical consequences of the Westphalian impress on geo-space and the post-colonial world.¹¹⁸

In the 19th century European encounter with the northern tier of the Indian subcontinent, forces of ethnic, religious, and linguistic pluralism complicated the platting and overlaying of sovereignty's territorial domain.¹¹⁹ These forces involved hierarchically-formed princely states, the traditional ways of the Pashtuns (Pashtunwali), vassal relations of the Ming Dynasty's tributary system, ritualized Confucian expressions of obligation and fealty,¹²⁰ and layered cross-cultural expressions of *dharmā*.¹²¹ The scale over which this spatial backdrop extended significantly challenged the west-

113. See *id.*

114. John Agnew, *Revisiting the Territorial Trap*, 44 *NORDIA GEOGRAPHICAL PUBL'NS* 43, 44 (2015).

115. See Agnew, *supra* note 111, at 77.

116. See *id.* (emphasizing modern geographical interstices).

117. Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES* 19, 31 (Alan Boyle & David Freestone eds., 1991).

118. Lowe specifically noted the rise of sustainable development and its treatment in dicta in Case Concerning the Gabčíkovo-Nagymaros dam. See *id.* at 20. ("[N]ew norms and standards have been developed . . . [and] have to be taken into consideration [and] given proper weight This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development." (quoting Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. Rep. s¶ 140)).

119. See Lisa R. Wiggins, *Sino-Tibetan Relations and Tributary Ideology*, 25 *TIBET J.* 63 (2000) (noting China's imperial treatment of Tibet and other peripheral areas as tributaries).

120. See Kirk W. Larsen, *Comforting Fictions: The Tribute System, the Westphalian Order, and Sino-Korean Relations*, 13 *J. E. ASIAN STUD.* 233, 236-37 (2013) (contrasting Westphalian equality with the Chinese tributary hierarchies).

121. For a general review of the complexity of Hindu *dharmā* and its counterparts, see generally Bernard S. Jackson, *From Dharma to Law*, 23 *AM. J. COMPAR. L.* 490 (1975).

ern imperial project and the legal tools employed to secure imperial frontiers.¹²² The formality and rationality of the horizontal Westphalian legal framework presented a kind of square peg that could not be made to fit tightly into the round hole of perpendicular wilderness emerging from the collisions of the Eurasian plate.¹²³ The convergent geophysical landscapes of the Hindu Kush, the Pamirs, the Kun Lun, the Pir Panjal, the Himalaya, and the Karakoram mountain masses widened the interstice between the peg and the hole. This geography contributed to the creation of a normative dynamic about the law of interstitial space. Within this evolving interstitial space—the tectonics of western, eastern, and sub-continental understandings of obligation and agreement—would intermix, clash, and produce the jumbled political and legal history that today characterizes this land space. In writing of his experiences as the viceroy's Military Secretary to the Gilgit Frontier, Algernon Durand seemingly partook in but nevertheless eschewed any "criticisms or attacks on those who . . . ride out to do battle with the windmills of the forward or backward policy."¹²⁴ He claimed that opinions regarding the management of British relations with Frontier tribes could "only be given with their full effect by men who know nothing of the question."¹²⁵

A. *The Nearby Example of the Radcliffe Line*

Nowhere in the region is this clash better illustrated than in the drawing of the so-called Radcliffe Line, which partitioned India and Pakistan in 1947. Sir Cyril Radcliffe, the man charged to head the partition commissions by the viceroy of India, Lord Mountbatten, had never been east of Paris.¹²⁶ He had a formidable legal mind but no training in the techniques of boundary delimitation. He forewent cadastral and arial surveys preceding his line-drawing.¹²⁷ He worked in haste, without advisors, and immediately

122. On the importance that scale be considered as a narrative device in interpreting human geography and the British Raj, see generally Stephen Legg, *Of Scales, Networks and Assemblages: The League of Nations Apparatus and the Scalar Sovereignty of the Government of India*, 34 TRANSACTIONS INST. BRITISH GEOGRAPHERS 234 (2009).

123. For a representative cartographic and photographic presentation of the complexity of the region, see *The Great Himalayan Mountain Complex* (Apr. 1, 2018), <https://travelthehimalayas.com/kiki/2018/4/1/the-great-himalayan-mountain-complex> [https://perma.cc/PZR9-JESJ].

124. Algernon Durand, *Preface*, in *THE MAKING OF A FRONTIER: FIVE YEARS' EXPERIENCES AND ADVENTURES IN GILGIT, HUNZA NAGAR, CHITRAL, AND THE EASTERN HINDU-KUSH* X (Indus Publications 1977) (1899).

125. *Id.*

126. BBC, *Partition: The Day India Burned*, YOUTUBE (AUG. 14, 2007) (Ricardo Pollack director) <https://www.youtube.com/watch?v=0ZS40U5yFpc&feature=youtu.be&t=2577> (time mark: 43:00). There were actually two commissions, one for Bengal, and one for Punjab. Radcliffe chaired both commissions. See CYRIL RADCLIFFE, *REPORTS OF THE BENGAL BOUNDARY COMMISSION AND PUNJAB BOUNDARY COMMISSION RADCLIFFE AWARDS*, 1, 10 (1958), <https://indianculture.gov.in/reports-bengal-boundary-commission-and-punjab-boundary-commission-radcliffe-awards> [https://perma.cc/4J6E-2923].

127. RAZVI, *supra* note 9, at 7.

destroyed his papers after unveiling the partition.¹²⁸ He made only passing reference to the guiding principles of the Partition Plan, vague as they were,¹²⁹ and used his deciding vote to break the deadlocked deliberations of the commission, split equally and irreconcilably between representatives of the Indian National Congress and the Muslim League.¹³⁰ The result was a Pakistan divided into two unequal parts, separated by a thousand miles of Indian territory, creating for Pakistan two landmasses of frontiers with eight “long, unnatural[,] and vulnerable” boundaries.¹³¹ His “undoubted mastery of legal procedure was badly served by a lack of adequate knowledge of geography and of the Indian subcontinent itself.”¹³² According to Mujtaba Razvi:

The border line that emerged was not a smooth anthropogeographic line drawn on the basis of population along the existing district boundaries. It was not a natural line either Instead, it was a patch-work line incorporating certain features of both the natural and the anthropogeographic principles. It was a line of compromise intended to reconcile the apparently irreconcilable claims of both sides.¹³³

Sir Cyril noted in private correspondence that his line would leave “roughly 80 million people with a grievance.”¹³⁴ Indeed, Mountbatten later referred to Radcliffe’s method as “ghastly.”¹³⁵ The juxtaposition of topographic border divisions over and against the porosity of human geography created one of humanity’s most dramatic diasporas.¹³⁶ It also unnaturally partitioned the

128. See Lucy Chester, *The 1947 Partition: Drawing the Indo-Pakistani Boundary*, AM. DIPL. (Feb. 2002), <http://americandiplomacy.web.unc.edu/2002/02/the-1947-partition-drawing-the-indo-pakistani-boundary/> [https://perma.cc/NW5P-TVS2] (without advisors/destruction of papers); Joya Chatterji, *The Fashioning of a Frontier: The Radcliffe Line and Bengal’s Border Landscape, 1947–52*, 33 MOD. ASIAN STUD. 185, 242 (1999) (noting partition produced “a hastily and ignorantly drawn line”). The British decision to partition India was announced on June 3, 1947 and India achieved formal independence seventy-three days later, on August 15, 1947, producing a “hasty and ill-conceived exit” resulting in “the largest human exodus ever recorded.” JISHA MENON, *THE PERFORMANCE OF NATIONALISM: INDIA, PAKISTAN, AND THE MEMORY OF PARTITION* 7 (2013).

129. See MENON, *supra* note 128, at 7. For a discussion of the terms of reference for demarcating the partition, see H.V. HODSON, *THE GREAT DIVIDE: BRITAIN, INDIA, PAKISTAN* 346–47 (1969) (noting the ascertainment of contiguous majority areas of Muslims and non-Muslims, taking into account unspecified other factors).

130. See HODSON, *supra* note 129, at 348 (attributing the deadlock to the wide divergence of opinion of the commission). For a detailed critique of the commission, see generally LUCY P. CHESTER, *BORDERS AND CONFLICT IN SOUTH ASIA: THE RADCLIFFE BOUNDARY COMMISSION AND THE PARTITION OF PUNJAB* (2009).

131. RAZVI, *supra* note 9, at 7.

132. *Id.* at 32.

133. *Id.*

134. HEWARD, *supra* note 13, at 42 (quoting Radcliffe’s 1947 letter to Mark Tennant).

135. Chester, *supra* note 128 (quoting Mountbatten’s appraisal of Radcliffe and the not “very deep-seated” reasoning for his partition line).

