The *Nomos* of Border-Making Discourses: The Chaco War, League of Nations and Indigenous Dispossession

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A Thesis

In the Department

of

Geography, Planning and the Environment

Presented in Partial Fulfillment of the Requirements

For the Degree of

Masters of Science at

Concordia University

Montreal, Quebec, Canada

August 2014

CONCORDIA UNIVERSITY

School of Graduate Studies

This is to certify that the thesis prepared

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Entitled: The *Nomos* of Border-Making Discourses: The Chaco War, League of Nations and Indigenous Dispossession

and submitted in partial fulfillment of the requirements for the degree of

Master of Science (Geography, Planning and the Environment)

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ABSTRACT

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The Chaco War (1932-1935) was a border war fought between Bolivia and Paraguay over the Chaco Boreal, a vast expanse of land in the centre of South America that was (and still is) traditional indigenous territory. This thesis analyzes a document published by the League of Nations on the conflict, *The Report of the League of Nations Commission on the Chaco Dispute Between Bolivia and Paraguay,* from the perspective of critical border studies. The League of Nations considered itself a disinterested third party arbitrator in the dispute. The central argument of this thesis is that the League was not a disinterested party and that its Report on the Chaco War is not a neutral retelling of the events of the Chaco War. Rather, the League's Report is an expression of dominant Western border-making practices and exemplifies the way in which the border discourses of the interwar period failed to recognize indigenous sovereignty with respect to land, law and custom. This thesis therefore inquires into the relationship between borders and spatial imaginaries as embedded in three discourses of indigenous dispossession: the doctrine of just war, the legal principle of *uti possidetis de jure* and the legal concept of *terra nullius.* The work of Carl Schmitt is used to highlight the links between these border-making discourses and indigenous dispossession. Schmitt's concept of the *nomos* is discussed in relation to the spatial order of the League of Nations and its attempts to uphold the Westphalian paradigm of international law while simultaneously claiming to be a humanitarian institution.

ACKNOWLEDGEMENTS

I would like to thank Professor Kevin Gould for his patience, his support and his continued dedication to this project. He has been incredibly helpful. Since starting this thesis, I have travelled to South America on four occasions, have learned to conduct archival research, have become proficient in Spanish and (bizarrely) have transformed myself into a tango dancer. I hold Professor Gould to be at least indirectly responsible for all of these things.

I would also like to thank the examiners, Alan Nash and Kregg Hetherington, for their time and effort.

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Chapter One: Introduction

On April 28th, 2009, President Fernando Lugo of Paraguay and President Evo Morales of Bolivia met in Buenos Aires, Argentina to ratify the final report on the demarcation of their shared international boundary. The final report brought to an end the long-standing boundary dispute that in the 1930s led to the Chaco War (1932-1935), a devastating border war that was the first instance of total war in the Americas. The Chaco War is considered both the "first modern war of South America" and the "last war of colonization of the free Indian territories" as it involved the indiscriminate bombing of both soldiers and the indigenous inhabitants of the Gran Chaco (Krebs and Braunstein, 2011, p. 14). The war was fought by two small, poor, landlocked countries, neither of which had the means of producing the arms needed for modern warfare (Farcau, 1996). Paraguay had the backing of France and Bolivia had the backing of Germany. In the years before Guernica and the Spanish Civil War, the air forces of the European countries tried out their new planes, weapons and strategies on what had been, until the 1930s, the tribal territories of the Ayoreode, Yïshïro, Enxet, Angaité, Sanapaná, Guan'a, Enenlhit, Enlit, Yofuaza, Nievaclé, Mak'a, Toba-Gom and Guaicurúan peoples (Harder Horst, 2010).

Map 1: Map of Chaco War, 1932-1935. Baker Vail, 2009

The Chaco War took place during the heyday of the League of Nations and, despite the efforts of the League and the other American states to end the conflict, the war continued until the two sides were too exhausted to continue (Farcau, 1996). Over one hundred thousand soldiers died and the conflict also led to epidemics, demographic decline, forced removals and massacres of the indigenous peoples of the region (Harder Horst, 2010). The soldiers on the Paraguayan side were illiterate peasant Guarani *mestizos* and, on the Bolivian side, indigenous Altiplano Indians of Aymara and Quechan descent (Gotkowitiz, 2007). The battles were fought across the terrain of the Gran Chaco, a vast expanse of land that stretches from the foothills of the Andes to the Rio Paraguay and the edge of the Amazon Basin. In popular culture, the region was known as the "green hell"—due to its harsh climate and extreme environment, it was considered one of the most inhospitable places on earth (English, 2008).

Map 2: Map of Chaco War, 1932-1935. Baker Vail, 2009

Both Paraguay and Bolivia were members of the League of Nations. In 1932, as the war was intensifying, the League convened a Commission of Reconciliation whose members travelled to the South American continent with the express purpose of bringing about a settlement of the war. Paraguay and Bolivia were to turn the conflict over to the League—understood as "an impartial authority"—and have it fix the frontier between the two countries (League of Nations, 1934, p. 138).

The results of the League's intervention can be found in their publication, *The Report of the League of Nations Commission on the Chaco Dispute Between Bolivia and Paraguay*, signed at Geneva on May 9th, 1934. The document examines the geography of the Chaco, the territorial claims of Paraguay and Bolivia with respect to the international boundary and the evolution of the Chaco border dispute from 1840 onward. It makes note of the near-constant wrangling on the part of Paraguay and Bolivia to establish ownership over the area and details the League's efforts to come up with a program of arbitration for settling the dispute. The document also attempts to determine which side of the dispute ought to be held responsible for the war and contains a survey of the military situation, likewise addressing the problem of armament.

The purpose of this thesis is to consider the League of Nation's Report on the Chaco War from the perspective of critical border studies. Critical border studies inquires into the relationship between borders and spatial imaginaries by evaluating the ethical and political dimensions of the discourses that sustain border regimes and control (Parker, Vaughan-Williams et al, 2009). It is an offshoot of critical geography and moves away from the state-centric approaches of traditional border studies in order to make room for the concerns of non-state, sub-state and trans-state actors and agencies (Blake, 2000; Kolossov, 2006; Newman, 2006; Agnew and Muscarà, 2012). Critical border studies also moves beyond descriptive, empirical-analytic approaches in order to incorporate the insights of post-structural research, in particular those pertaining to discourse analysis, deconstruction and critical theory (Grundy-Warr and Schofield, 2006). As with critical geography, critical border studies is predicated on the idea that critical forms of scholarship can be used to denaturalize, contest and alter the hegemony of dominant spatial representations (Blomely, 2006). As such, critical border studies views the border as a series of practices that are performed through the interactions that take place between state and non-state actors, processes and

organizations. These practices and performances have the effect of sustaining or modifying the border, be it through the activities that are more explicit, such as war, or activities that are more subtle and passive, such as written documents.

The League of Nations' Report can therefore be considered a textual performance of the Paraguayan-Bolivian border. The central argument of this thesis is that the League's Report does not provide a neutral retelling of the events of the Chaco War, but is instead reflective of the dominant geopolitical imaginaries of the time. More specifically, the argument is that the League's Report is an expression of dominant Western colonial border-making imaginaries and exemplifies the way in which the border discourses of the interwar period failed to recognize indigenous sovereignty with respect to land, law and custom (Graham and Weisner, 2011). The Chaco War was fought over a territory that was—and still is—inhabited by a variety of indigenous groups whose land rights and territorial claims were ignored, not only by Paraguay and Bolivia but also by the League of Nations. The League's Report is virtually silent when it comes to the indigenous peoples who were historically the inhabitants of the Gran Chaco. It is this point that is explored in this thesis. What explains the near total erasure of the indigenous peoples of the Chaco from the League's account of the Chaco War? On the one hand, the League of Nations Report might be read as a simple restatement of the moral and legal arguments used by Paraguay and Bolivia to justify their engagement in the war. Neither Paraguay nor Bolivia acknowledged indigenous land claims when putting forth their competing claims to the Chaco. Ergo, neither did the League of Nations.

