# 8 *Territoriality from the Sea*
## *Political Action in a World of Vanishing Exteriority*

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### Introduction

The old idea in international law according to which a ship is the territory of its flag state has long been discredited; as explained in the *Danish Company Tax Liability Case* (Germany 1971), "this […] would mean that the air space above the ship, "territorial waters" of at least three nautical miles around the ship as well as the water column and the interior of the earth around it, would all have to be considered as part of the 'floating territory.'"[1] This chapter proceeds from the reverse postulation, namely that in a certain sense territory is an anchored ship. I do not mean to say that we should abide by the law of the sea when standing on firm land (equipping every locomotive with life jackets would be silly). But analytically, territory should be relativized and understood as a process rather than a given fact; much like a ship is characterized by varying legal regimes along its maritime journey.

As Nathwani observes in Chapter 7, territory remains "an organizing principle of the global *res publica*." This principle can be conceived of as fundamentally private, that is, modeled on the property owner's right to exclude others from their plot; or public, that is, modeled on the sovereign's power to establish de-facto exclusive jurisdiction over people. Whether we begin from sovereignty (*imperium*) or property (*dominium*), territory is usually premised on the fact that land, water, and air can all be subjected to a state's power to exclude.

This all seems to be very unship-like; it would be rather unusual to say that the ship is an organizing principle of the global order. The Montevideo Convention on the Rights and Duties of States (1933) tells

[1] *Danish Company Tax Liability Case*, 1987: 210–217.

us that "The state as a person of international law should possess […] a defined territory." Not only soil and rock, but air and water too are often tucked into the fold of real property or sovereign authority. When I tie a rope that hangs regularly in the air above my neighbor's property, I may be trespassing. When I fly in the air over Germany I am in German airspace. The streams and rivers beneath me may be privately or publicly owned, as provided for by domestic law. In any case, all these are subsumed, somehow, under terra firma. Property and sovereignty are thus imagined as coconstitutive and universal. Despite occasional references to the doctrine of *terra nullius* – "no body's land" – the latter doctrine is largely regarded as obsolete: a colonial rule, no longer binding. In stark distinction from the ship, nothing falls outside territory. We may call this the premise of *universal territoriality*.

But what happens if we begin our analysis of territory neither from private property nor from public jurisdiction but from the maritime commons? Beyond the 12 nautical mile strip of territorial waters, maritime space is shared among nations. The vast majority of it is defined as the "high seas," a global commons that is legally protected from being subsumed under imperium or dominium. Here, the premise of universal territoriality is utterly extinguished.

This chapter thus addresses two questions: What is territoriality, if we consider it from a maritime, rather than landed perspective? And how should borders be reconsidered, if we assume that the nonsovereign space of world seas is constitutive of politics, rather than exceptional to it? Adopting an approach stemming from international legal process (see, e.g., O'Connell, [1999] 2017), and following a host of new works in law and society focusing on oceans and seas (see, e.g., Braverman, 2022; Johnson & Braverman, 2020; Mawani, 2018; Ranganathan, 2016), this chapter is an attempt to cast the question of territoriality from the sea more broadly. I argue that if we are to understand territoriality, we must reject the premise of universal territoriality and understand it (also) from the position of nonterritoriality which is offered to us by the sea. Further advancing this point of view, previously suggested by the law and society scholars mentioned here, amounts to a contribution to a theory of political action.

This short chapter outlines a vast trajectory, with an expectation that my future work will provide further detail of this vista of territoriality from the sea. The story it tells is one of transformation: Sources from antiquity display an imagination of maritime spaces as

exterior to politics. In the seventeenth and eighteenth centuries, classical international lawyers internalized this exteriority and formulated an international law that first sought global applicability. Grotius, who is credited for the basic legal framework, articulated the freedom of the high seas – *mare liberum*. To do so, he relied on ancient sources referring to maritime exteriority, only in order to recast the legal principles governing the seas and thus internalizing them in the system of international law. I thus call his intellectual (legal, political, economic) revolution *the first internalization*.

The principle he seemingly defeated, that of *mare clausum*, is currently reemerging, powerfully, as *the second internalization*. The contraction of *mare liberum* is observable at least since the framing of the United Nations Convention on the Law of the Sea (UNCLOS) toward the mid-twentieth century. Its elimination, not yet concluded, is observable in transformations of maritime space owing to developed states' efforts to impose extraterritorial border controls in an age of digital surveillance. The chapter concludes with reflections on how traces of exteriority, beyond the premise of universal territoriality, can be utilized today for the purpose of political action.