136. For two of the more recent and compelling accounts of partitionment and its human consequence, see generally YASMIN KAHN, *THE GREAT PARTITION: THE MAKING OF INDIA AND PAKISTAN* (2008); NISID HAJARI, *MIDNIGHT’S FURIES: THE DEADLY LEGACY OF INDIA’S PARTITION* (2015).

hydrological structure of the gigantic Indus River Basin, bequeathing to India and Pakistan ill-conceived and often non-existent “cooperative procedures for resource sharing.”¹³⁷ Pakistan now faces an existential freshwater crisis involving control over the headwaters of the Indus River Basin—almost all of which originate from the same and similar High Himalayan lineaments streaming around places like the Galwan River Valley.¹³⁸

Within this history, imperial bureaucrats created their own “formative genre of international law” through ad hoc policies and interactions with obscure forces operating on the peripheries and in the gaps of empire.¹³⁹ Martti Koskenniemi claimed that where the European agents of bureaucratic empire met with non-European populations and cultural practices, “imagination [was] needed to fit [malleable] legal patterns in the new circumstances.”¹⁴⁰

B. *Filling the Spatial Imaginary*

The established view of international law and its intimate association with imperialism concentrates on the binary opposition of the metropole (core) and periphery.¹⁴¹ The argument here imports to international law the historiographic interpretations of imperialism that created alternative spatial frameworks within the interface of the binary subjects. John Darwin problematized Britain’s nineteenth-century imperium as a hodge-podge conglomeration of sub-empires, protectorates, condominiums, mandates, fortresses, occupations, treaty-ports, concessions and spheres of interference, hardly a systemic master plan at all.¹⁴² Lord Lytton, the crown’s viceroy of India between 1876 and 1880 affirmed Darwin’s point in 1877. Reflecting on decades of Britain’s Northwest Frontier policy, he concluded the crown “has obtained so little influence over its semi-savage neighbours” as to leave the land “absolute terra incognita” with “absolutely no security for British life a mile or two beyond our border.”¹⁴³ Lauren Benton referred to this heteronomy as “quasi-sovereignty,” or multiple terms employed by interna-

137. Chester, *supra* note 128.

138. See Rossi, *supra* note 31, at 126 (noting that Pakistan, as the third most water-stressed country in the world, with the world’s fourth-highest water rate use, is fast approaching its absolute water scarcity level).

139. Lauren Benton, *Made in Empire: Finding the History of International Law in Imperial Locations*, 31 LEIDEN J. INT’L L. 473, 474 (2018). A broader treatment of this thesis can be found in LAUREN BENTON & LISA FORD, *RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800-1850* (2016).

140. Martti Koskenniemi, *Less Is More: Legal Imagination in Context*, 31 LEIDEN J. INT’L L. 469, 471 (2018).

141. See Trevor M. Simmons, *Conceptualizing the Geography of Empire*, 37 J. HIST. GEO. 127, 127 (2011). On the intimate connection between international law and imperialism, see generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

142. JOHN DARWIN, *THE EMPIRE PROJECT: THE RISE AND FALL OF THE BRITISH WORLD-SYSTEM 1830-1970*, at 1 (2009).

143. H. CALDWELL LIPSETT, *LORD CURZON IN INDIA, 1898-1903*, at 30 (1903) (quoting viceroy Lord Lytton’s 1877 assessment of Frontier policy).

tional lawyers and colonial officials “to describe arrangements of shared or limited sovereignty, like Indian princely states.”¹⁴⁴ To Benton, referring to empire “as a kind of international system” begged numerous questions, such as “when and where, and in the interests of whom and what, it was permissible to subvert treaties, suspend law, or otherwise ignore agreements between states in the imperial system.”¹⁴⁵ Such quasi-sovereign admixtures of subaltern identities at the perimeter of the Westphalian mindset remained conceptual interstices never bridged by the British Raj’s Frontier policy.

“New imperial historians” have begun to reconfigure passively construed social geographies, which create spatial chains of causation as relevant to history as the study of temporal chains of causation.¹⁴⁶ Moreover, the orthogonal, or grid-like, mindset of Westphalian space drew from powerful, western constructs. The Westphalian state system and its idea of sovereignty projected a “horizontal order of coexistent places that could be sharply delimited and compartmentalized from each other.”¹⁴⁷ This idea drew from Newtonian and Cartesian representations of space, which projected standards of homogeneity, absoluteness,¹⁴⁸ and of rationality while admitting no possibility of empty spaces.¹⁴⁹ The Westphalian idea of space borrowed from Cartesian objectivism to render space a “measurable, rationalized expanse that can be quantified and conquered” by the power of cartography.¹⁵⁰ A spatial imaginary formed and it represented the “civilizational geopolitics”

144. LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900*, at 226 n. 13 and accompanying text, 250 (2010) (citing Indian princely states as an example). Over a fifty-year period, the British variously estimated the number of Indian princely states, over which the Raj maintained limited and sometimes nominal authority, at 693, 620, and 562. These princely states covered “an area larger than one-third of the region” and “about a quarter of its population.” *Id.* at 238.

145. *Id.*

146. Alan Lester, *Spatial Concepts and the Historical Geographies of British Colonialism*, in *WRITING IMPERIAL HISTORIES* 118, 118 (Andrew Thompson et al. eds., 2014); *see also* *COLONIAL FRONTIERS: INDIGENOUS-EUROPEAN ENCOUNTERS IN SETTLER SOCIETIES* (Lynette Russell ed., 2001) (presenting essays on cross-cultural encounters and the production of boundaries and frontiers).

147. GEARÓID Ó TUATHAIL, *CRITICAL GEOPOLITICS: THE POLITICS OF WRITING GLOBAL SPACE 4* (1996) (conceiving of the Westphalian system of space as a Euclidean “horizontal order of coexistent places that could be sharply delimited and compartmentalized from each other”).

148. ISAAC NEWTON, *PRINCIPIA* 77 (Andrew Motte trans., 1846) (1726) (famously noting that “absolute space, in its own nature, without regard to anything external, remains always similar and immobile”).

149. RENÉ DESCARTES, *PRINCIPLES OF PHILOSOPHY* 43–44 (Valentine Rodger Miller & Reese P. Miller trans., 1982) (1644) (attributing “a generic unity to the extension of the space, so that when the body which fills the space has been changed, the extension of the space itself is not considered to have been changed but to remain one and the same”).

150. Duncan Weaver, *Spatiality and World Politics*, *OXFORD RESEARCH ENCYCLOPEDIA, INTERNATIONAL STUDIES* (2020), <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-562?print=pdf> [https://perma.cc/NW5P-TV2S]. The idea of rectilinear land boundary measurement was particularly influential in the mindset of Thomas Jefferson’s survey system established by the Land Ordinance of 1785 and his proposed treatment of the expanding United States countryside. *See* WILLIAM D. PATTISON, *BEGINNINGS OF THE AMERICAN RECTANGULAR LAND SURVEY SYSTEM, 1784–1800* (1966).

of the western mindset, an artifice that eclipsed the consideration of human geography in the construction of the emerging nineteenth century Cosmopolis and its global legal order.¹⁵¹ The main object of this post-colonial western project was to tamp out the sudden appearance of no-man's lands, or indeterminate stretches of *terra nullius*. To this end, Britain's colonial encounter with the expansive Northwest Frontier, notwithstanding the creative and romantic works of writers like Kipling,¹⁵² took on the character of "butcher and bolt" repressions against a landscape that remained "a closed system in the most profound sense . . . not only a different world, . . . a different century."¹⁵³

C. Beyond the Line of Amity

Political geographer John Agnew described this imaginary in terms of the acceptance of sovereign equality within European Concert system following 1815 ("in which no one state 'laid down the law' for the others within Europe"), and the spread of "British economic dominance in much of the rest of the world," leaving the competing European empires to catch up. The important but problematic twentieth century international lawyer, Carl Schmitt, noted the existence of a bounded sense of space and propriety (in terms of bracketing violence) within the *jus publicum Europeum*, but he contrasted that condition with a "spatially undifferentiated," or *raumlose* borderlessness beyond the European line of amity,¹⁵⁴ where unbounded even nihilistic imperial practices ruled.¹⁵⁵ Unlike the bounded development of sovereignty in Europe, which "was separated from most of its colonies by large tracts of water," the frontier zones of Central Asia admitted to the designation of the Ural Mountains as the dividing line between Europe and

151. JOHN AGNEW, *GEOPOLITICS: RE-VISIONING WORLD POLITICS* 80 (1998); Tayyab Mahmud, *Law of Geography and the Geography of Law: A Post-Colonial Mapping*, 3 WASH. U. J. REV. 64, 80 (2011); see also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 3, 3 (1999) (discussing the imperial expansion of European international law).

152. See, e.g., RUDYARD KIPLING, GUNGA DIN (1890) ("You're a better man than I am, Gunga Din"). For similar romanticized sentiments of the noble savage in Sudan and the Philippines, see RUDYARD KIPLING, FUZZY-WUZZY (1892) ("You're a pore benighted 'eathen but a first-class fightin' man"); RUDYARD KIPLING, *THE WHITE MAN'S BURDEN: THE UNITED STATES AND THE PHILIPPINE ISLANDS* (1899) ("Take up the White Man's burden, Send forth the best ye breed, Go send your sons to exile, To serve your captives' need.").

153. Akbar S. Ahmed, *Colonial Encounter on the North-West Frontier Province: Myth and Mystification*, 14 ECON. & POL. WKLY. 2092, 2093 (1979); see also Leslie Harris, *A Scientific Frontier for India: Background to the "Forward Policy of the Nineties"*, 1 CAN. J. HIST/ANNALES CANADIENNES D'HISTOIRE 26, 49-50 (1966) (discussing British Frontier policy and the establishment of frontier forts to create a close border system as a means of dealing with tribes of the "Northwest Hills").