On the other hand, it is precisely this silence that is at issue. The Chaco Boreal was clearly inhabited by indigenous peoples at the time of the Chaco War. It seems odd that the League of Nations, who professed to be a humanitarian organization, would be so blind as to the conditions of the indigenous peoples on the ground. Why did the League of Nations ignore the fact that the Chaco was

originally indigenous territory? And how is this silence related to the League's representation of the border discourses of the Chaco War? How did these border discourses function as technologies of indigenous dispossession? There are three border discourses in particular that can be reconstructed from the League of Nations' Report: the doctrine of just war, the legal principle of *uti possidetis de jure,* the legal concept of *terra nullius*. The discourses are related in that they point to the way in which the violent appropriation of indigenous lands could be justified discursively on the basis of Western forms of moral and legal argumentation. Both Paraguay and Bolivia appealed to the doctrine of just war as they both saw themselves as fighting for a just cause (MacKinnon, 2003). The doctrine of just war is a moral doctrine in that it appeals to the notion of right. Each side claimed that they had a right to the territory in question as guaranteed by international legal principles. First, Paraguay and Bolivia both referred to the legal principle of *uti possidetis de jure* and considered it their legal right to divide the Chaco Boreal in accordance with the colonial administrative boundaries that had been bequeathed to them in 1810 by the Spanish Crown (Ratner, 1996). Second, both sides made use of the legal principle of effective occupation (or, *uti possidetis de facto*), a doctrine that is an extension of the earlier colonial concept of *terra nullius* ('empty land') (Anaya, 2004).

In other words, the League of Nations Report offers a restatement of Paraguay and Bolivia's moral and legal justifications for military action in the Chaco Boreal. Paraguay and Bolivia's appeals to the doctrine of just war were articulated with reference to the just cause condition. The arguments for just cause were in turn formulated on the basis of the *uti possidetis de jure* and *uti possidetis de facto*, both of which presuppose the legal-geographic concept of *terra nullius* and the fiction of the Chaco Boreal as being an empty and free space that could be incorporated into the state system. Both Paraguay and Bolivia held that the border, as drawn by Spain before the 1810 Wars of Independence, was to

continue as the definitive territorial boundary separating the two states. The problem was that the border had been imperfectly drawn and that the two sides interpreted the boundary delimitation in different ways. Another problem was that the border ran through what was considered the relatively unknown and unexplored region of the Chaco and had not yet been demarcated on the ground. This led Paraguay and Bolivia to also attempt to establish their territorial claims on the basis of effective occupation, a doctrine of international law that holds that a state is entitled to a given territory if it has colonized that territory either through settlement or through economic development.

The League's Report is therefore an expression of the border logics that underlie Paraguay and Bolivia's use of the doctrine of just war, their respective interpretations of the principle of *uti possidetis de jure,* their presumptions concerning *terra nullius* and their attempts to establish effective occupation. The League replicates the border discourses that led to the further consolidation of indigenous territories under the state system. This is because the League of Nations views the international order as being made up of independent states whose rights to territorial integrity and political sovereignty take precedence over the territorial claims of non-state indigenous actors. The point of the League of Nations was to promote *international* cooperation and to safeguard *international* peace and security. Member states of the League were obligated to never resort to war as a way of settling conflict and were to submit all international disputes to arbitration, be it to the Permanent Court of International Justice or to the Council of the League. In the case of Paraguay and Bolivia, however, arbitration failed and the League's attempts at intervention were ineffectual in that they were unable to halt the devastation and destruction caused by the Chaco War.

The League's intervention into the Chaco War was presumably undertaken on humanitarian grounds. The League was an international institution while at the same time a universal organization whose stated goal was to bring

about the end of war and usher in a new era of world peace. This point is explored in detail in the work of Carl Schmitt, a legal philosopher and political theorist that critical border theorists take to be an under-utilized resource in the field of boundary studies (Vaughan-Williams, 2011). Schmitt condemns the League of Nations for having instituted a form of international law that upheld the old order of the European state-system while simultaneously claiming to be a humanitarian institution. For Schmitt, the League of Nations was emblematic of a peculiar form of "spatial chaos" in that it continued to assert the primacy of state sovereignty and the inviolability of state borders while at the same time arguing for interventions "in the name of humanity." For Schmitt, this led to a situation in which the international legal order was destabilized, meaning that the League of Nations was not only incapable of settling international disputes and putting an end to war, but in fact contributed to their perpetuation.

Schmitt was not concerned with indigenous land claims or with indigenous dispossession. From the perspective of critical border studies, however, Schmitt's work is of value given his use of spatial concepts, his theorization of spatial ontologies an the role he accords space in the construction of political and legal theory. At the same time, critical border theorists acknowledge that Schmitt is a controversial and polarizing figure. On the one hand, Schmitt is well known for his work on the concept of the political, his theory of sovereign exception and his critique of liberalism. On the other hand, he is equally well known for his support of National Socialism in 1930s Germany (Elden, 2009). Regardless, critical border theorists look to Schmitt in order to understand the way that the spatial ordering of different border regimes are in turn related to the *nomos*, understood as a tripartite process of land appropriation, division and cultivation that are ultimately rooted in specific forms of spatial consciousness (Minca and Vaughan-Williams, 2012).

Schmitt's *Nomos of the Earth in the International Law of the Jus*

Publicum Europaem (1950) is a key text for understanding both past and present border regimes and the way that spatial imaginaries and border-making practices are embedded in international law (Minca and Vaughan-Williams, 2012). The *Nomos of the Earth* is important for this thesis given that the text deals systematically with the League of Nations, international boundary disputes, the doctrine of just war, *uti possidetis de jure, terra nullius* and effective occupation. The research questions guiding this thesis are therefore of two kinds. The first asks after the discourses of indigenous dispossession and looks at the way that League's Report on the Chaco War functions as both a border-making practice and a border performance. What kinds of border imaginaries are employed throughout the League's Report? How do these border imaginaries relate to the doctrine of just war, the legal principle of *uti possidetis* and the legal concept of *terra nullius*? How do these discourses function as technologies of indigenous dispossession? The second set of questions concerns Carl Schmitt: In what way do Schmitt's critique of League of Nations and his theory of the *nomos* help to illuminate the relationship between boundary disputes, the principles of international law and indigenous dispossession?

To answer these questions, I will first provide an overview of the relevant border and boundary literature in political geography as a way of situating the emerging field of critical border studies. I will then discuss the concepts of bordering practices and border performances and show how they are related to the discourses of the doctrine of just war, *uti possidetis de jure* and *terra nullius.* The next chapters will proceed with an in-depth analysis of the League's Report and look more specifically at how the doctrine of just war, *uti possidetis de jure* and *terra nullius* are predicated on a erasure of indigenous peoples and their land claims. Each of these discourses is considered as exemplifying what Carl Schmitt would consider the *nomos* of the interwar period. The doctrine of just war is generally thought to be a moral discourse but is also a way of justifying land

appropriation. The legal principle of *uti possidetis* is a form of land division and *terra nullius*, along with its contemporary manifestation in the principle of effective occupation, is linked to land cultivation. I will then conclude with a brief discussion of how the boundary discourses of the League's Report are not merely of antiquarian interest. Rather, it is possible to understand the document with reference to "present pasts," a term Derek Gregory (2004) uses to refer to the way in which the colonial histories and geographies of the past are "routinely reaffirmed and reactivated in the colonial present" (p. 7)

Chapter Two:
The Gran Chaco, The League of Nations and Indigenous Dispossession

The Gran Chaco is a flat, alluvial sedimentary plain in the heart of South America and is bounded on the west by the Andean foothills, to the south by the Salado River basin, on the east by the Paraguay and Paraná Rivers and to the north by the Mato Grosso plateau (Braunstein and Miller, 1999). It is the second largest ecosystem in the Plata basin, after the Amazon, and is popularly known as "the green hell"—an expanse of "uninhabited insect-infested thorn desert" and "one of the most inhospitable, impenetrable and mysterious places on Earth" (Romero, 2012, p.1). It is a distinct ecological area and a rich natural habitat for wildlife. It is home to approximately 3,400 plant species, 500 bird species, 150 species of mammals, 120 species of reptiles, and 200 species of amphibians, with jaguars, pumas, giant anteaters and otters, making it one of the most diverse regions in the world (Vidal, 2010). The Chaco is also the home to approximately 50 different indigenous groups, speaking around twenty different languages (Krebs and Braunstein, 2011). The region is today undergoing the stress of demographic expansion and economic exploitation. Environmentalists are concerned about its development given that at least 1.2 million acres have been deforested in the last two years. The Chaco is turning into a "human and ecological disaster" as the land is currently being converted into North American style prairie grassland in order to rear meat for the European market and to produce biofuel for cars (Romero, 2012).