## 1 Maritime Space as Exteriority

The social contract tradition, associated with political thinkers starting from the seventeenth century and still influential today, begins with a firm assumption of bounded territory. Whether we begin from private property or from public jurisdiction, territory is usually not *explained* by the social contract. It is presumed by the social contract tradition. Inasmuch as territory is discussed, it appears as a fait accompli. John Locke, whose concept of property is prepolitical, gives us a certain theory of how property developed (based on labor exerted before the social contract). As is well known, Locke's theory served to justify acts of expropriation, during his own time, directed towards indigenous populations (Hsueh, 2006; Murray, 2022). Despite that fact his social contract theory, like others, regards the making of territory as something that happened in the past; happened – and ended. As with other classical social contract theorists, readers will not receive an account of territorialization as a process.

Commenting on "Territorial Rights and Territorial Justice" in the *Stanford Encyclopedia of Philosophy*, Margaret Moore explains that

in our own time political philosophers have been "guilty of this blind spot, in part perhaps because of the extraordinary influence of Rawls in contemporary political philosophy" (Moore, 2020). As she explains, Rawls' task in *A Theory of Justice* was to theorize the domestic justice of the state, and he therefore assumed that "political society is closed" (Rawls, 1971: 4). For Moore this is also an assumption of the sedentary nature of political life: "he meant that we should conceive of it in the first instance as a self-sufficient entity that we happen to be in and cannot leave." As for international law, the discipline's problem with territoriality is much related. The Montevideo Convention definition, referred to earlier, *presumes* rather than *explains*. The Convention provides a definition of the state's reliance on territory, not a rational basis or a justification for territory.

Processes of territory-making are thus arguably occluded from the views of both political philosophers and international lawyers. In reality, however, territory does not come premade: not any specific territory, and not the notion of territoriality *tout court*. Oceans and seas illustrate the problems of assuming that territory is universal and all-encompassing. The notion of territoriality as a global regime of imperium and dominium ignores too much of the face of the planet to be truly informative. Considering maritime space, it quickly becomes apparent that the world is not fully divided into defined territories as the premise of universal territoriality may lead us to think. Sovereign states as well as public and private territories are constantly in a process of construction. From antiquity to the present, they have also had an outside, which figured both in political imagination and in law. This exteriority is significant not only for historical research, but also for legal and political theory.

Earlier traditions of political thinking, starting from antiquity, do not adopt the premise of universal territoriality, which exists in the social contract tradition. In the Old Testament, according to Genesis, history begins after the deluge. Animals and persons alike disembark from a large ship. In the story of Noah's Ark territory emerges from undefined water. Perhaps even more clearly marking the beginning of politics, think of the Exodus: This is a condition of movement, in which the parting of the Red Sea arguably has an important role not only for punishing the Egyptians, but also for the emergence of the Israelites as a people. At this stage, the "promised land" is still yet to be discovered and conquered. In the Book of Jonah, the prophet

attempts to escape from his calling by way of maritime travel, but the sea surges and storms with the might of God's wrath. Jonah may run from politics, but not from the elements.

Moving to ancient Greece, Plato too advances an image linking politics and maritime movement. In the *Republic*, Plato introduces the "ship of state" simile in which a state is likened to a maritime vessel. For a completely different example, consider the practice of scaphism, an ancient Persian punishment described by Plutarch. This method of execution entailed trapping a person between two boats and pushing him out to float at sea, covered with honey to be devoured by creatures. The sea thus figures as a place for banishment and exile – and the sea's exteriority is revealed once again.

How does our understanding of politics change if we try to dislocate ourselves from the social contract tradition and from the premise of universal territoriality, and think of maritime movement as a political starting point? Emphasizing maritime travel, rather than bounded territory, we are led to think of political life as outward looking, in constant encounters with a changing environment. Stars, sky, and wind are all sensible natural phenomena. The citizen stands on the deck and looks into the atmosphere, observing transformations.

This view of politics is not primarily concerned with the relationship between citizens, or between citizens and their sovereign, as the social contract tradition is. Rather, it starts from a different relationship, namely that between a people and its god(s). The latter's concrete embodiments are the elements: waves and wind, temperature and humidity. Throughout antiquity, rival groups engaged in battle, and often offered service to different gods. But observing the dangers of nature at a settlement's edge was an experience common to many cultures. This was an experience of exteriority, of natural forces, and of deities. In this view, the sea or the ocean is a placeholder for a superpower outside politics. The sea can be calm or furious. The political person must try to predict what comes next.