154. Carl Schmitt, *Großraum Versus Universalism: The International Legal Struggle over the Monroe Doctrine, in SPATIALITY, SOVEREIGNTY AND CARL SCHMITT: GEOGRAPHIES OF THE NOMOS* 47-48 (Stephen Legg ed., 2011).

155. See CARL SCHMITT, *NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 254-55 (Telos Press 2003) (1950) (warning of the empty normativity of the Monroe Doctrine).

Asia.¹⁵⁶ However, the vast expanse east of the Urals subscribed to Schmitt's undifferentiated space that became the object of nineteenth century imperial concern. The fundamental "ambiguity of in-betweenness"¹⁵⁷ resulted in international legal approximations, estimates, assumptions, and at times indifference to the phenomenon of political geography and the organic, anti-stasis qualities European geographers had already ascribed to the concept of the state.¹⁵⁸

II. ORIGINS OF THE DISPUTE

The British East India Company first penetrated India by royal charter in 1600, setting up a trading post that eventually would lead to monopolistic engagement with the Mughal Empire. In 1858, British Queen Victoria proclaimed the crown governance of India, establishing the period of British rule known as the Raj,¹⁵⁹ which ended with India's independence and partition in 1947.

Throughout the eighteenth and nineteenth centuries, control over the peninsular subcontinent of India activated an expansive British India policy. British India's frontier pushed toward the Hindu Kush and Karakoram mountains in the northwest to counter advancing Imperial Russian interests from the other side.¹⁶⁰ This geopolitical rivalry became known as the Great Game.¹⁶¹ One British objective of advancing frontier policy into the Himalayas was to "meet the Russian threat directly and as far away from the plains as possible."¹⁶² Concern arose about Russian movement into the high plateau of the Karakoram, which served as "the watershed between India and Central Asia,"¹⁶³ as well as the fount of one of the world's most impor-

156. See AGNEW, *supra* note 151, at 90 (noting that the Ural Mountain division separating Europe and Asia became a standard reference in geography texts by the end of the eighteenth century).

157. Sherin Ajin, *Situating the Sino-Indian Border of Tawang in the Border Studies Discourse*, in TAWANG, MONPAS AND TIBETAN BUDDHISM IN TRANSITION: LIFE AND SOCIETY ALONG THE INDIA-CHINA BORDERLAND 13, 13 (M. Mayilvaganan et al. eds., 2020).

158. See generally FRIEDRICH RATZEL, *POLITISCHE GEOGRAPHIE: ODER DIE GEOGRAPHIE DER STAATEN, DES VERKEHRES UND DES KRIEGES* (1903) (identifying the state as a living organism); Ola Tunander, *Swedish-German Geopolitics for a New Century: Rudolf Kjellén's 'The State as a Living Organism,'* 27 REV. INT'L STUD. 451 (2001).

159. See generally SHASHI THAROOR, *INGLORIOUS EMPIRE: WHAT THE BRITISH DID TO INDIA* 1–45 (2016) (discussing the period between the arrival of the British East India Company and queen Elizabeth's proclamation). Raj is the Hindi word meaning to rule, or kingdom.

160. MAXWELL, *supra* note 18, at 19.

161. On the so-called Great Game—British and Russian machinations throughout most of the nineteenth century to secure Central Asia, the Hindu Kush, and India's Northwest Frontier—see generally EVGENY SERGEEV, *THE GREAT GAME, 1857–1907: RUSSO-BRITISH RELATIONS IN CENTRAL AND EAST ASIA* (2013). For a discussion on late-nineteenth century British concerns about Russia's interest in the region to securing access to a warm water port on the Persian Gulf or Arabian Sea, see William C. Green, *The Historic Russian Drive for a Warm Water Port: Anatomy of a Geopolitical Myth*, 46 NAVAL WAR C. REV. 80, 82–83 (1993).

162. MAXWELL, *supra* note 18, at 20.

163. WOODMAN, *supra* note 15, at 52.

tant water systems—the Indus Basin.¹⁶⁴ This focus led to two British incursions into Afghanistan (1839–1842; 1878–1880) and a pendulum swing away from attention on China,¹⁶⁵ which would suffer significant losses of prestige and territory following the Qing Dynasty’s defeat in the First Sino-Japanese War (1895).

The British intended to turn Afghanistan into a buffer state against Russia, ringing the interstice between Afghanistan and the Raj with the “Frontier,” a “deliberately created no-man’s land,” populated by stereotyped primitive Pashtuns who were “too steeped in tradition to benefit from the “modernizing” influences of colonialism.”¹⁶⁶ This intended “ungovernable space” was “thus actively encouraged by the British to maintain the boundaries of the empire.”¹⁶⁷

Kashmiri, Sikh, Tibetan, and Chinese interests had long disputed areas of Ladakh and Aksai Chin and these areas, “scarcely-inhabited . . . were not demarcated or otherwise defined.”¹⁶⁸ Chinese and Sikh forces battled for the region beginning in 1834 before signing a peace treaty in 1842.¹⁶⁹ Britain’s defeat of the Sikh Confederacy of the Punjab in 1846 brought Ladakh under the control of the British but the discussions with China left the disputed border defined by natural topographic fault lines.¹⁷⁰

The British attempted three major demarcations of the boundary separating Ladakh, Xinjiang, and Tibet, although perhaps as many as twelve lesser plans were drafted in view of shifting projections of Russian intentions.¹⁷¹ In 1897, British general John Ardagh proposed a border line separating Kashmir from Chinese Turkestan and Tibet, essentially claiming Aksai Chin as part of Ladakh and British India from a rough line following the Kunlun

164. It should be noted that India’s other great basin, the Brahmaputra-Ganges Basin, originates from the Kailash ranges of the Himalayas and, after flowing through Tibet, enters India through Arunachal Pradesh along the eastern sector of the LAC. It then enters Bangladesh before debouching into the Bay of Bengal. See *Brahmaputra River System*, GOVERNMENT OF ASSAM, <https://waterresources.assam.gov.in/portal-innerpage/brahmaputra-river-system> [https://perma.cc/Z7AU-63Y5].

165. See MAXWELL, *supra* note 17, at 21 (noting that at this time Britain’s “pendulum of official favour swung” away from China and toward Afghanistan). Ethnic conflict in western China (the Dungan Rebellion of 1862–77) additionally compromised the interests of the Qing Dynasty). For more, see generally JONATHAN N. LIPMAN, *FAMILIAR STRANGERS: A HISTORY OF MUSLIMS IN NORTHWEST CHINA* ch. 4 (1998) (on the rebellion involving the Hui [Dungan] ethnic minority).

166. MYRA MACDONALD, *DEFEAT IS AN ORPHAN: HOW PAKISTAN LOST THE GREAT SOUTH ASIAN WAR* 211 (2017).

167. *Id.*

168. Ranjan, *supra* note <CITE_Ref68369725>, at 104.

169. Alfred P. Rubin, *The Sino-Indian Border Disputes*, 9 INT’L & COMP. L.Q. 96, 102 (1960) (providing “there shall be no transgression and no interference in the country beyond the old-established frontiers”) [the Treaty of Chushul, Sep. 16 or 17, 1842]; see also *id.* at 120 (discussing the 1834 invasion of Ladakh by the Sikh-Dogra Raja of Jammu).

170. Nadeem Shafiq, *India versus China: A Review of the Aksai Chin Border Dispute*, 18 J. POL. STUD. 207, 209 (2011). This intervention became known as the First Sikh War, which ended with the Treaty of Amritsar on Mar. 16, 1846. Rubin, *supra* note 169, at 122.

171. See Muhammad Arif Khan, *China-India Territorial Disputes: Emergence, Post Independence Scenario and Conflicting Approaches*, 20 MA’ARIF RES. J. 1, 8 (2016) (noting multiple British line-drawing attempts).

Mountains. His line drew from a survey of the area conducted by William Johnson in 1865 (published as part of the 1868 Survey of India), which was the most advanced line in the western sector of British India. The Johnson Line contained inaccuracies, which benefitted the Maharaja of Kashmir, who accepted the plan because it enlarged by about 18,000 square kilometers the size of his domain.¹⁷² The British soon settled on the need for a more rigorous, cost-conscious, and defensible border while maintaining the need to turn Tibet into a buffer zone against Russian intrusion into British India. The Chinese were never presented the Johnson-Ardagh Line by the time the British sought to re-draw it.