Map 3: The Gran Chaco Plain. Romero, 2012.

The purpose of this chapter is to provide background information on the Chaco Boreal and the Chaco War with reference to the indigenous peoples of the region. The main concern is to show how their ongoing struggles are related to the historical failure of Paraguay, Bolivia and the League of Nations to recognize indigenous sovereignty with respect to land, resources, laws or customs (Graham and Weisner, 2011). The first section provides detail on the evolution of the boundary dispute and the consequences for the indigenous peoples of the Chaco. The second section discusses the League of Nations involvement in the Chaco War. The third section contextualizes the relationship between international law and indigenous dispossession.

The Gran Chaco and the Chaco War

The Chaco War was fought between 1932 and 1935 and led to the deaths of approximately forty thousand Paraguayans and close to fifty-five thousand Bolivians, with more combatants dying from thirst than from enemy fire (Lambert and Nickson, 2013). It is generally thought that the war was motivated by economic interest on the part of Paraguay and by a desire for territorial expansion on the part of Bolivia. The conventional understanding is that Bolivia was seeking better and more secure access to the River Paraguay and, ultimately, the Atlantic Ocean and that both countries were seeking possession of what was thought to be a region rich with oil reserves (McCormack, 1999). This latter explanation—"the petroleum explanation" (Meierbing, 2010, p. 2)—underscores the popular notion that the Chaco War was primarily an oil war. The petroleum explanation was even reiterated by President Morales and President Lugo at the 2009 demarcation ceremony. The Presidents agreed that the Chaco War was caused by "outside, foreign influences" and was the result of "external transnational companies eager to exploit the natural resources of the area." The

2009 demarcation agreement therefore hailed the end of "a senseless confrontation" and the end of a war "that had the smell of petroleum" ("Bolivia, Paraguay," 2009).

The companies seeking to develop the region during the 1920s and 1930s were US Standard Oil (on the Bolivian side) and the Anglo-Dutch Shell Oil (on the Paraguayan side). However important the oil companies were, the petroleum explanation is only a partial explanation. Most historians agree that the true cause of the Chaco War was the unresolved boundary dispute, a problem that first arose with the carving up of the South American continent at the end of Spanish rule. In other words, the proximate cause of the Chaco War was the influence of the oil companies and their respective interests in the Chaco, while the ultimate cause could only be found by going "far back into the dim area of Spanish colonial history" (McCormack, 1999, p. 5). The Spanish crown was inexact in its delineation of the boundaries of its South American Empire, leaving a mess of overlapping jurisdictions that were spread between competing administrative regions. The indefinite nature of the boundary did not mean very much during the colonial period given that the provinces owed their allegiance to a common crown. It was only after the 1810 Wars of Independence that each country emerged with their own separate interests, ambitions and problems (McCormack, 2011).

At the time of decolonization, neither Paraguay nor Bolivia saw any reason to delimit and demarcate the border as the Chaco Boreal was thought to offer little by way of economic profit (Gillette, 1970). The two countries were also too busy fighting border wars with their other neighbours (e.g., Paraguay versus Argentina and Brazil, Bolivia versus Chile and Peru) such that fighting each other was not yet possible. Paraguay and Bolivia had been engaged in diplomatic discussion, beginning negotiations 1878 (Lambert and Nickson, 2013). With the prospect of oil reserves, however, it became imperative to settle the

border and to definitively determine the region's rightful territorial owners (Lambert and Nickson, 2013). Who owned the Chaco? The treaties, conferences and exchange of diplomatic notes proved to be futile and the claims resting on ancient maps and equivocal demarcations appeared to be pointless. Part of the problem was that the land at the heart of the heart of the dispute had until the 1930s been tribal territories. The Gran Chaco was (and still is) the home to a variety of different indigenous tribes, including: the Ayoreode and Yïshïro from the Zamuco linguistic group in the north; the Enxet, Angaité, Sanapaná, Guan'a and Enenlhit of the Lengua-Maskoy group in the centre and east; the Enlit, Yofuaxa, Nicvaclé and Mak'a from the Mataco-Mataguayo linguistic group in the central and southern areas; and the Toba-Qom, a Guaicurúan people, in the southeast (Harder Horst, 2010).

The international boundary between Paraguay and Bolivia ran directly through indigenous territory and most of the military battles were conducted on indigenous land. Both armies relied on local indigenous guides and used their skills and knowledge to navigate the region. The armies also depended on indigenous resources for sustenance (Harder Horst, 2010). The short-term effects of the Chaco War on the indigenous populations were epidemics and demographic decline, cultural annihilation, forced removals and massacres (Harder Horst, 2010). Indigenous peoples were conscripted into fighting the war and were not only the primary combatants but also the primary recipients of the more horrifying effects of the war (McCormack, 2009). The Chaco War is but one chapter in the long history of dispossession, however, as the peoples of the region have been grappling with centuries of exploitation and land-grabbing by foreign missionaries, colonial powers and transnational corporations (Vidal, 2011). Today, on the Paraguayan side of the border, indigenous peoples are subjected to forced labour, inadequate working conditions, inequitable land ownership, deprivation of lands and territories, restrictions on freedom of

association, lack of access to health and other public services, as well as to food insecurity (UN, Paraguay, 2009). On the Bolivian side, there is systematic violence, discrimination, lack of access to justice, lack of legal security in respect of land ownership, deprivation of territory and resources, as well as inequitable land ownership (UN, Bolivia, 2009).

The League of Nations and South American Interventionism

The Chaco War brought about violent death, epidemics, forced migrations and severe cultural disruption among the indigenous groups of the Chaco Boreal. Indigenous peoples found themselves in the crossfire of a neo-colonial border war that was, in certain respects, an extension of the political instability of 1930s Europe. France supported the Paraguayan military and Germany supported the Bolivian military. Neither Paraguay nor Bolivia had a domestic arms industry, meaning that the materials used to fight the war had to be sourced, ordered, paid for and imported from Europe. This means that the tanks, warplanes, 750-ton naval monitors, heavy and light artillery, antiaircraft guns, flamethrowers, trucks, sophisticated optical ranging devices, clothing, saddles, rifles and automatic weaponry had to be commissioned and transported across oceans and continents (De Quesada and Jowett, 2011). It was the first modern war of South America and also the first instance of total war—this was before Guernica and the Spanish Civil War—as Germany and France tried out their new planes, weapons and strategies in the forests of the Chaco (Krebs and Braunstein, 2011). Total wars are wars of annihilation in which no distinction is made between soldiers and civilians. It is a method of waging war that attacks all sectors of an enemy society with the goal being the complete annihilation of the enemy's way of life. They occur when whole societies are mobilized for the war effort and they involve

massive investments in the technological means of destruction (Honig, 2011; Reid, 1992).