## 2 The First Internalization: *Mare Liberum*

So far, I have suggested that ancient sources reveal an imagination of the sea as exteriority. But for Hugo Grotius, author of *Mare Liberum* (1609), these ancient sources serve as a scaffold for a different imagination altogether (Grotius, 2004). His is a project of *internalizing* the

sea and eliminating its imagination as exteriority. With Grotius, maritime space becomes a building block of onshore territoriality.

To understand how Grotius territorializes, we must focus on what is perhaps his most familiar concept, namely the freedom of movement on the high seas. To be sure, Islamic authors predated Grotius' idea (Khalilieh, 2019). Yet, clearly, he must be credited with much of its global dissemination. For Grotius, the sea is free for movement not because it is exterior to politics but precisely to serve particular political and economic goals – colonization and global commerce. The internalized sea is the infrastructure for an imperial legal order at sea, and importantly on land.

Representing the Netherlands' interests as a maritime power, Grotius argued that the sea by its very nature cannot be divided, nor can sovereignty or private ownership be imposed upon it. The sea was an "original gift of the world to mankind," meaning that "The sea was common in the same way that everything was common in ancient times before the introduction of laws of private property" (Salter, 2001: 539). Grotius' return to antiquity was a characteristic move for commentators of his time. He relies on Aristotle, Plato, and others. According to Pliny the Elder, mobility (Grotius thinks this refers to maritime transportation in particular) belongs to a prepolitical realm of self-preservation: "traffic was found out for the maintenance of the life of man" (Grotius, 2004: 50). Seemingly, Grotius tells a similar story about ancient texts as the one outlined earlier: The sea comes before politics and draws its limits; the sea is our common exteriority. Yet for the clever lawyer this was but a strategic move.

In truth, neither the legal idea of a "free sea" nor the political idea of a maritime commons, as they emerged in Grotius' work, represented exteriority. Nor was Grotius' story only about standing before the elements. He was indeed interested in mutual assistance among commercial vessels in condition of peril. But the doctrine of the freedom of the high seas served to eliminate anarchic elements of exteriority and subject land to territoriality in the forms of imperium and dominium. With Grotius, the idea of the commons receives one of its first and still most powerful articulations (Chan, Khan, & Awan, 2019: 404). Remarkably, this happens precisely when the oceans serve as the traffic artery for imperial expansion, colonialism, and an evolving Atlantic slave trade.

Practically, although the sea is imagined as commons, maritime powers including Great Britain, Spain, and Denmark constantly sought to

control it (Glete, 2002). Arguing for the recognition of maritime commons was a strategy of gaining maritime control – the strategy adopted by the Netherlands thanks to its skillful lawyer. From this perspective, it is no different from Britain's attempt to do away with the maritime commons, which John Selden espoused in his reply to Grotius under the opposing title *Mare Clausum* (1631) (Selden, 2004). The European construction of global maritime commons opened a shared space for mobility. But the purposes and motivations of this legal construction illustrate how this mobility was not, in and of itself, a liberating force.

To be sure, the idea of a commons does have an emancipatory aspect, one that seeks to set a limit to territoriality, or, in other words, to government by sovereignty and property. This idea goes back to the struggle against the enclosure of land property in seventeenth-century England (Winstanley, 1983, 2011). As Linebaugh and Rediker explain, in revolutionary sources such as the writings of the Diggers and the Levellers, an ancient tradition and idea of the commons was marshalled to counter "enclosure" and appropriation (Linebaugh & Rediker, 2000); it epitomized an insistence on exteriority, aimed to counter the territorialization of every corner of the British Empire. For Linebaugh and Rediker, pirates exploited and fought for the maritime commons in much the same liberating way (see also Rediker, 2004). The commons thus appear as a weapon against territoriality. For Grotius, commons functioned in precisely the opposite way. While common property was at times a revolutionary and protoanarchist slogan, Grotius built on natural rights traditions to support property acquisition as an imperial mode of accumulation. A common sea was the conduit for the imposition of military rule across centuries and many colonies, and the exploitation of their resources.