Rivalry with Russia prompted this re-visitation of the Ardagh-Johnson line. The cultivation of China as a proxy for British interests against Russia became increasingly of interest. In 1889, the Viceroy of India, Lord Lansdown, noted:

The country between the Karakoram and [Kunlun] range is, I understand, of no value, very inaccessible and not likely to be coveted by Russia. We might, I should think, encourage the Chinese to take it, if they showed any inclination to do so. This would be better than leaving a no-man's land between our frontier and that of China.¹⁷³

In 1899 British India's envoy to China proposed a more conservative division of Aksai Chin from the Karakoram Pass, which would have ceded more of Aksai Chin to China given that Aksai Chin itself had been cut off from India by the Himalayas. This line became known as the Macartney-MacDonald line, which today "is more or less the existing" LAC.¹⁷⁴ Britain's principal aim was to create a strategic "buffer between British India and Russia" while encouraging the Chinese to take the 'no man's land' between the Karakoram and Kunlun ranges (as it was deemed valueless, inaccessible and "not likely to be coveted by Russia").¹⁷⁵

Securing the underbelly against the Russian Empire gained strategic emphasis with the publication of Halford John Mackinder's 1904 Heartland Thesis in the Royal Geographical Society's leading journal.¹⁷⁶ Mackinder refocused the understanding of the geostrategic periphery and identified control over Central Asia as the geographical pivot of history that would

172. *Id.* at 10; see also ANNA ORTON, *INDIA'S BORDERLAND DISPUTES: CHINA, PAKISTAN, BANGLADESH AND NEPAL* 22 (2010) (noting a possible personal motivation for Johnson to curry favor with the Maharaja).

173. MICHAEL TAILLARD, *ECONOMICS AND MODERN WARFARE: THE INVISIBLE FIST OF THE MARKET* 265 (2018) (quoting Lord Lansdowne).

174. Shafiq, *supra* note 170, at 210.

175. J.R.V. PRESCOTT, *MAP OF MAINLAND ASIA BY TREATY* 230, 232 (1975).

176. H.J. Mackinder, *The Geographical Pivot of History*, 23 *GEO. J.* 421 (1904).

lead to world domination.¹⁷⁷ This concept necessarily brought into play the “great inner crescent” countries including India and China.¹⁷⁸ However, Britain’s plan to control part of this inner crescent with the Macartney-MacDonald Line incorporated the princely states of Hunza (which the Chinese call Kanjur) and Nagar “to protect British India from Russian advances.”¹⁷⁹ This incorporation cut off Kanjur from within the sphere of the Chinese Emperor’s established tributary system.¹⁸⁰ China did not formally respond to the initiative, prompting British Indian authorities to reassert the Ardagh-Johnson Line, which India took to be its border in this area following partition in 1947. An exchange between Nehru and Chou En-Lai in 1954 centered on competing interpretations of the border as represented in Indian and Chinese cartographic depictions. Neville Maxwell’s summary of Chou En-lai’s position noted “that since there had been no boundary delimitation between India and China there were bound to be discrepancies between the two countries’ maps.”¹⁸¹ By Nehru’s account, no map had ever clearly depicted a division of Kashmir and China on the Aksai Chin plateau and “[it] is a matter of argument as to what part of [Aksai Chin] belongs to us and what part belongs to somebody else.”¹⁸² In the disputed eastern sector of the LAC, the 1914 Simla Agreement proceeded to assert the legality of the McMahon Line, a 550-mile long division of Arunachal Pradesh. That line was agreed to by Tibet and British India but never ratified by the Chinese government, which at this time had been weakened by the 1911 Xinhai Revolution, warlordism, and the simultaneous focus on the state-building agenda of the 1912 Republic of China.

The problematic legal significance of imperial line drawing, against the backdrop of complicated and un-demarcated topography and imprecise cartography, together with the waxing and waning imperial strength of the principal playmakers of the Great Game, created lacunas within overlapping claims of space. These gaps over territorial control turned confusion and uncertainty into perceived indications of acquiescence and quiescence, all of which was abetted by the geographic remoteness of the region.

Part of this confusion may trace to British and Chinese imperial assumptions. When western powers began to expand into Central Asia in the seventeenth century, they encroached on a Chinese imperium based on a tribute system. Frontierlands bore no Euclidean resemblance to border demarcations. Any such arbitrary line-drawing was “unthinkable” to Imperial China

177. *Id.* at 436 (arguing that control “over the marginal lands of Euro-Asia would permit of the use of vast continental resources for fleet-building, and the empire of the world would then be in sight”).

178. *See id.*

179. Julie Flowerday, *Britain and China’s 19th Century Stalemate over Hunza-Kanjut*, 8 NAVEIN REET: NORDIC J. LAW & SOC. RES. 123, 127 (2018).

180. *See id.* at 149 (discussing, as well, the debate over the tributary system as a nonequivalent state scheme used by western to secure territory).

181. Neville Maxwell, *China and India: The Un-Negotiated Dispute*, 43 CHINA Q. 47, 58 (1970).

182. *Id.* at 56 (quoting Nehru).

as it would place the tributary on an equal footing with the Chinese Empire, which by its very nature was hierarchical.¹⁸³ China's "socio-political fabric" was also tightly bound to a code of Confucian ethics, which preferred "strategic discretion" over more western and legalistic mechanisms of conflict resolution and spatial platting.¹⁸⁴ The period of British colonial governance in the subcontinent also "favored a policy of ambiguity with respect to India's Himalayan borders" to accommodate changing circumstances.¹⁸⁵ India interpreted British imperial policy as bequeathing to independent India an inheritance of extraterritoriality in relation to Tibet, an inheritance fortified by Lhasa's expulsion of China's representative toward the end of the Mao's communist civil war victory over the nationalists (Kuomintang) in 1949, and India's 1951 establishment of an administrative center for the Himalayas (the Northeastern Border Defense Committee).¹⁸⁶ However, this opacity bequeathed a "toxic legacy of contested national borders."¹⁸⁷ This uncertainty "explains in large part the inconsistencies of the maps of the time and the absence in many of them of any defined border."¹⁸⁸

Ambiguities of interstitial space contributed to historical assumptions about borders that magnified psychological dispositions already held by Indian decisionmakers,¹⁸⁹ and territorial dispossessions that Chinese leaders would seek to remediate following their Century of National Humiliation.¹⁹⁰ The irreducibility of the idea of securing natural boundaries incon-

183. BYRON N. TZOU, *CHINA AND INTERNATIONAL LAW: THE BOUNDARY DISPUTES* 23 (1990).

184. Roda Mushkat, *China's Territorial Disputes: The Ongoing Quest for a Viable Explanatory Framework*, 27 WILLAMETTE J. INT'L L. & DISPUTE RESOLUTION 103, 118–19 (2020).

185. Paul M. McGarr, *The Long Shadow of Colonial Cartography: Britain and the Sino-Indian War of 1962*, 42 J. STRAT. STUD. 626, 627 (2019).

186. See TZOU, *supra* note 183, at 25–26 (noting Tibet's expulsion of China's Amban (central government representative) and suspicions of India's involvement). In 1953, India marked the extension of the administrative area with the North East Frontier Agency. *Id.*

187. McGarr, *supra* note 185, at 628.

188. *Id.* at 627. Regarding cartographic confusion, the Chinese government-published "Postal Atlas of China" also showed from 1917 to 1933 the boundary in Aksai Chin as per the Ardagh-Johnson line, which runs along the Kunlun Mountains. After attaining independence in 1947, the Indian government fixed its official boundary on the western side which included the Aksai Chin, in a manner that resembled the Ardagh-Johnson Line, yet there is some interpretation that China accepted by not objecting to the Macartney-MacDonald Line until 1958. See Siddharth Shankar V., *Sino-Indian Border Dispute: How India and China are Stuck in Deadlock?*, HIDDEN DOTS (June 2, 2020), <https://medium.com/thehidden-dots/sino-indian-border-confusion-19981d98667d#:~:text=however%2C%20Johnson%20presented%20this%20line,accepted%20it%20under%20his%20territory.&text=the%20Ardagh%E2%80%93Johnson%20Line%20was,General%20John%20Ardagh%20in%201897> [https://perma.cc/L4XU-CVQ6].

189. See Steven A. Hoffmann, *Ambiguity and India's Claims to the Aksai Chin*, 6 CENTRAL ASIAN SURVEY 37 (2007). Jawaharlal Nehru's authorized biographer, Sarvepalli Gopal, has argued that the Indian traditional border in disputed regions with China extend far beyond what was ceded to India by Britain.