The League of Nations entered into the fray in 1932. The League was created in 1919 at the Paris Peace Conference and was an organization tasked with addressing international security, diplomatic relations, alliance-building, military competition and the settlement of international disputes (Housden, 2012). The primary purpose of the League was to maintain international peace, with the primary mechanism for the settlement of disputes between states being international law (The Covenant, The Avalon Project). As signatories to League's 1919 Covenant, both Paraguay and Bolivia were in theory bound by its dictates. It was in fact Bolivia who invited the League to mediate between the two parties and to begin the process of boundary arbitration. In response, The League convened a Commission of Reconciliation, in accordance with Article 11 of the Covenant: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." (http://avalon.law.yale.edu).

The Bolivian and Paraguayan armies began fighting the war in June of 1932, although the official declaration of war did not come until 10 May 1933. It was the first time in the history of the League of Nations that any of its members had declared war (McCormack, 1999). The League formed a committee to keep track of the conflict, which was at first composed of representatives of the Irish Free State, Spain and Guatemala and later changed to representatives from Spain, Mexico and Czechoslovakia). The League had hoped that the American States (the ABCP powers—Argentina, Brazil, Chile and Peru) could solve the conflict themselves but, when the negotiations failed, the League Council considered it necessary to send a travelling commission to the region. On October 18th, 1933, the European members of the Commission sailed for South America, and were

joined by their Mexican colleague in Montevideo, Uruguay. The travelling commission was composed of an Italian ambassador, a Spanish ambassador, a French General, a Mexican Major, and a British Brigadier-General, as well as the Legal Advisor to the League of Nations and a Counselor from the Political Section of the Secretariat (Report, p. 140). The Commission then travelled to Buenos Aires, Argentina, and onward to Asuncion and La Paz, as well as through the Chaco itself (p. 142).

The travelling commission was not an anomaly, as the League of Nations often sent fact-finding committees overseas (e.g., Palestine in 1924, South Manchuria in 1931). Paraguay and Bolivia were to turn the border dispute over to the League of Nations and to have them arbitrate the boundary division. There is a tendency among historians to view the work of the League in a somewhat negative light, which is in keeping with many post-World War narratives. The problems with the League's intervention are, first, that its original Commission of Reconciliation only lasted three weeks. The subsequent Commission of Conciliation proposed a truce right at the moment that Paraguay had almost lost total military control of the Chaco (Finan, 1977). The League failed to negotiate an arms embargo, they failed to arbitrate and negotiate the terms of peace between the two countries, and they failed to put a stop to the hostilities. The League was slow to act, it refused to assign responsibility to the primary aggressor and it failed to produce any concrete proposals that would help overcome the obstinacy of the antagonists (Rout, 1972).

International Law and Indigenous Dispossession

The beginning of the twentieth century saw the end of the European empires, the inauguration of the world of nation-states, and the introduction of international institutions such as the League of Nations. The League emerged as a new actor in the international system and provided international law with a new

framework. The world of colonial empires was transformed into a system of independent nation-states built around the pillar of self-determination (Anghie, 2007). In Europe, the League attempted to create an effective legal system for the protection of minority rights within the newly created nation-states. Outside of Europe, the League promoted self-government and sought to integrate previously colonized and dependent peoples into the international system as sovereign nation-states (Anghie, 2007). The League was therefore responsible for the implementation and enforcement of both the Minority System and the Mandate System, both of which were new techniques in the management of international relations. The Minority System was created in response to the problem of nationalism in Eastern Europe and stipulated that, as a condition of nationhood, the newly created or enlarged nation-states were to enact minority protection legislation to protect the populations within their borders (Fink, 1995). The Mandate System was created in order to provide "international supervised protection" for the peoples of the Middle East, Africa and Pacific who had previously been colonized Germany and the Ottoman Empire (Anghie, 2006).[1]

The Mandate System in particular represented a radically different

[1] Article 22: To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances (http://avalon.law.yale.edu/20th_century/leagcov.asp#art22)

approach to colonialism as the League sought to overturn nineteenth century positivist law and sought to end European conquest and the exploitation of non-European peoples. The transformation of the colonial territories into sovereign states was part of the overall push toward the universalization of international law. The goal was the creation of an international system in which all societies, both European and non-European, would participate as equal and sovereign states. At the same time, the League did not make any provisions for indigenous peoples, at least not for those who were otherwise considered under the Mandate Systems. There was at this time little or no acceptance of the distinct personality of indigenous groups or their land claims (Graham and Wiessner, 2011).

One such example is when in 1923 the Haudenosaunee Confederacy (the Iroquois Six Nations) applied for a hearing with the League, arguing that Canada had violated their right to self-government and independence. Chief Deskahah travelled to Geneva on an Iroquois-issued passport, but was not given the opportunity to present or formally defend his arguments. The League refused to meet with the Chief, claiming that a hearing of even preliminary issues would constitute interference with Canada's territorial integrity and right to internal self-government (Woo, 2007). This indifference is tied to the League's mandate to uphold a form of international law that was based on the Westphalian state-centered system (Anaya, 2004). The League of Nations was bound to the logic of state sovereignty and upheld the right of states to territorial integrity, even in cases where non-state actors also claimed the territory in question. The international law of the interwar period was a means of furthering colonial patterns of occupation and promoted the rights of European states at the expense of the claims of indigenous peoples (Anaya, 2004). The very concept of the state, as defined by League of Nations, made it difficult for aboriginal peoples to qualify as such. The Westphalian state is based on European models of political and social organization, whose dominant characteristics are exclusivity of

territorial domain and a hierarchical, centralized authority (Anaya, 2004). The function of Westphalian-based international law, in turn, is to define the rights and duties of states and to uphold their territorial integrity and political sovereignty. The consequence of such a model is that indigenous peoples, whose traditional modes of governing did not follow the model of European civilization, were excluded from the international system (Anaya, 2004).

The Chaco War between Paraguay and Bolivia was state-centric and sovereignty-based. The war was the culmination of at least a century of territorial conflict, with both countries attempting to "inscribe their sovereign signatures on the physical map and political landscape of Latin America" (McCormack, 1999, p. 289). Paraguay and Bolivia, along with all of the other states involved in the conflict, unleashed a terror that was unrivalled in the Western Hemisphere. The war was undertaken in order to circumscribe and encompass traditional indigenous territories. The doctrine of just war was used in order to justify the violent appropriation of indigenous lands; the doctrine of *uti possidetis de jure* provided justification for the partitioning of indigenous territory in accordance with the previous colonial administration; and *terra nullius* and the doctrine of effective occupation discounted indigenous social and political organization. Indigenous lands were declared open and free for state appropriation state-appropriation (Duffy, 2008).

Conclusion

The Chaco Boreal is currently under stress as the result of demographic expansion and economic exploitation (Krebs and Braunstein, 2011). The ongoing struggles faced by the indigenous peoples of the Gran Chaco are related to the failure on the part of Paraguay and Bolivia to recognize indigenous sovereignty with respect to their land, resources, laws or customs (Graham and Weisner, 2011). This lack of recognition has a long colonial history and is enshrined in the

principles of international law. International law is rooted in the colonial encounter and as such is connected with inequalities and exploitation (Anhgie, 2007). The Western international legal framework defines political and economic sovereignty in such a way that it not only denies indigenous peoples their land rights but also denies them status as nations or states subject to international law (Duffy, 2008, p. 512).