Grotius thus built on the seeming "freedom" of the maritime vantage point and utilized it – but not as an alternative to territoriality, and clearly not as alternative to rule by law. Despite its reliance on natural rights and natural law, Grotius' freedom of the sea is legally constructed. Its role as platform for trade renders it replete with legal regulation (Benton, 2009: 105–106). Already in Grotius' time, every ship carried a flag, and brought its laws with it. As the image I start with suggests, later jurists thus thought of maritime vessels as "floating territory" (Tanaka, 2012: 152). The flag projects not only jurisdiction, but also an image of the ship as an arm of the state, highlighting a "public" or sovereign aspect of maritime travel. The phrase "free sea"

can be misleading, if by that one means free of legal regulation (Aalberts & Gammeltoft-Hansen, 2014: 440).

To be sure, just like territory, the ship couples between imperium and dominium, and is ultimately both at the same time. And the "private" ordering of the ship is just as prevalent in Grotius' work. Specifically, Grotius already recognized ship owners' limited liability, a legal-economic principle later justified to mitigate risks of trade and incentivize it (Neff, 2012: 195). As he writes in 1624: "the principle has been established that, in respect to responsibility for the acts of the captain, all the owners together are liable for no more than the value of the ship and the cargo" (Putnam, 1883: 2). The work of later jurists occasionally identified limited ship owner liability as a predecessor of the limited liability firm and modern capitalist corporate law more generally (Mahoney, 2000: 886).

And so the ship figures as a public and private entity at one and the same time. The European ship foreshadows public ordering in terms of states and private ordering in terms of property, and ultimately the limited liability corporation. To reiterate: By doing so, it brings into sharp relief the common origin of imperium and dominium, which informs the premise of universal territoriality. In its legal construction joining together imperium and dominium, the ship is not an exceptional model of territoriality. It is the paradigm for it. It is not that the ship is floating territory. Territory is but an anchored ship.

While foreshadowing political-economic formations yet to come, maritime powers exploited and transported natural resources, laborers, and slaves around the world. With European expansion, European powers destroyed myriad forms of indigenous political organization, which did not share many of its defining aspects (Wilson, 2021). Indigenous cultures across the world did not share emerging distinctions between public and private life. As Antony Anghie has shown, the fundamental legal distinctions of the time emerged as a response to the encounter with indigenous cultures and in attempts to subdue them (Anghie, 2005: 15–16). In the large project of colonial war against indigenous populations, the freedom of the high seas was a technology of empire. It was advanced in the name of but in fact destroyed an imagination of freedom that construed the sea as the exteriority of politics and law. Grotius' freedom of the high seas was the apogee of a first internalization of the sea and of the imagination of exteriority, in a world governed by law and economic interest.

## 3 The Second Internalization: *Mare Clausum*

Section 3 suggests that the victory of *mare liberum* over *mare clausum* was not a victory of liberty or of emancipation. It was a victory of one technology of imperial power over another. However, it is important to also stress that *mare liberum*, while it served the process of territorialization in the colonies, still anchors a distinct perspective, not abiding by the premise of universal territoriality. For *mare liberum* advanced the territorialization of land precisely by legally constructing the sea as *not* territorialized.

As is well known, however, the victory of *mare liberum* was neither an absolute nor a stable victory. Elements of *mare clausum* remained central to the discipline, and especially reemerged in the twentieth century. The confinement and submission of maritime space under sovereignty reappeared, already in the eighteenth century, with the claims of coastal states which led to the recognition of territorial waters, initially 3 nautical miles wide. Cornelius van Bynkershoek's famous "cannon shot rule," according to which territorial sea must cover the distance of a cannon's shot, illustrates vividly that principles of *mare clausum* were intimately tied to national security concerns as well as technological developments (Walker, 1945). The 3 mile stretch gradually grew and developed into the 12 mile rule recognized today both under treaty and under customary law.