190. See William A. Callahan, *National Insecurities: Humiliation, Salvation, and Chinese Nationalism*, 29 ALTS.: GLO., LOC., POL. 199, 205 (2004) (discussing the PRC's deliberate appeal to national humiliation and subservience to unequal treaties as forms of Chinese identity politics). China's list of "lost territories" includes: Taiwan, the Penghu Archipelago (the Pescadores), Burma, Annam (Vietnam), the Amur and Ussuri river basins, areas north of Ili, Kholand, the Ryukyu (Okinawa), Thailand, Borneo, the Sulu Archipelago, Java, Ceylon (Sri Lanka), Nepal and Bhutan. See TZOU, *supra* note 183, at 77.

gruously promoted the “disreputed theory” that natural boundaries always tended to conform to the earth’s natural geographic features.¹⁹¹ The renowned political geographer J.R.V. Prescott expressed difficulty knowing “where to start challenging this statement,”¹⁹² as political geography holds “that ‘natural boundaries’ are always the limit to which a state wishes to expand.”¹⁹³ Achille Mbembe also noted the noncoincidence of state and natural borders in the context of African colonization. He attributed many controversies about Europe’s Scramble for Africa to the gaps and cavities created by laying the imperial grid of sovereignty over the human pluralities of a continent.¹⁹⁴

India took for granted many of the assumptions of its frontierland shaped by the British. It led to a Forward Policy that conflicted with Chinese strategic assumptions about sovereignty, producing cross-purpose and unhelpful considerations of the historical proofs (*effectivités*) resorted to by international lawyers to clarify contested title to territory.¹⁹⁵

From India’s perspective, these *effectivités* establish the identity of Ladakh and Tibet according to a peace treaty of 1684; however the PRC regards this agreement as a subdivision of fiefdoms pertaining to the manorial estate of the Tibetan prince, Skyid-Ida-Ngeemagnon, not a realignment of boundaries.¹⁹⁶ India relies on an 1852 provision in an agreement between Ladakh and Tibet referencing that the “boundary between [the two] remains the same as before;” the PRC interprets the provision as upholding the annual tribute Ladakh should pay to Tibet.¹⁹⁷ India references an 1847 British affirmation that “the borders of the territories have been sufficiently and distinctly fixed; the PRC notes that “China never accepted the proposal.”¹⁹⁸ British ambivalence about including Aksai Chin in Ladakh, Xinjiang, or Tibet depended on shifting perceptions of Russian intentions in the Great Game, however it has also been noted that arguably “neither India nor China had a solid claim” to Aksai Chin as it had never been historically administered by either country.¹⁹⁹

191. Neville Maxwell, *Fresh Insights into India’s Boundary Claims*, 25 ECON & POL. WKLY 2425, 2426 (1990).

192. PRESCOTT, *supra* note 175, at 278.

193. *Id.* at 279.

194. See Achille Mbembe, *At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa*, 12 PUB. CULTURE 259, 272–73 (2000) (discussing African spatial arrangements and superimposed hydropolitical conflicts).

195. See WOODMAN, *supra* note 15, at 320–21 (noting with regard to the Sino-Indian border disputes and the hundreds of pages of documentation provided by both parties that “it can be argued that there has been too much discussion already on maps and documents and historical records. The innumerable discrepancies on maps might lead the most naïve student of cartography to view that ‘the devil can quote maps to serve his own purpose’”).

196. See TZOU, *supra* note 183, at 63.

197. *See id.* at 65.

198. *Id.*

199. Myra MacDonald, *The Sino-Indian Standoff and a Most Misunderstood Frontier*, WAR ON THE ROCKS (July 15, 2020), <https://warontherocks.com/2020/07/the-sino-indian-standoff-and-a-most-misun->

India's reliance on Britain's ambiguous historical bequest produced for India a symbolic defense of its northwest borderland claims that China shattered in the mid-1950s when India realized that China had completed a 1,200-kilometers all-weather road connecting the entirety of Aksai Chin to China's interior.²⁰⁰ And it produced a new Great Game of interstitial rivalry between China and India over strategic interests across Central Asia and the High Himalayas.²⁰¹

In his Romanes Lecture at Oxford University, the former viceroy of India, Lord Curzon, delivered his famous discourse on "Frontiers," noting from personal experience that they "are the chief anxiety of nearly every foreign office"²⁰² and "indeed the razor's edge on which hang suspended the modern issues of war or peace."²⁰³ Five years before becoming the viceroy of India in 1899, Curzon had privately journeyed through the Karakoram-Hindu Kush region,²⁰⁴ and he would recall how the "tumbled mass of peaks and gorges" of the Himalayas north of Kashmir challenged the "absurd and irrational" penchant for Euclidean straight-line geometrics and the "modern notion" of fixed boundaries.²⁰⁵ Nomadic and seasonal migrations of human populations complicated the physical transference of frontier lines onto maps.²⁰⁶ Nevertheless, Curzon "devoted the majority of his lecture to establishing frontiers as an object of 'scientific' analysis,"²⁰⁷ which he labeled "a preventive of

derstood-frontier/ [https://perma.cc/244S-BNUN]. See generally MYRA MACDONALD, *WHITE AS THE SHROUD, INDIA, PAKISTAN AND WAR ON THE FRONTIERS OF KASHMIR* (2020).

200. The resulting 1962 war sparked important historical debates about the aggressor in the conflict. See SARVEPALLI GOPAL, *JAWAHARLAL NEHRU: A BIOGRAPHY* (2004); see also STEVEN A. HOFFMANN, *INDIA AND THE CHINA CRISIS* (1990); ALASTAIR LAMB *TIBET, CHINA AND INDIA 1914-1950* (1989); Gupta, *supra* note 5.

201. See David Scott, *The Great Power 'Great Game between India and China: 'The Logic of Geography,'* 13 *GEOPOLITICS* 1, 2 (2008) (describing the intersecting rivalries of these two rising powers as a 'New Great Game'); see also Rajan Menon, *The New Great Game in Central Asia*, 45 *SURVIVAL* 187, 198 (2003) (identifying Central Asia as a critical new region); Matthew Edwards, *The New Great Game and the New Great Gamers: Disciples of Kipling and Mackinder* 22 *CENTRAL ASIAN SURVEY* 97 (2003) (discussing the revival of the geopolitical concept in Central Asia); Dianne L. Smith, *Central Asia: A New Great Game?* 23 *ASIAN AFF.* 147, 157 (noting India's overland dependence on Pakistan and Afghanistan (limited at that) for trade access into Central Asia); *id.* at 163 (noting China's interest in establishing Xinjiang as a catalyst for the revived Silk Route into Central Asian markets).

202. CURZON OF KEDLESTON, *supra* note 14, at 2, 4 (1907). At this time, Curzon was the Chancellor of Oxford. As viceroy (1898–1905), he noted his personal responsibility for the security and defense of India's 5,700-mile land frontier and his overseeing of five boundary commissions. *Id.* at 4.

203. *Id.* at 7.

204. See GEORGE NATHANIEL CURZON, *ON THE INDIAN FRONTIER* (2012) (presenting the future viceroy's account of his 1894 fifty-four-day, 1,200-mile trek across the Pamirs, the highland region of Central Asia). The British Foreign Office government halted publication in 1898 on grounds of diplomatic discretion and proscribed the newly-appointed viceroy from publishing an account of the territory he was to govern. See Salman Rashid, *Cover Story: Review of On the Indian Frontier by Lord Curzon of Kedleston*, *DAWN* (Aug. 12, 2012), <https://www.dawn.com/news/741656/cover-story-review-of-on-the-indian-frontier-by-lord-curzon-of-kedleston> [https://perma.cc/U4TH-77TB] (reviewing the delayed publication of Curzon's account).

205. CURZON OF KEDLESTON, *supra* note 14, at 19, 35, 49.

206. Satinder Kumar Lambah, *The Durand Line*, 7 *INDIAN FOR. AFF. J.* 42, 46 (2012).

207. THOMAS SIMPSON, *THE FRONTIER IN BRITISH INDIA: SPACE, SCIENCE, AND POWER IN THE NINETEENTH CENTURY* 260 (2021).

misunderstanding, a check to territorial cupidity, and an agency of peace.”²⁰⁸ Part of this mentality of fixity had grown out of the importation of the Roman law principle of *uti possidetis* (as you possess, so you may possess) to demarcate newly-formed boundaries in western hemisphere following the collapse of the Spanish New World empire beginning in 1810.²⁰⁹ European colonial powers would adapt the same principle to end their Scramble for Africa following the Berlin Conference.²¹⁰ The fundamental purpose of the principle was to maintain order by solving territorial disputes in favor of the supervening power that had acquired possession “irrespective of the means by which possession had been gained.”²¹¹ Preserving the status quo sought to avoid the sudden appearance of *terra nullius* amid the process of decolonization.

Lord Curzon also noted the scholarly subject of frontiers was “almost wholly ignored” except for “[a] few pages . . . in compilations on International Law.”²¹² Notwithstanding the “controversies” and “passions” “the Indian Frontier Problem . . . has provoked” for the British empire,²¹³ he adopted a sanguine view of the imperial legacy and of the progressivity of international law. He wrote, “[T]he scramble for new lands . . . will become less acute as there is less territory to be absorbed and less chance of doing it with impunity We are at present passing through a transitional phase, of which less disturbed conditions should be the sequel, falling more and more within the ordered domain of International Law.”²¹⁴

III. CONFIDENCE-BUILDING MEASURES

Since 1949, China has pursued the doctrine of *rebus sic stantibus* (fundamental change in circumstance) instead of *pacta sunt servanda* on the treaties signed by previous rulers during the colonial period.²¹⁵ As a result, China has abandoned unjust treaties imposed on it by colonial powers, contesting as well the “unacceptable colonial imposition” of demarcation agreements affecting Sino-Indian relations that resulted from “colonial British authorities of India and the Tibetan government.”²¹⁶ China annexed Tibet along with nine Bhutanese territorial enclaves; it rejected the Simla Accord of

208. CURZON OF KEDLESTON, *supra* note 14, at 48.

209. See generally GIUSEPPE NESI, L'UTI POSSIDETIS IURIS NEL DIRITTO INTERNAZIONALE 25 (1996) (discussing the application of *uti possidetis* in the jurisprudence of Latin America immediately after the end of colonization).

210. P. MwetI Munya, *The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects*, 7 J. INT'L L. & PRAC. 159, 215 (1998).