Chapter Three: Literature Review: Border and Boundary Studies

The purpose of this thesis is to engage in a close reading of the League of Nations' Report on the Chaco War through the lens of critical border studies, a field of research that is normally subsumed under the discipline of political geography (Flint and Taylor, 2007). The following literature review compares and contrasts traditional boundary studies with the work of critical "postmodern" geographers, arguing in favour of the new field of critical border studies as a perspective that combines the traditional themes of boundary studies with the insights of critical geography. The first section considers traditional approaches and their concern with testing empirical hypotheses, statistical analyses and the construction of classificatory schemes. The second section looks at the critique of the traditional approaches, in particular the contention on the part of postmodern geographers that traditional perspectives are overly reliant on state-centered perspectives. The third section argues that the best approach is one that joins the traditional and critical perspectives together and considers the relatively new field of critical border studies as a way of combining traditional concerns with contemporary critical methods. The fourth section looks at critical border studies in relation to Carl Schmitt's theory of the *nomos.* The *nomos* is a spatial concept that links boundary-making practices to processes of land appropriation, land division and land cultivation. For critical border theorists, it also allows for an understanding the forms of spatial consciousness that underlie border discourses, the juridical-political order that these discourses determine and the way that these discourses find material expression in specific border regimes (Vaughan-Williams, 2011).

Traditional Approaches to Border Studies

Academic research on international boundary disputes is tied up with the general field of border and boundary studies, which in turn is an offshoot of political geography and has links to the discipline of international relations. The traditional approach in geography considers borders as the physical outcome of political decision-making processes, something to be described rather than analyzed. In other words, the classic studies of borders and boundaries are largely descriptive analyses of boundary location and the political and historical processes leading to their demarcation (Newman, 2006). One approach is to classify the various boundaries and boundary disputes in relation to the ideal sequence of boundary-making processes. The four stages of the boundary process are: description (identifying the location of the boundary), delimitation (plotting of the boundary), demarcation (marking the boundary on the ground), and administration (governing the boundary) (Glassner and Fahrer, 2004). Boundary disputes are then linked to the phase of the boundary-making process that they correspond to—definitional disputes arise at the first stage when, for instance, boundary description is at issue; locational disputes are the result of arguments over the delimitation and/or demarcation of the boundary, and operational disputes arise when there are arguments over how a border should be administrated and/or how it should function (Glassner and Fahrer, 2004).

Another approach is to consider boundary disputes as positional, territorial, resource or cultural. It is a classification scheme that follows from the larger push in traditional political geography to create typologies based on the border's morphology, natural features, origin, age and the historical circumstances of its allocation and delimitation (Kossolov, 2006). Morphological classifications divide the boundaries into various categories, depending on their form and structure—geometric borders consist of straight lines or arcs, physiographic borders lie along physical features of the landscape, riparian boundaries are river

borders, and cultural-political boundaries are based on ethno-linguistic criteria. Genetic boundary classifications, by contrast, focus on the time when a boundary is established in relation to human settlement. Pioneer boundaries are drawn through what was considered unoccupied territory, antecedent boundaries are those drawn prior to intensive settlement and land use, subsequent boundaries are those drawn when the cultural landscape is emerging, and consequent boundaries are a consequence of settlement by peoples with different languages, religions, and ethnicities. These latter borders are superimposed on existing cultural patterns and are understood as vestiges of past colonial rule (Glassner and Fahrer, 2004).

The focus on boundary demarcation and delimitation, in addition to the positioning of the boundary in relation to either the physical or human environment, is predicated on the idea that borders are largely static and deterministic entities (Newman, 2006). Related to this understanding are the fields of historical mapping, as well as functional and political methodologies. The historical-geographic approach is associated with the mapping of economic and social structures in border regions, the accumulation of empirical data, and the description and classification of numerous case studies. Functional approaches look at transboundary flows of people, goods and information and seek to determine the influence of borders and boundaries on natural and social landscapes. The political approach is associated with the work of political scientists and their studies of the relationship between the main paradigms of international relations and what they take to be the functions of state boundaries. An example of this latter perspective is to be found in works that employ the perspective of power politics when discussing the relationship between border disputes and war (Kolossov, 2006).

Within international relations, the power politics perspective focuses on the proximity of borders (the closeness of states), the utilitarian dimension

(boundary controversies as part of the game of power politics instead of a genuine source of disagreement) and the realist position (which focuses on relative capabilities) (Blanchard, 2006). Challenging this position is the issue-based approach, a strand of analysis that holds that conflict can be understood in terms of the intrinsic characteristics of the territories under analysis (i.e., their economic endowments) such that there are reduced prospects for negotiation and increased chances of conflict (Blanchard, 2006). An example of quantitative methodologies in traditional border research includes work of Paul Hensel (2004) on the effects of the colonial legacy on border stability, which entails an analysis of the consequences of colonial rule for the stability of the territorial status quo after independence. The study is an example of traditional border studies in that it proceeds from a series of hypotheses that are then tested through statistical analysis, eventually determining that borders with a colonial legacy are less stable than borders with no colonial legacy. The approach of Dominguez et al (2003) to boundary disputes is conducted in a similar fashion, but is instead supplements large-scale statistical analysis with comparative case-based, time-limited approaches.

The traditional approach can therefore be understood as providing a theoretical framework that analyzes the politico-geographic factors that are determinative of the border's position and character (Paasi, 2006). The concern is with the historical evolution of boundaries as lines that delimit state jurisdiction and state territories. Empirical generalizations are formed on the basis of treaties, agreements and official documents, which are then linked to processes of border allocation, delimitation, demarcation and administration mentioned earlier (Grundy-Warr and Schofield, 2006). The central research question for traditional theorists is "where?"—"where is the border located, how did it come about, evolve, change over time, become the topic of military disputes and what are the political consequences of its changes of location?" (van Houtum, 2006, p. 674)

Thus, traditional border studies brings together an extensive body of empirical material from separate border case studies and tests hypotheses, engages in statistical analyses and constructs classificatory schemes. As a result, traditional boundary research understands border disputes as concrete empirical phenomena that ought to be studied using concrete, empirical methods (Paasi, 2006).

Critical "Postmodern" Geography and Boundary Discourses

The traditional approach to borders and boundaries has been extensively criticized. First, it is predicated on an overly simplistic view of the border as a naturalized entity whose primary function is to mark and divide the political limits of states (Newman and Paasi, 1998). The approach is state-centric and does not challenge the theoretical primacy of the Westphalian nation-state as a fixed and bounded entity, meaning that there is little room for the concerns of non-state, sub-state and trans-state actors and agencies that may be affected by and/or influence the boundaries under discussion (Grundy-Warr and Schofield, 2005). Traditional boundary studies therefore falls into the "territorial trap"—it is considers state boundaries as a set of fixed units, it dehistoricizes and decontextualizes processes of state formation, and it obscures the interaction between processes operating at different scales in that it views the territorial state as existing both prior to and as a container of society (Agnew, 1994). Part of the difficulty, then, is that the traditional approach often analyzes state borders and boundary disputes at the national level and as such fails to contextualize border zones and borderlands with reference to either the global or the local scale (Kossolov, 2005).

Critical postmodern geographers argue that the understanding of state borders as unifying, dividing and exclusionary entities can no longer be upheld. They instead engage with theoretical perspectives that take account of the way in

which non-state actors, plurinational communities and stateless nations undermine the integrity of state borders on the basis of differing ethnic, religious, social and economic identities (Brunet-Jailly, 2005). For critical postmodern geographers, neither states nor borders are "given realities" nor "natural regions" (Kossolov, 2005, p. 610). Rather than viewing borders and boundaries from the traditional state-centric perspective and instead of taking sovereignty, territoriality and boundaries for granted, critical postmodern geographers understand borders and boundaries as socially constructed and/or socially produced entities (Blanchard, 2005). Borders are social, political and discursive constructs. They may be part of the production and institutionalization of territories and territoriality, but they also have symbolic, cultural, historical and religious meanings for social communities (Newman and Paasi, 1998).