Next came the recognition of certain protective powers in "contiguous zones" attached to territorial sea, which also convey an aspect of closure. Of crucial importance was the new realization of economic opportunities at the depth of the sea and the ocean floor: In the twentieth century, the United States claimed exclusive jurisdiction over "the natural prolongation of its land into and under the sea" (Hasin, 2023: 231). This claim was later followed by other states, culminating in the 1958 Conventions on the Law of the Sea. The evolution of *mare clausum* continued with claims made for exclusive fishing zones and extended territorial seas. As Hasin writes, the result was a "new balance," still rather unstable, between principles of *mare liberum* and of *mare clausum*:

> The Third United Nations Conference on the Law of the Sea in the 1970s was convened, and after a decade long process it produced a global order which balanced the aspirations of coastal states to extend their exclusive jurisdiction seaward due to economic and security interests, and the interest

of other participants to inclusively use the oceans and their resources (Hasin, 2023: 231; see also Papastavridis, 2011: 47)

The international codification of search and rescue zones in the 1979 International Convention on Maritime Search and Rescue (SAR) further extended a measure of sovereignty out to sea. It thus extended state's responsibilities of security and surveillance offshore (Aalberts & Gammeltoft-Hansen, 2014; Keady-Tabbal & Mann, 2022).

These twentieth-century developments signaled the beginning of a second internalization of maritime exteriority. This second internalization was different from the first. *Mare liberum* internalized the sea, but still anchored a perspective free of territoriality. The second internalization was about a process of selective territorialization of the sea. Rather than the sea being constructed as free in order to serve the territorialization of land, the sea itself was being gradually constructed *as land*.

Under UNCLOS and the global order described here, the freedom of the high seas is still protected. Article 87 of UNCLOS unquestionably enshrines aspects of *mare liberum*: "The high seas are open to all States, whether coastal or land-locked" says the provision, before specifying "freedom of navigation" and "freedom of overflight"; and the same article protects additional freedoms concerning submarines, cables, pipelines, artificial structures, fishing, and scientific research. These rules are undeniable. Note, however, that in the third decade of the twenty-first century we are still in the process of the second internalization. It has not yet fully concluded, and cannot be appreciated by looking only at the international law rules of the law of the sea. To fully appreciate the second internalization and the potentially vast territorialization of the sea currently underway, one must look into other areas of law and policy. Indeed, many of the relevant developments are so far occurring only de-facto, with the normative environment still reflecting tenets of *mare liberum*. One area in which this process is apparent is that of migration control, with its novel attempt to impose borders far at sea.

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Since the beginning of the twenty-first century, developed states and international organizations have been drawing new lines in maritime spaces, for example in the Mediterranean by redefining and negotiating

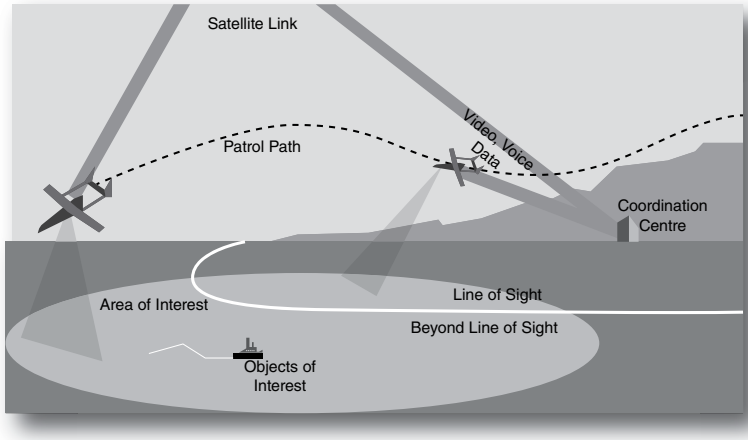



**Figure 8.1** Joint Operation Hera, 2010
Source: Frontex/OP/694/2016/JL (2016). Trial of a Remotely Piloted Aircraft System (RPAS) for Maritime Aerial Surveillance. Tender Specifications – Annex I. Frontex.

SAR zones (Aalberts & Gammeltoft-Hansen, 2014: 450, 454), and off the western coast of Africa (Mann, 2013). These lines have been part of the operational plan for "border externalization" and remote strategies of border control. Border externalization is the process, much commented-upon, whereby developed states are gradually contracting out border enforcement capacities (see, e.g., Gammeltoft-Hansen, 2011; Ghezelbash, 2020; Tan, 2021). The latter are increasingly conducted from without and formally under the authorities of developing states. Within this process, substantial resources have been dedicated to the question of how to enforce borders at sea. *Mare liberum* has, within this context, become an impediment to border control, and has been targeted as such.

To understand how this territorialization works, take a look at Figure 8.1. This is a map produced by the European Union's border enforcement agency, Frontex. It describes so-called Joint Operation Hera, which has been in place off the western African coast since the mid-2000s.