211. Freddy D. Mnyongani, *Between a Rock and a Hard Place: The Right to Self-Determination Versus Uti Possidetis in Africa*, 41 COMP. & INT'L L.J. S. AFR., 463, 468 (2008).

212. CURZON OF KEDLESTON, *supra* note 14, at 4, 5.

213. *Id.* at 6.

214. *Id.* at 8.

215. See Vienna Convention on the Law of Treaties, art. 62, 26, Jan. 27, 1969, 1155 U.N.T.S. 331.

216. CHUNG, *supra* note 26, at 96.

1914; it effectively annexed Aksai Chin in the 1950s, rejected the McMahon Line, absorbed from Pakistan land claimed by India in 1963 and has fought one major war and three minor but serious conflicts in Nathu La and Cho La in 1967 and Sumdorong Chu Valley in 1987.²¹⁷ It resolved successfully territorial and boundary disputes with Burma, Afghanistan, Mongolia, Pakistan, Vietnam, Russia, Kazakhstan and Kyrgyzstan,²¹⁸ but in addition to the nettlesome and extensive border disputes on its southern tier, it has yet to resolve sovereignty questions in the East China Sea involving Japan and Taiwan (over the Senkaku/Diaoyu/Tiaoyutai islands), the status of Taiwan itself, and an array of difficulties in the South China Sea with Vietnam, Malaysia, the Philippines, Brunei, and most problematically, the United States.²¹⁹

The modern diplomatic history between China and India began in 1950 and converged around five principles of peaceful coexistence.²²⁰ The 1962 war caused a breach in Indo-Chinese diplomatic relations that did not begin to mend until 1976, when diplomatic overtures again explored discussions on the border question.²²¹ Deng Xiaoping renewed consideration in 1980 of a package deal proposal proffered in 1960 by Chou Enlai,²²² whereby “China would accept Indian claims in the eastern sector [Arunachal Pradesh] in exchange for Indian recognition of China’s claims in the western sector.”²²³ Zhou’s proposal failed as “neither party could agree to the facts as presented by the other” regarding the historical *effectivités*.²²⁴ Following Rajiv Gandhi’s visit to Beijing in December 1988, the first visit by an Indian prime minister since Nehru’s trip in 1954, a Joint Working Group (“JWG”) was established “to deal exclusively with the border question under the supervision of the Indian foreign secretary and the Chinese vice-foreign minister.”²²⁵ After

217. Suneel Kumar, *China’s Revisionism Versus India’s Status Quoism: Strategies and Counter-strategies of Rivals in Doklam Standoff*, 24 JADAVPUR J. INT’L REL. 73, 80 (2020).

218. PAN, *supra* note 93, at 1.

219. See Christopher R. Rossi, *Treaty of Tordesillas Syndrome: Sovereignty ad Absurdum and the South China Sea Arbitration*, 50 CORNELL INT’L L.J. 231, 245 (2017) (discussing sovereignty contentions over the world’s fifth largest body of water).

220. The five principles are: mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference, equality and mutual benefit, and peaceful coexistence. See Gov’t of India, Ministry of External Affs. Panchsheel 1 (2004), http://www.mea.gov.in/Uploads/PublicationDocs/191_panchsheel.pdf [https://perma.cc/X8WS-3LKN]. The principles were articulated in the Agreement on Trade and Intercourse between the Tibet Region of China and India, signed on April 29, 1954 (the Panchsheel Agreement). *Id.* Chinese Premier Zhou Enlai and Indian Prime Minister Jawaharlal Nehru issued a joint statement on June 28, 1954 that expanded the Panchsheel framework to relations with all other countries. *Id.* at 2. It found expression in the 1955 Bandung Conference, in the 1957 UN General Assembly resolution on peaceful coexistence, and as a principal core component of the Non-Aligned movement. See *id.*; *China’s Initiation of the Five Principles of Peaceful Co-Existence*, MINISTRY OF FOREIGN AFFS., PRC, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/18053.shtml [https://perma.cc/M6QE-YCQG].

221. CHUNG, *supra* note 26, at 110.

222. See *id.* at 111 (prompting India’s welcoming of the proposal as a point of departure for border talks).

223. *Id.* at 104.

224. *Id.*

225. *Id.* at 115.

almost 60 years of tension and multiple rounds of sub-summit official discussions, the two countries still cannot agree on the exact location of the LAC.²²⁶

However, pronouncements by both countries indicate that the rhetoric surrounding the resolution of the Galwan River dispute must revolve around these established principles, with added emphasis on dialogue and communication efforts through the Special Representatives mechanism on the India-China boundary question,²²⁷ the Working Mechanism for Consultation and Coordination on India-China border Affairs (“WMCC”), and through expedited work to conclude new confidence building measures.²²⁸ However, China, which is in possession of the bulk of disputed western territory India claims, may be relying with confidence on the *ex factis* principle, which works against any speedy rearrangement to the status quo.

Mindful of the colonial inability to legally demarcate the interstitial frontier stretches, and of the insufficiency of international legal tools to fill the void, the parties have between themselves constructed a viable confidence building network to facilitate communication. These principal instruments include a 1993 border security framework that attempts to minimize the military forces in areas along the LAC and set up a system to notify one another of military exercises of specified levels near the LAC,²²⁹ a 1996 military disclosure mechanism undertaken to reduce troop levels and major categories of armaments in border areas, observe and inspect troop movements, and prohibit the use of guns and explosives within two kilometers of the LAC,²³⁰ a 2005 protocol on modalities to implement confidence building

226. Zhang, *supra* note 63 (noting “no final agreement between the countries on the exact location of the LAC”).

227. India and China established the Special Representatives (“SR”) on the Boundary Question mechanism in a 2003 meeting between Prime Minister Atal Bihari Vajpayee and his Chinese counterpart, Wen Jiabao. The purpose was to create a high-level dialogue channel to stimulate border negotiations, which to that time had bogged down through 14 unproductive rounds of the India-China Joint Working Group. See *Sino-Indian Meeting on Border Dispute*, REDIFFINDIAABROAD (Oct. 22, 2003, 6:54 PM), <https://www.rediff.com/news/2003/oct/22china.htm> [https://perma.cc/XU2U-GNCF]. As of May 2020, 22 rounds of SR talks have taken place and the mechanism is credited with promoting special economic dialogues, the 2005 agreement on boundary settlement guiding principles, and maintaining an extant forum for dialogue regarding ever fluctuating alignment issues along the LAC. See Nayanima Basu, *India, China Special Representatives Talks key to Keeping the Peace, Should Continue: Experts*, PRINT (May 26, 2020, 10:30 AM), <https://theprint.in/india/india-china-special-representatives-talks-key-to-keeping-the-peace-should-continue-experts/429373/> [https://perma.cc/SC4Y-MB74].

228. See *Joint Press Statement—Meeting of External Affairs Minister and the Foreign Minister of China*, Ministry of External Affairs, GOVERNMENT OF INDIA (Sept. 10, 2020), <https://www.mea.gov.in/press-releases.htm?dtl/32962/Joint+Press+Statement++Meeting+of+External+Affairs+Minister++and++Foreign+Minister+of+China+September+10+2020> [https://perma.cc/4JVG-GMCK] (presenting consensus agreements of the Shanghai Cooperation Organization meeting to diffuse tensions relating to the Galwan River incident and the ongoing Himalayan border disputes).

229. See 1993 Agreement on the Maintenance of Peace and Tranquility along the Line of Actual Control in the Sino-Indian Border (Sept. 7, 1993), <http://treaty.mfa.gov.cn/tykfiles/20180718/1531876687358.pdf> [https://perma.cc/XRJ9-8VWQ].

230. See Agreement Between the Government of the Republic of India and the Government of the People's Republic of China, *supra* note 74.

measures through information exchange, bi-annual politico-military meetings, and diplomacy,²³¹ a 2005 agreement not to allow differences to affect the overall development of bilateral relations and peaceful consultations,²³² a 2012 working mechanism for handling border incidents,²³³ and a 2013 agreement prohibiting the tailing of patrols and outlining additional procedures for resolving disputes “where there is no common understanding of the LAC.”²³⁴ More than revisiting competing historical narratives, the countries ultimately sense the need to return to this constructed discourse of confidence building communication. It is the only viable means of mitigating tensions that disrupt mutual perceptions of reward.

CONCLUSION

The High Himalayan stretches separating South and Central Asia in the erstwhile remains of the princely state of Jammu and Kashmir reflect international law’s continuing encounter with the problem of interstitial space. Conflicts wrought by colonial line-drawing and inadequate assumptions about the fixity of the state, the dynamics of human geography, and the international legal tools to fill or manage gaps in sovereign space are apparent across the region. They arise in the high altitudes of the Siachen Glacier, in the contested cold desert plateaus of Ladakh, in the Galwan Valley, in other flash-points separating India from Chinese-administered Aksai Chin (such as Pangong Lake and the Grogra Hot Springs), along the western stretches of the LAC that lead to the Shaksgam Tract (ceded by Pakistan to China in 1963 and claimed by India), in contested claims over Gilgut-Bal-tistan, in the persistent cross-border violence between Pakistani- and Indian-

231. See Protocol Between the Government of the Republic of India and the Government of the People’s Republic of China on Modalities for the Implementation of Confidence Building Measures in the Military Field Along the Line of Actual Control in the India-China Border Areas, GOI MIN. EX. AFF., (Apr. 11, 2005), <https://www.mea.gov.in/bilateral-documents.htm?dtl/6539/Protocol%20between%20the%20Government%20of%20the%20Republic%20of%20India%20and%20the%20Government%20of%20the%20Peoples%20Republic%20of%20China%20on%20Modalities%20for%20the%20Implementation%20of%20Confidence%20Building%20Measures%20in%20the%20Military%20Field%20Along%20the%20Line%20of%20Actual%20Control%20in%20the%20India-China%20Border%20Areas> [https://perma.cc/TNY7-AF4P].