Critical postmodern geographers therefore seek to understand the relationship between territory and sovereignty from a position that is anti-determinist and anti-essentialist. They are not focused on the line of the border per se, but instead on the way that the line is representative of socially constructed mindscapes and meaning (van Houtum, 2005). Critical postmodern geographers no longer ask about the "where" of the border, but instead ask after the "how"—how are borders constructed? How are they represented and symbolized? As such, they do not consider borders as the concrete political limits of states, but instead see them as socio-territorial constructs. In other words, critical postmodern approaches orient themselves around questions of meaning and representation. Borders are the product of social practices, a position that is more amenable to the study of the border beyond the nation-state in that it incorporates the viewpoints and perspectives of a wider range of actors (van Houtum, 2005).

The idea that borders are the product of our knowledge and interpretation—and that they produce a disciplining lens through which we perceive and imagine the world—is directly related to the critical turn in the

social sciences (van Houtum, 2005). The constructivist position means that all political borders are human-made and, from a theoretical perspective, more amenable to being understood in terms of symbols, signs, identifications and representations. The main difference, then, between traditional and critical approaches is that the former is primarily an empirical-analytic approach, whereas the latter takes discourse, symbolism, social practices and power relations as analytic and explanatory tools. Critical postmodern geographers consider the traditional empirical-analytical approaches to be incapable of engaging with the discourses and power relations that are crucial to boundary-producing practices (Paasi, 2006).

Critical Border Studies: Traditional Borders Meets Postmodern Boundaries

Traditional boundary theorists hold that the border is quite simply a physical line that separates states in international system (Newman, 2006). Critical postmodern geographers take the border to be a socially constructed entity mirrors both past and present power relations (Kossolov, 2005). These two strands are considered at odds with one another, leading to a split in border studies between two distinct subfields, each having their own institutional expertise centers, their own journals and their own leading figures (van Houtum, 2005). Critical border theorists, on the other hand, argue that knowledge of both subfields is required if the historical context, the evolution of border regimes and the meanings these regimes have for affected communities are to be adequately understood. It is therefore necessary to reorient border and boundary studies so that the critical postmodern approaches are applied together with—rather than instead of—traditional border concepts. State borders are important, precisely because they remain important territorial dividers (Kolossov, 2005). The point is that while traditional border research needs to be more cognizant of discursive

practices, deconstruction and critical theory, the traditional or descriptive border theories need not be jettisoned.

Analyses of actual borders as representations of constructed political territories remain relevant (Nicol and Minghi, 2005). The traditional approach underlies the work of international lawyers, diplomats and scholars, and practitioners who are interested in particular boundary descriptions and their associated treaties, protocols, arbitral awards and disputes. Traditional methods make geographical knowledge understandable to the professionals and lawyers who deal with concrete boundary problems, which is especially relevant in the context of an international legal system that remains very much state-oriented (Grundy-Warr and Schofield, 2005). At the same time, the shift away from boundary lines *qua* boundary lines towards a more intensive focus on borderlands, border people and trans-border movements opens up spaces for analyses of global interconnections, practices of local resistance, trans-territorial flows, state policies and regional dilemmas, along with identity formations that often contradict and challenge state sovereignty (Grundy-Warr and Schofield, 2005). Research agendas should therefore take account of the complex cultural and political tapestry of borderlands that are often obscured by state practices and, by doing so, can give voice and visibility to practices and processes that both underpin the modern political map and undermine it (Grundy-Warr and Schofield, 2005).

One way of joining traditional border concerns with insights of critical postmodern geography is through the field of critical border studies. Critical border studies is now a specific field of geographic inquiry that came about as the result of a series of interdisciplinary workshops sponsored by the British Academy, the results of which were first published in *Geopolitics* (2009) under the guise of a collectively authored "Agenda." The Agenda sought to identify new epistemological, ontological and spatial-temporal dimensions for border research. Critical border studies is a reaction to the territorialist epistemology of

traditional border studies and asks after alternative epistemologies, ontologies and methodologies. It seeks to develop new border concepts, border logics and border imaginaries that are able to encapsulate what borders are supposed to be and where they are supposed to lie. As such, critical border studies maintains an interest in the themes of traditional boundary studies, but interrogates the relationship between border materialities and border imaginaries by shifting from the fixed border epistemologies of traditional research toward the alternative epistemologies that are articulated by critical postmodern theorists (Parker, Vaughan-Williams et al., 2009).

Critical border studies understands the fixed border of traditional boundary research as being uncertain, indeterminate and characterized by contingency. It accepts the insights of traditional boundary studies while also questioning its foundational ontologies. It interrogates the taken-for-granted assumptions of traditional border studies with respect to whom and what makes the border, as well as how they are established and how they are reproduced. Critical border studies calls border spatialities and temporalities into question, asking how the border opens or forecloses different ethical and political possibilities, how different conceptions of space lead to different modes of theory and practice, how borders change and how and in what way borders enable transformative practices (Parker, Vaughan-Williams et al., 2009). It therefore goes beyond the traditional understanding of the border as a territorially fixed and static line and aims to free the study of borders from the epistemological, ontological and methodological confines of the Western geopolitical imagination (Parker, Vaughan-Williams et al., 2009).

Critical border studies therefore seeks to "decentre" the border and to question its status as a taken-for-granted entity. By so doing, the border becomes a site of investigation and "not something that straightforwardly presents itself in an unmediated way" (Parker and Vaughan-Williams, 2012, p. 728). Again, the

main difference between traditional and critical geography is that the former produces empirical analyses of concrete border cases, while the latter theorize about boundaries within the context of key social and political categories such as state, nation, nationalism, territoriality, identity and ethnicity (Paasi, 2005). Both approaches are important since boundaries have practical meanings for states that are (and are not) recognized by international law. Borders are concrete phenomena that are fundamental to the socio-spatial organization of the contemporary world and they have versatile functions—they are instruments of state policy and territorial control, markers of both identity and the discourses that manifest themselves in legislation, diplomacy and academic and scholarly languages (Paasi, 2005). Critical border studies is a way of bringing traditional concerns together with critical approaches in that it recognizes the way in which boundaries are part of the material and discursive practices by which the territorialities of societies are produced and reproduced. Critical border studies recognizes the importance of traditional studies while also theorizing about the ideological and material practices through which boundary-making discourses become a part of the broader socio-spatial consciousness and by extension the everyday lives of individuals (Paasi, 2005).

Carl Schmitt and the Nomos of the Earth

Critical border studies theorists have recently taken up the theories of Carl Schmitt—albeit contentiously—as they consider Schmitt's spatial theorizations as lending themselves to the construction of new border concepts, new border logics and new border imaginaries. Schmitt's theory of the *nomos* in particular allows for new areas of ontological and social-spatial inquiry (Minca and Vaughan-Williams, 2012). The *nomos* is defined as a form of spatial consciousness that precedes and makes possible processes of land appropriation, land division and

land cultivation. It is way of linking border discourses with the juridical-political order that these discourses determine and as well as with the way that these discourses find material expression in specific border regimes. In this sense, critical border theorists consider the work of Carl Schmitt to be a precursor to their own project of joining together the concerns of traditional border studies with the insights of critical theory. The *nomos* addresses the traditional themes of state-centered theory (sovereignty, the spatial extent of the state) while at the same time going beyond it by taking the movement and mutation of borders into account (Vaughan-Williams, 2011).

Schmitt's *Nomos of the Earth in the International Law of the Jus Publicum Europaem* (1950) is a key text for critical border studies in general, and for this thesis in particular, in that it links boundary-making practices to processes of land appropriation, the territorial ordering of the state and the legal discourses related to the colonial occupation of indigenous lands. The *nomos* is a form of spatial consciousness but also "a spatially concrete, constitutive act of order and orientation" (Schmitt, 2003, p. 78). This means that it is prior to every legal, economic and social order (it makes that order possible) and also that it finds expression materially and spatially through borders and border-making practices. The *nomos* is therefore demonstrative of the intertwinement of space, politics and the law—politics and law are grounded on the division of space. Spatial appropriation and spatial division provide the foundation for the political sphere and constitute the conditions of the possibility of the formal framework of law and legal systems (Rowan, 2012).