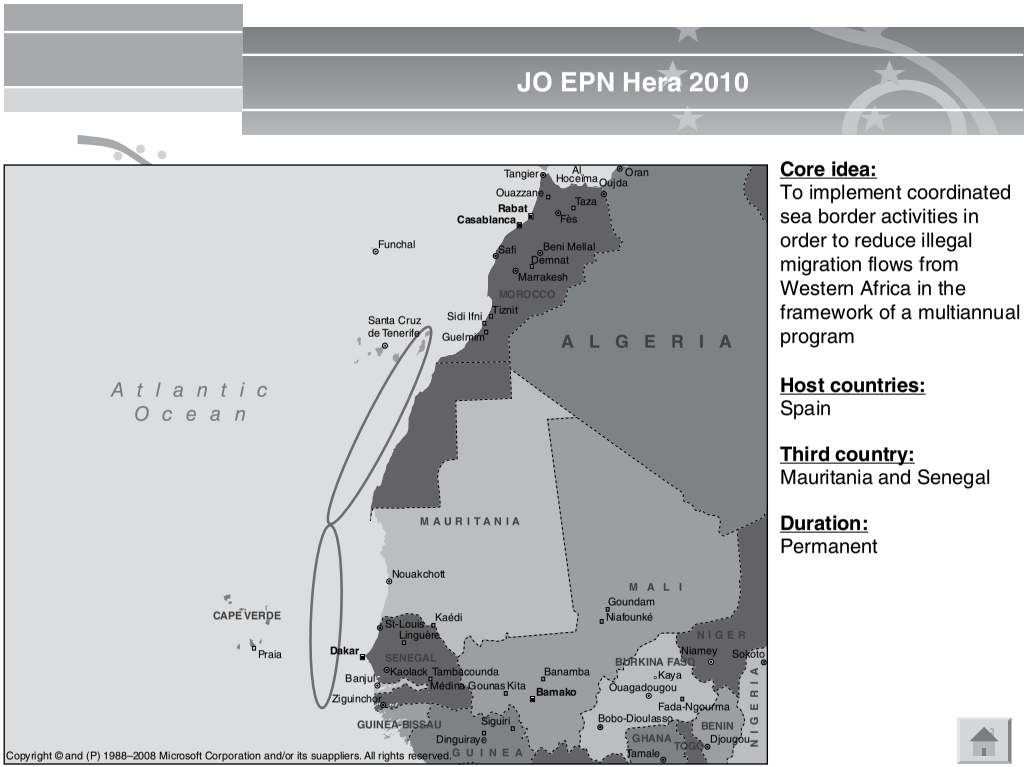
The map, from 2010, depicts two oval shapes which are presumably located (at least partly) in international waters. These are areas where,

under UNCLOS, the freedom of the high seas under Article 87 is supposed to apply. However, the operation is designed "[t]o implement coordinated sea border activities in order to reduce illegal migration from Western Africa…" In other words, the operating forces surveil and intercept migrant vessels leaving from West Africa with hopes of reaching Europe.

Under an idea of *mare liberum*, and seemingly under Article 87, such interception would not be legal. However, as I have explained in detail elsewhere (Mann, 2013), the legal theory behind these operations seeks to rely on *mare clausum* authorities provided by law to coastal states: in this case, Mauritania and Senegal. *Mare clausum* is thus expanded to undo the apparent legal rule of *mare liberum* (see also Moreno-Lax, 2021: 485). The maritime space is internalized, not by way of legally constructing a commons (as was the case with the first internalization). The second internalization, which this map is a part of, is about selectively territorializing maritime spaces, and imposing *sovereign* authorities upon them. One may say this is only an imposition of a de-facto authority, while the rule continues to enshrine *mare liberum*. But that would only be partially convincing: Through a sophisticated reliance on law, *mare liberum* is gradually eliminated. The maritime perspective on territoriality thus allows us to see territoriality in the making. The error of the social contract tradition, which regards territoriality as a fait accompli, is thus avoided. What we come to see is the construction of a border at sea. As will become immediately clear, the emerging form of that border is that of a virtual wall. Digital signals are its building blocks.

Whether we regard the process as a de-jure or de facto development, contemporary technologies of border-making at sea go well beyond "joint operations." In more recent years, a crucial aspect of the process of border-making at sea is airborne maritime surveillance. Figure 8.2, also produced by Frontex in its explanation of its operations, illustrates this vividly.