232. See Agreement between the Government of the Republic of India and the Government of the People’s Republic of China on the Political Parameters and Guiding Principles for the Settlement of the India-China Boundary Question, MIN. EX. AFF., GOI (Apr. 11, 2005), <https://www.mea.gov.in/Portal/LegalTreatiesDoc/CH05B0585.pdf> [https://perma.cc/PPX8-7Q5C].

233. See Agreement between the Government of the People’s Republic of China and the Government of the Republic of India on the Establishment of a Working Mechanism for Consultation and Coordination on China-India Border Affairs, MIN. EX. AFF., GOI (Jan. 17, 2012), <https://www.mea.gov.in/Portal/LegalTreatiesDoc/CH12B0194.pdf> [https://perma.cc/6HCJ-M38T].

234. Agreement between the Government of the Republic of India and the Government of the People’s Republic of China on Border Defence Cooperation, MIN. EX. AFF., GOI, (Oct. 23, 2013), <https://www.mea.gov.in/bilateral-documents.htm?dtl/22366/Agreement%20between%20the%20Government%20of%20the%20Republic%20of%20India%20and%20the%20Government%20of%20the%20Peoples%20Republic%20of%20China%20on%20Border%20defence%20Cooperation> [https://perma.cc/TZ4V-BGN9].

Administered Kashmir, as well as in the eastern trijunction region of Doklam, and in Arunachal Pradesh.

It is difficult to conceive of a more problematized set of borders in the history of the modern world than those declining from the High Himalayas. Ironically, much of the infrastructural development and high-altitude road construction, perceived in part to secure military advantage, present targets that are incapable of being defended given advances in air systems and satellite targeting.²³⁵ The combination of indefensible borders, ill-defined to begin with, and increasing militarization has created a ripple effect of regional instability.²³⁶ This instability is fed by “the perverse logic of mountain warfare: for every new position staked out to shore up defenses, another one beyond needs to be defended to protect it.”²³⁷

And yet, “essentially each country holds the territory that really matters to it.”²³⁸ In line with the *ex factis* principle, China has effective control over Aksai Chin and Shaksgam Valley and India effectively controls Ladakh and the territory in the eastern sector of Arunachal Pradesh. The overarching threat of strategic nuclear conflagration is muted by expert opinion that the two countries do not view themselves as nuclear rivals, having pursued defensive nuclear postures vis-à-vis each other.²³⁹ Their more dangerous rivalries extend to regional influence in Southeast Asia and across the Indian Ocean along with their respective suspicions and potential miscalculations “about the strategic relations each has built with the other’s main adversary—China with Pakistan and India with the U.S.”²⁴⁰

China and India maintain important economic relations.²⁴¹ They have fortified relations among newly created global institutions, such as the BRICS bloc, which involves Brazil, Russia, India, China, and South Africa, and the Asian Infrastructure Investment Bank (“AIIB”), the New Development Bank, the Shanghai Cooperation Organization,²⁴² the Bangladesh-China-India-Myanmar Economic Corridor, and the China-Indochina Peninsula Economic Corridor deriving from China’s establishment of the Kunming Area Pilot Free Trade Zone.²⁴³ It has been suggested that their growing economic interdependence means “they cannot afford to be enemies,”²⁴⁴ a point em-

235. MacDonald, *supra* note 199 (discussing the indefensibility of the terrain in Galwan).

236. *See id.*

237. *Id.*

238. Neville Maxwell, *India-China Dispute Revisited: How It Could Be Resolved*, 47 ECON. & POL. WKLY. 10, 13 (2012).

239. *See* Toby Dalton & Tong Zhao, *At a Crossroads? China-India Nuclear Relations After the Border Clash* (Carnegie Endowment Working Paper No. 5, Aug. 2020), <https://carnegieendowment.org/files/%20Zhao%20-%20China-India%20Nuclear%20Relation%20.pdf> [<https://perma.cc/RY39-VJDA>].

240. *Id.*

241. Favel, *supra* note 47 (noting that bilateral trade between India and China has increased from \$2 billion to over \$90 billion in the past two decades).

242. Ayres, *supra* note 46.

243. *See* INKUNMING (Sept. 25, 2019), [https://m.kunming.cn/en/c/2019-09-25/10793777.shtml/#\[https://perma.cc/4HH5-4YPP\]](https://m.kunming.cn/en/c/2019-09-25/10793777.shtml/#[https://perma.cc/4HH5-4YPP]) (reporting on the sub-regional expansion of trade interests).

244. Dalton & Zhao, *supra* note 239.

phasized by the Chinese Foreign Office's emphasis on upholding the "big picture."²⁴⁵

And yet from the Indian perspective, China's encirclement continues apace. The loss of Aksai Chin after the 1962 war, followed by the 1963 China Pakistan Boundary Agreement, where Pakistan ceded to China the 5180 square kilometers of territory of the Shaksgam Valley in Pakistan-controlled-Kashmir, all of which was claimed by India, directly threatened India's access to Central Asia via the Karakoram Pass. This threat made crucial to India the control of the Siachen Glacier, which remains, quite literally, the most frozen of the world's contested territorial disputes. Accessing the Siachen Glacier requires physical control over Ladakh, which makes any alteration to its status quo and military machinations in the Galwan Valley a matter of existential consideration.

China's encirclement of India via flagship projects of China's Belt and Road Initiative now compounds the significance of activities in the Galwan Valley, as does the recent establishment of a Chinese military base in western Tajikistan.²⁴⁶ China's parallel infrastructural development projects connecting Kashgar in western China to Aksai Chin and Kashgar to Islamabad (via the Karakoram's Khunjerab Pass) and ultimately the Arabian port city of Gwadar (the 2013 China-Pakistan Economic Corridor initiative) establish North-South feeder lines that link China's northern overland economic belt to the west with its southern maritime road into the Indian Ocean.²⁴⁷ These feeder lines pass directly through Pakistan-controlled Kashmir. By proxy, Pakistan incrementally secures its control over the interstitial Himalayan borderlands by working with China to allow for its development of the Belt and Road Initiative into Kashmir. Is this development really an alteration of the status quo? The 1965 completion of the mega-Mangla Dam on the Jhelum River—one of the largest dams in the world—effectively secured for Pakistan (with the World Bank's financing and blessing) sovereign rights over Azad Kashmir more than any new concern regarding the China-Pakistan Economic Corridor.²⁴⁸

245. Nirupama Rao, *The Year of Living Dangerously for India and China*, WIRE (July 7, 2020), <https://thewire.in/diplomacy/india-china-70-years-diplomatic-relations> [<https://perma.cc/4LZN-DXS3>] (quoting a Chinese Foreign Office statement).

246. See Stephen Blank, *China's Military Base in Tajikistan: What Does it Mean?*, CENTRAL ASIA–CAUCASUS (Apr. 18, 2019), <https://www.cacianalyst.org/publications/analytical-articles/item/13569-chinas-military-base-in-tajikistan-what-does-it-mean?.html> [<https://perma.cc/T3R6-PBE3>] (noting the regional implications of China's strategically positioned military base in western Tajikistan, north of Kashmir and close to the Wakhan corridor leading into Afghanistan).

247. A project is underway to create the first Chinese Master-Community in Gwadar, which will house 500,000 Chinese professionals as part of the port development project of the Belt and Road Initiative. See Murtaza Ali Shah, *500,000 Chinese Professionals Expected in Gwadar by 2023*, THE NEWS INTERNATIONAL (Oct. 21, 2017), <https://www.thenews.com.pk/print/238644-500000-Chinese-professionals-expected-in-Gwadar-by-2023> [<https://perma.cc/TML3-KJXZ>].

248. The Mangla Dam is essential to Pakistan's rapidly depleting water needs. Its placement in Azad Kashmir was done in exchange for allowances to India, as detailed in annexures C and D of the 1960 Indus Waters Treaty. See Indus Waters Treaty, Sept. 19, 1960, 419 U.N.T.S. 126. The Treaty created a

The widening gap between India's and Pakistan's relations with China has created yet another interstitial problem.²⁴⁹ Even if the Sino-Indian border dispute lacks an ideological trigger to spark a limited conventional war,²⁵⁰ India's substantial militarization and infrastructural upgrading of the region stands as likely threat to other Pakistan.