The *nomos* allows for the analysis of borders as both material constructs and as the result of particular forms of spatial consciousness. In this sense, Schmitt's work provides an approach that brings together the traditional and critical literature on borders and boundaries. By linking the *nomos* to land appropriation, land division and land cultivation, Schmitt shows how spatial

divisions are constitutive of dominant orders of international law (Vaughan-Williams, 2011). The *nomos* makes land appropriation, land division and land cultivation possible and are in turn determinative of the international juridical-political order. For critical border theorists, this is important as Schmitt establishes links between the international spatial order as inscribed in international law and the boundaries that sustain the international political order.

Schmitt's work in *The Nomos of the Earth* is therefore important for this thesis as Schmitt offers a jurisprudential and political account of the rise and fall European public law and traces its development from the initial colonial land-appropriation of the Americas to the rise of the League of Nations and international interventionism. For Schmitt, however, the *nomos* of the League of Nations was spatially chaotic and based on an empty universalism that subscribed to the international legal principles that regulated the old Westphalian world order while simultaneously considering itself a humanitarian institution. It is this issue that is under review in this thesis. The border discourses of the League of Nations' Report are discourses of indigenous dispossession. From the perspective of the *nomos*, it is argued that the problematic nature of the League's Report is due to its inability to transcend the *nomos* of the Westphalian legalist paradigm and to articulate a vision that sees indigenous peoples not only as individual persons but as peoples bound together by specific histories of colonial oppression.

This thesis therefore elaborates on critical border studies' recent engagement with the work of Carl Schmitt through an analysis of the three central border discourses in the League of Nations' Report. The specific focus is on the border discourses of the doctrine of just war, the legal principle of *uti possidetis de jure* and the legal concepts of *terra nullius*. The background theoretical framework is that of critical border studies as it allows an understanding of the League's Report in relation to bordering practices and border performances. It also allows for a critical analysis of the way in which the border discourses of the

League of Nations function as technologies of indigenous dispossession. The work of Carl Schmitt is used to illuminate the relationship between the silences found within the League's Report on the Chaco War and the discourses of dispossession. They are indicative of what Carl Schmitt would consider the League's "spatial chaos" in that the League was simultaneously attempted to uphold the *nomos* of the previous era of European international law while also instituting an era of humanitarian intervention. For Schmitt, the League of Nations is symbolic of a new epoch based a "vapid border-less universalism," with the League of Nations therefore being symbolic of the new era of global disorder (Minca and Vaughan-Williams, 2012, p. 763).

Chapter Four: Theoretical Framework and Methodologies

The purpose of this project is to engage in a close reading of the 1936 *Report of the League of Nations Commission on the Chaco Dispute Between Bolivia and Paraguay*. The focus is traditional in that the areas of interest are the political and historical processes that led to the final demarcation of Paraguay and Bolivia's shared international boundary. This necessitates an understanding of the border as traditionally conceived—the border as a line, as "the razor-edge" of the state where mutually recognized sovereignties are expected to meet but not overlap (Prescott and Triggs, 2007). At the same time, this thesis calls the traditional understanding of the border into question. Critical border studies and Carl Schmitt's theory of the *nomos* provides the overall theoretical framework as they both allow for the traditional themes of border research to be joined together with the precepts of critical theory. The first section provides an overview of the shift in critical border studies from the traditional concept of the border to the notion of bordering practices and the concept of border performances, with the latter being the means by which bordering practices are produced and reproduced. The second section considers bordering practices as being performed discursively through text and therefore as amenable to discourse analysis. The third section discusses the three discourses that are under review in the thesis: the doctrine of just war, the legal principle of *uti possidetis de jure* and the legal concept of *terra nullius*. The fourth section once again discusses Schmitt's theory of the *nomos*, this time as spatial-ontological device that enables a deeper understanding of the relationship between histories of land appropriation, the doctrine of just war, international law and the formation of international border regimes.

Theoretical Framework: Bordering Practices and Border Performances

Critical border studies goes beyond the traditional understanding of the

border as a territorially fixed and static line and aims to free the study of borders from the epistemological, ontological and methodological confines of the Western geopolitical imagination (Parker, Vaughan-Williams et al, 2009). Epistemologically, borders structure our understanding and knowledge of the 'reality' of the international state system. They function as categories and reduce epistemological uncertainty by dividing the world into different units, which in turn provides a framework for political decision-making on the part of states. Ontologically, borders are prior to specific state entities and are a precondition of state identity. Borders provide continuity and are constitutive of the identity of a social and political unit. Borders are therefore also tied to the identity-making activities of the nation-state (Parker and Vaughan-Williams, 2012). The aim of critical border studies is to therefore 'decentre' the border and to problematize the traditional concept of the border as a taken-for-granted entity. It instead views the border as indeterminate and uncertain (Parker and Vaughan-Williams, 2012). State borders are conceptualized as a series of bordering practices, a theoretical perspective that is meant to open up spaces for alternative views on how the divisions between states appear, how they are produced and how they are sustained (Parker, Vaughan-Williams et al., 2009).

The point is to understand the dynamism of state borders—bordering practices include all those activities that have the effect of constituting, sustaining or modifying the border, from the most explicit and active (e.g., war) to the more subtle and passive (e.g., written documents). Bordering practices can therefore be intentional or unintentional and can be carried out by both state and non-state actors. They come about as a result of the interactions between a variety of different actors, process and organizations and can include, for instance, anything that contributes to the four stages of the boundary-making process. Bordering practices encompass boundary descriptions, which take place when the location of a boundary is identified in treaties, protocols and arbitral awards. They include

practices of boundary delimitation, when the border is plotted on a map, and practices of boundary demarcation, when the border is marked on the ground. Bordering practices also include forms of boundary administration and the way in which state boundaries are governed (Glassner and Fahrer, 2004). Bordering practices can also be understood as a spatialization of the violence that underpins the state system. From this perspective, borders are the physical and symbolic manifestations of past and present violence as etched into the political and social landscape (Parker and Vaughan-Williams, 2012).

The shift in focus from the traditional concept of the border to bordering practices entails the adoption of the language and imagery of border performances. One way of viewing border performances is as taking shape in texts and documents, a means by which bordering practices are produced and reproduced. Borders are not simply lines on a map or on the ground, but are practices that are performed through geographic language and imaginaries. These imaginaries are in turn performative of particular social, economic and political realities. They are also performative of different subject positions. For the purposes of this thesis, the League's Report on the Chaco War is considered a bordering practice that contributed to the making of the boundary between Paraguay and Bolivia. The document is performative in the sense that it both produces and reproduces the border through its use of specific border languages and border imaginaries. It defines the League of Nations as an apolitical international institution that is interested in upholding the Westphalian legalist paradigm of the international political and legal order. It considers Paraguay and Bolivia as unified actors that are that are accrued the specific rights of political sovereignty and territorial integrity under international law. And through the document's silences, it marginalizes and erases the perspectives and viewpoints of the indigenous peoples whose traditional territories were at the centre of the Chaco dispute.

Methodologies: Discourse Analysis

The League of Nations' Report is a bordering practice that is performed discursively. This renders the text as amenable to discourse analysis. Discourses are the sets of ideas, terms and connecting phrases that arise in distinct historical-geographical contexts. They provide the background framework for the ordering of specific combinations of narratives, concepts, ideologies and signifying practices. Discourses can be found in anything that can be read for meaning, from written documents, photographs, paintings, maps, landscapes to social, economic and political institutions (Berg, 2009). They are reflective of dominant socio-political values and are constitutive of those socio-political values in that they position people in different ways as social subjects. Individuals and groups are both the subjects of and subjected to discourses, with discourses constructing a variety of subject positions, which can in turn be taken up, contested or resisted (Morgan, 2010). Discourse therefore plays a role in the production and reproduction of dominance, defined as the exercise of social power by elites, institutions or groups. Such discourses results in social inequality, be it political, cultural, class, ethnic, racial or gender inequality (van Dijk, 1993).