"Objects of interest," at the lower side of the image, stands for "suspected migrant vessels." The "Coordination Centre," at the right side of the image, is the EU coastal states' Maritime Rescue and Coordination Centre. States are obliged to establish such centers to provide maritime rescue in their search and rescue areas under the 1979 SAR Convention. The white line in the water represents the line of sight from the coastal state. The image thus demonstrates how RPAS




**Core idea:**
To implement coordinated sea border activities in order to reduce illegal migration flows from Western Africa in the framework of a multiannual program

**Host countries:**
Spain

**Third country:**
Mauritania and Senegal

**Duration:**
Permanent

**Figure 8.2** RPAS aerial surveillance in a maritime scenario
Source: R. Liubajevas (2010). EPA Annual Conference: Frontex Within Integrated Border Management Concept – Structural Approach in Planning Capacity.

can expand the "area of interest": "The scenario depicted in Figure 8.1 shows a typical maritime border surveillance operation conducted by border control authorities. The 'artist impression' reflects the development of a mission where the surveillance platform (RPA) surveys the area of interest, included in the deployment area, searching for 'objects of Interest,' and passing surveillance data/information to the designated Coordination Centre."

These drones have been known to serve "pull-backs," a mode of externalization in which migrants are pulled back by their country of embarkation (see, e.g., Cuttitta, 2022: 7; Markard, 2016: 592). One such country has been Libya, where the violations of migrant rights are rife. The pattern exposed by human rights observers is that European state authorities, mostly Italians, "warn" Libyan Coastguard authorities that a migrant vessel is sailing away from Libya's shores. The Libyans then capture the migrant vessel, negating any opportunity that its passengers might otherwise have to seek asylum (Giuffré & Moreno-Lax, 2019; Pijnenburg, 2018, 2020). In Figure 8.1, the white line in the sea seemingly shows the maritime space where pullbacks are possible *without* drones. The drones allow Frontex to facilitate pull-backs from further away. The whole apparatus amounts to the building of a digital border wall at sea (compare Shachar, 2020). It is another aspect of the way in which border externalization expands the *mare clausum* and selectively internalizes and territorializes the sea. The model is designed to eliminate a certain aspect of freedom and indeed of maritime exteriority that remained in a world of *mare liberum*. Air becomes an agent for territorializing the sea.

But airborne surveillance in the Mediterranean has not exclusively been in the control of governments. Already in 2013, Pezzani and Heller called for a "disobedient gaze" – exploiting surveillance technologies for the protection of migrants (Pezzani & Heller, 2013), (see also Ghezelbash, 2022). More recently, the solidarity organization Sea Watch has deployed its own airborne surveillance. Cuttitta has thus noted that solidarity activists employ a mode of counterexternalization (Cuttitta, 2022: 21). By using this term, scholars aim to make a more general point about externalization. Unlike states which try to externalize enforcement without human rights protection, activists try to externalize human rights protections – decoupled from enforcement (Mann & Mourão Permoser, 2022: 444). Activists too therefore take part in this second internalization.

The territorialization of the sea has so far been selective. SAR activists and humanitarians contest that selectivity or contest it selectively. The first amounts to asserting that states cannot be selective: If they are to externalize enforcement capacities, their human rights obligations will necessarily be externalized as well. Executive power and judicial accountability cannot be decoupled (Mann, 2013). The second amounts to asserting that the activist community too can play the same game of selectivity. Whichever we choose, what is clear is that states and activists coconstitute the second internalization. As Aalberts and Gammeltoft-Hansen put it, "to deal with politically sensitive issues relating to the search and rescue (SAR) regime," they all apply "a territorial logic" (Aalberts & Gammeltoft-Hansen, 2014: 441). Whether this ultimately leads to liberating migrants and ensuring safe passage or to the solidification of borders remains to be seen. So far, evidence militates mostly towards the latter.

## 4 Political Action from the Sea

What is territoriality, if we consider it from a maritime rather than landed perspective? Keeping in mind the ancient imagination of the sea as exteriority, and the two historical and revolutionary internationalizations described here, an answer emerges. What I have called the premise of universal territoriality has always been false. Territoriality never existed as a finalized regime of imperium and dominium. Rather, territoriality is made of processes of territorialization. In these processes, the imagination of the sea as exteriority is gradually eliminated and maritime space is internalized. But they are never full or complete. In territorialization, law has had two distinct and partially contrasting roles. It served as technology of internalization in the form of a legally constructed commons, or *mare liberum*. And it has served as a technology of internalization in the form of a selective imposition of sovereignty upon maritime space, or *mare clausum*. Within the context of border control, another aspect of territoriality that has been studied but must be mentioned here too is, conversely, *deterritorialization*. Apposite examples of the latter strategy are Australia's "excision zones," an arrangement on land and at sea whence sovereign territories are no longer regarded as such for migration purposes (Maillet, Mountz, & Williams, 2018).