West of the Siachen Glacier is the contested region of Pakistan-controlled-Kashmir—Gilgit-Baltistan. China's rhetorical policy has described Gilgit-Baltistan as "Northern Pakistan," a description that negates India's interests, legitimizes Pakistan's claim on the territory,²⁵¹ and ignores Kashmiri self-determination. China has used Gilgit-Baltistan as a staging ground for its overland commercial campaign to reach the Arabian Sea, making it the largest single strand of the international routes forming China's Belt and Road Initiative. In response to India's abrogation of the special autonomous status of Jammu and Kashmir, and allegedly pressured by China,²⁵² Pakistan has taken a leaf from China's cabbage peeling strategy and a page from India's Art. 370 playbook by declaring its intention to change the status of Gilgit-Baltistan and incorporate it into Pakistan as its fifth province,²⁵³ engendering a warning from India not to bring "material changes" to Gilgit-Baltistan.²⁵⁴

As a counterbalance, India has explored strengthening its strategic relationship with the United States by enhancing the interoperability between respective armed forces,²⁵⁵ finalizing the Basic Exchange and Cooperation

convenient legal fiction by asserting that nothing in its terms reached to the question of Kashmir's legal status even as it "partially cemented territorial designs in the disputed region." Rossi, *supra* note 31, at 137.

249. See William Shriver, *Why China has the Power to Dictate Pakistan's Future*, NAT'L INTEREST (Oct. 6, 2020), <https://nationalinterest.org/feature/why-china-has-power-dictate-pakistan%E2%80%99s-future-170219?page=0%2C1> [<https://perma.cc/B7TZ-HLR2>] (cautioning that the gap between India and Pakistan's relations with China will widen as both India and China seek to assert status as regional powers in South Asia).

250. See Singh, *supra* note 78.

251. Bhatt, *supra* note 56, at 5.

252. See Shabbir Hussain, *G-B to Be Made Province Soon*, EXPRESS TRIB. (Sept. 17, 2020), <https://tribune.com.pk/story/2264299/g-b-to-be-made-province-soon> [<https://perma.cc/4Q39-BDGF>] (quoting Federal Minister for Kashmir Affairs and Gilgit-Baltistan, Ali Amin Gandapur); Manish Shukla, *Under Pressure from China, Pakistan to Merge Gilgit-Baltistan with the Mainland*, DNAINDIA (Oct. 4, 2020), <https://www.dnaindia.com/world/report-under-pressure-from-china-pakistan-to-merge-gilgit-baltistan-with-the-mainland-2847336> [<https://perma.cc/VZ4T-ZFHK>] (noting surrogate economic and strategic benefits for China and security benefits for Pakistan).

253. Joining Punjabi, Balochistan, Sindh, and Khyber Pakhtunkhwa. See Benjamin Elisha Sawe, *Provinces of Pakistan*, WORLD ATLAS (July 30, 2019), <https://www.worldatlas.com/articles/provinces-of-pakistan.html> [<https://perma.cc/WM2Y-7F2G>]. The constitutional change in status of Gilgit-Baltistan would end a 73-year course of dealing, which provided limited autonomy for the territory and include representation in the Senate and National Assembly and the establishment of the Moqandass Special Economic Zone in conjunction with the China Pakistan Economic Corridor. See Hussain, *supra* note 252.

254. Sudheendra Kulkarni, *Ladakh LAC on the Boil, India Must Avoid Stirring Gilgit Baltistan Cauldron with Pakistan*, WIRE (Sept. 20, 2020), <https://thewire.in/diplomacy/ladakh-lac-on-the-boil-india-must-avoid-stirring-gilgit-baltistan-cauldron-with-pakistan> [<https://perma.cc/YAF5-RMH4>].

255. See Thakker, *supra* note 19.

Agreement on Geospatial Cooperation (“BECA”),²⁵⁶ and forwarding maritime cooperation in the Western Pacific Naval Symposium and the Indian Ocean Naval Symposium, where India can support observer status for the United States.²⁵⁷ Efforts to compete with the Chinese-led South-Asian Association Regional Cooperation and the Kunming Area Pilot Free Trade Zone²⁵⁸ have energized quadrilateral U.S., Japanese, Indian, and Australian ministerial meetings in the Indo-Pacific region,²⁵⁹ expanded cooperation under the U.S.-India 2+2 Ministerial Dialogue framework,²⁶⁰ and reiterated the centrality of the Association of Southeast Asian Nations (ASEAN),²⁶¹ which retains potential as a hedge against growing regional economic dependency on China.²⁶²

More than the competing historical *effectivités* and parochial narratives that frame international law’s approach to this seemingly intractable territorial dispute are the ancient Central, South, and East Asian trade pathways that converge in the contested environs of the Galwan Valley. Among Pakistan, China, and India alone, these pathways connect three billion people. A co-constituted spatial and the socio-commercial construct has outpaced in-

256. See Sanjeev Miglani & Nigam Prusty, *India, US Clinch Defence Pact on Satellite Data as Pompeo, Esper Hold Talks*, REUTERS (Oct. 26, 2020) (noting the sensitive satellite data sharing agreement as a counter to China’s growing regional power), <https://www.reuters.com/article/us-usa-asia-india/india-u-s-clinch-defence-pact-on-satellite-data-as-pompeo-esper-talks-idUSKBN27B10K> [https://perma.cc/P629-7HR7]. The agreement extends key foundational defense agreements with India, including the General Security of Military Information Agreement (2002), the Logistics Exchange Memorandum of Agreement (2016), and the Communications Compatibility and Security Agreement (2018). For background on BECA, see Pia Krishnankutty, *All About Basic Exchange and Cooperation Agreement, which India and US are all set to sign*, PRINT (Oct. 26, 2020), <https://theprint.in/theprint-essential/all-about-basic-exchange-and-cooperation-agreement-which-india-and-us-are-all-set-to-sign/530883/> [https://perma.cc/XV99-79ZJ].

257. See Thakker, *supra* note 19 (emphasizing maritime cooperation in the region). China views this activity as a provocation. For an expression of its Indian Ocean encirclement concerns, see Wei Dongxu, *Malabar Drill Exposes India’s Oceanic Ambitions*, GLOB. TIMES (Oct. 20, 2020), <https://www.globaltimes.cn/content/1204103.shtml> [https://perma.cc/6ZVT-SJG7].

258. For a description of the Kunming Pilot Free Trade Project, see *Wujiaba New City Center Project in Kunming Area of China (Yunnan) Pilot Free Trade Zone*, YUNNAN INVESTMENT PROMOTION (Sept. 4, 2020), <http://invest.yn.gov.cn/ENArticleInfo.aspx?id=18561> [https://perma.cc/F33B-KX2T].

259. See Alastair Gale & Rajesh Roy, *U.S., Japan, India and Australia Strengthen Ties to Counter China*, WALL ST. J. (Oct. 6, 2020), <https://www.wsj.com/articles/u-s-japan-india-and-australia-strengthen-ties-to-counter-china-11601986397> (reporting on strengthening relations among these four so-called ‘Quad’ countries). In 2020 the Indian navy hosted joint exercises in the Bay of Bengal with Japan, newly re-joined Australia, and the U.S. (Exercise Malabar). See *India Hosts Japan, Australia, U.S. in Naval Exercise MALABAR 2020*, U.S. NAVY (Nov. 2, 2020), <https://www.navy.mil/Press-Office/News-Stories/Article/2402780/india-hosts-japan-australia-us-in-naval-exercise-malabar-2020/> [https://perma.cc/HD8S-LDL3].

260. See *Joint Statement on the Third U.S.-India 2+2 Ministerial Dialogue*, U.S. DEP’T OF ST. (Oct. 27, 2020), <https://www.state.gov/joint-statement-on-the-third-u-s-india-22-ministerial-dialogue/> (expressing shared visions and advancing defense and trade partnerships).

261. *Id.* (“The Ministers reiterated their commitment to a . . . prosperous Indo-Pacific . . . underpinned by ASEAN centrality”).

262. See Lindsay Maizland & Eleanor Albert, *What is ASEAN?*, COUNCIL ON FOR. RELS. (Nov. 24, 2020), <https://www.cfr.org/backgrounder/what-asean#:~:text=this%20group%20consists%20of%20ASEAN’s,New%20Zealand%2C%20and%20South%20Korea> [https://perma.cc/3G4H-Z5MB] (noting ASEAN’s anxiety over China’s rise and the prospect of the United States serving as a hedge against dependency).

ternational law's static, imperialistically-informed tool kit relating to the acquisition of territorial title. This construct implicitly acknowledges the vibrancy of interstitial space as something other than *terra nullius*, or an empty vessel landscape awaiting the political/military matter needed to fill and occupy it. Resolution of the Galwan Valley/LAC disputes await adoption of a new appreciation among the protagonists of the schema that have filled the void notwithstanding the politically deadlocked and rhetorically frozen reliance on 19th century international legal principles and spatial conceptualizations. Interstitial space pays no mortgage on conceptualizations of this kind. However, the confidence building measures constructed by China and India do. These measures hold from within the prospect of paying off the debt incurred by the Great Game. They recognize interstitial space as an organic and dynamic construct that is anything but frozen. If less than politically satisfying, they provide the only and ultimately likely means of upgrading international law as a relevant and peaceful means of dispute settlement in the Galwan Valley and elsewhere along the turbulent perimeters of China, India, and Pakistan.