Contrary to the social contract tradition, the maritime perspective helps reveal borders as unstable assumptions and not preexisting facts.

The maritime perspective reveals that borders are constantly being drawn and redrawn, and are themselves processes rather than things. Rawls' assumption, that political societies are closed, is revealed as an unhelpful abstraction. Political societies are more like crew and passengers on the anchored ship I described earlier: New members can board and old members can be thrown overboard. And the ship itself can set sail and move. With the climate crisis, its citizen-sailors are repositioned in the role of reading nature and expecting what will come next. But nature too is radically internalized: In the Anthropocene, seawater is a mirror reflecting a history of human exploitation and territorialization.

Historians may regard the insight that territories do not preexist as trivial or obvious. If we look to history, there can be no other option. But this chapter hopes to offer the insight not (only) as an historical observation, but as basis for a legal and political theory of territoriality and of borders. Ultimately, I also aim to outline a theory of political action.

How, then, should borders be considered if we assume that the non-sovereign space of world seas is constitutive of politics rather than exceptional to it? If territory is indeed an anchored ship, borders are moveable and open by nature. Their movement and openness can serve different and opposing normative ends. Of course, the "floating" nature of territoriality has long been a basis for tax havens and radical privatization (Palan, Murphy, & Chavagneux, 2010). But borders' indeterminacy, especially when they happen to pass in seawater, also opens particular and novel modes for political action. What is common to the modes of action I'm thinking of is that they rely upon or exploit residues of exteriority and nonterritoriality, despite the two maritime internalizations.

The best-known example of this kind of action relates to the movement of migrants and refugees. When asylum seekers move across the sea to a new country, they try to help themselves. But they also rely on the legal assumptions of *mare liberum* – the unrestricted movement at sea; and they further depend on the duty of rescue at sea, also part of Grotius' old legacy. Writing about the duty of rescue, Grotius thought of merchants in need of assistance during a storm. He internalized the sea by creating a legally-constructed fulcrum for them to fall back upon when in danger. Today, however, refugees and migrants trigger these duties with their bodies for other objectives: to protect themselves from a life that may not be worth living (Mann, 2016). Groups

of rescuers and volunteers moving across the Mediterranean Sea to extend a helping hand frequently make use of laws that originate in what I have called the first internalization. They carefully choose flags with a view to the unique system of authorities created at sea. They rely on rules advancing unrestricted movement for merchants and colonialists. And they sometimes see themselves as outside the laws of states and under the direct jurisdiction of a higher law – not the law of god, but international law (Mégret, 2021).

Despite the second internalization currently underway, the law of the sea still encapsulates a residue of exteriority and anarchic freedom, and thus still opens up a potential for new forms of solidarity. Mégret thus writes about solidarity with refugees, but also underscores how the maritime space enabled new forms of action for Greenpeace activists, who have sailed the seas to protect the sea and sea life; and also for the feminist group Women on Waves, which took to sea in order to operate extraterritorial abortion clinics off the coasts of countries that prohibit abortion (Mégret, 2021). These are all examples of political action that revives a form of nonterritoriality (whether "exterior" or not). And they rely on a certain anarchic perspective that the sea still offers to activists. They are not premised on waiting for an international or federalist government that might bring incremental positive change through democratic process. They are premised on doing what we can do now, moving through the cracks of territoriality to stake a position that is in certain ways both public and private at the same time. It is worth emphasizing that they can be initiated both by left and right, liberal as well as conservative initiatives. No matter what normative commitments lie behind them, such actions employ ships to enjoy a ship's nature as imperium and dominium, never firmly situated only in one.

A call for political action from the sea is not a call to exit politics. It is an attempt to characterize a particular kind of inroad to politics. All these actors – migrants, environmental activists, and feminists – take advantage of opportunities for action inherent in the ambiguities of territoriality. As long as a regime of *mare clausum* is not finalized, the maritime perspective may provide us with new opportunities to act.