Discourse analysis lends itself to an understanding of how the social categorization of dominant groups is normalized and rationalized through language. It requires the identification of hegemonic discourses and also the identification of inconsistencies in these discourses (Gallaher et al, 2009). Hegemonic discourses are always contested by subordinate discourses and texts are often filled with unacknowledged silences, inconsistencies, contradictions and paradoxes. Discourses rely on silence for their power and by engaging in discourse analysis to identify those silences, it becomes possible to theorize about how silence works to produce particular subjects while leading to the erasure of others (Berg, 2009). The identification of inconsistencies allows for an analysis of the way that discourses contest or reinforce dominant meanings. It also opens

up spaces for the creation of new subject positions and identities. It is the task of discourse analysis to examine these silences and inconsistencies in relation to how truth claims are created and how they are then normalized and naturalized.

Bordering practices and border performances can be ascertained via discourse analysis. Discourse analysis holds that there is no such thing as an objective, observable and knowable reality but that multiple versions of reality and multiple 'truths' are performed through texts. Hence, the identification of border imaginaries and border languages can help show the social categorization of dominant groups is normalized and rationalized through language. It can also highlight the epistemological and ontological underpinnings of border discourses to show how such discourses are imbued with binary oppositions and dualisms. The point of discourse analysis is to think of the border from a position of epistemological uncertainty—to "bracket out" their fixed nature—and to ask questions about how geographical imaginaries are used in the construction of particular political projects (Parker, Vaughan-Williams et al., 2009, p. 584).

Discourse analysis also shows how border texts construct the world through a simplified rendering of a messy reality. It enables us to consider border discourses not as objective descriptions of the world but as performative scriptings of it (Dahlman, 2009). As applied to the League of Nations Report, discourse analysis takes the shape of a textual intervention and disrupts dominant narratives of power by deconstructing the rhetoric of the Report's authors. Discourse analysis allows for the identification of the imaginative border geographies that were taken for granted at the time of the Chaco War. It further allows for an uncovering of the silences embedded in the text and therefore enables a shift in focus from state-centered perspectives toward the perspectives of non-state indigenous actors (Gregory et al., 2009). The purpose is to illuminate underlying power relations by highlighting how the silences and inconsistencies in the text are linked to practices of indigenous dispossession.

Carl Schmitt and the *Nomos* as a Spatial-Ontological Device

Carl Schmitt's *Nomos of the Earth in the International Law of the Jus Publicum Europaeum* is a study of the history of land appropriation and territorial expansion, war and colonialism, in addition to modern imperialism and international institutions. Critical border theorists view *nomos* as a spatial-ontological device that allows for an understanding of the relationship between spatial consciousness, international law and bordering practices. It brings the themes of traditional border studies together with critical theory and encapsulates what Schmitt calls the "concrete spatial character of a community" (Dean, 2006, p. 6). What this means is that the *nomos* is geographically situated and geographically situating. It describes the territorial ordering of the world, both the material fact of a particular set of orientations ("localizations") and the effect those orientations have on the nature of the legal, political and social order (Hooker, 2009). In Schmitt's formulation, the *nomos* cannot be reduced to a set of rules or norms that govern and regulate the conduct of individuals (or states). It is not law; it is the condition of the possibility of law. It is a spatial concept that has it origins in a tripartite process of land appropriation, land division and land cultivation. The *nomos* is the form by which the political and social order of a people (and peoples) becomes visible and includes the initial land appropriation as well as the "concrete order contained in it and following from it" (Schmitt, 2003, p. 70).

Schmitt holds that the disciplinary divisions between legal studies, economics, sociology and other areas of specialization can be resolved by applying the *nomos* to the doctrines and systems of the social sciences (Schmitt, 2003). It links the various disciplines together by being "a spatially concrete, constitutive act of order and orientation" and the "fundamental process of apportioning space that is essential to every historical epoch" (Schmitt, 2003, p. 78-79). The *nomos,* for instance, lends itself to different spatial orderings at

different times: the *nomos* of the Christian Middle Ages (*Respublica Christiana*) relied on mythological spatial divisions between the lands of the Medieval West, the lands of the heathens, and the lands of the Islamic empires. The spatial ordering of the modern period was predicated on the 'discovery' of the Americas in 1492 and brought with it a shift toward "global linear thinking." Global linear thinking gave rise to a new set of border logics, based on the appropriation, division and cultivation of colonial lands by Europeans. This in turn gave rise to the *jus Publicum Europaem*, the *nomos* of the Westphalian state, and its strict division of European lands into clearly identified and mutually recognized territorial units (Minca and Vaughan-Williams, 2012).

The *nomos* is therefore a spatial-ontological device that links modern international law together with international border regimes, as the *nomos* is rooted in land appropriation and manifests itself through differing spatial divisions, enclosures and spatial orders of the earth (Schmitt, 2003, p. 81). The point is that all property and every legal order have land as its precondition. The history of international law is, in other words, a history of land appropriations. The three processes of land appropriation, land division and land cultivation are at the basis of the history of law and social order. Schmitt's argues that prior to every legal, economic and social order—and prior to every theory about those orders—are three elementary questions: "*Where and how was it appropriated? Where and how was it divided? Where and how was it produced?*" (Schmitt, 2003, p. 328). For example, Schmitt holds that basic event in the history of European international law was the land-appropriation of the 'New World.' The spatial ordering of the earth in terms of international law required that lines were drawn to divide and distribute the earth, establishing the dimensions and demarcations of a new spatial order. Underlying the land-appropriations, land-divisions and land distributions of the Americas was a form of "planetary spatial consciousness" that took the form of "global linear thinking" that can be

ascertained through the first maps and globes. Crucially, this mapping conceptualized the Americas as a free space and as open to European occupation and expansion (p. 88). According to Schmitt, this European core determined the *nomos* of the rest of the earth, as the struggle for the land-appropriation of the New World became a struggle among European power complexes. International law was addressed to states as sovereign persons and the state was conceived of juridically as a vehicle the spatial order—the state was the legal subject of international law and only with a clear division of states into territories was the balanced spatial order possible. This spatial order was "comprehensive" and required firm borders as a guarantee of the individual states territorial status (p. 155).

Three Border Discourses: The Doctrine of Just War, *Uti possidetis de jure* and *terra nullius*

The League of Nations' Report on the Chaco War is a bordering practice that is performed discursively through text. Discourse analysis shows how the silences within the text are linked to indigenous dispossession as it highlights the way in which indigenous dispossession is normalized and rationalized. Carl Schmitt's theory of the *nomos,* in turn, shows how the border discourses of the League of Nations are spatialized through forms of land appropriation, land division and land cultivation. The three border discourses under review in this thesis are the doctrine of just war, the legal principle of *uti possidetis de jure* and the legal concept of *terra nullius*. The doctrine of just war is indicative of Carl Schmitt's understanding of the *nomos* and is linked with land appropriation, *uti possidetis de jure* is related to land division and *terra nullius,* along with effective occupation, are forms of land cultivation. As border discourses, they were chosen because they are central to the Western framework of international law and

historically have governed patterns of colonization, ultimately providing legitimation for the colonial order (Duffy, 2008). They were also chosen because they show how the tension in the *nomos* of League of Nations between the Westphalian legalist paradigm and its humanitarian claims function in relation to indigenous dispossession. The doctrine of just war is a moral doctrine that stipulates that, in order to be justified, a war must have a just cause. In the modern formulation, a state can claim to have just cause when their right to territorial integrity and political sovereignty has been infringed upon. Underlying Paraguay and Bolivia's respective appeals to the just cause condition was their respective considerations that the legal principle of *uti possidetis de jure* had been violated. Both Paraguay and Bolivia considered it their right by virtue of international law to retain the colonial administrative boundaries that had been bequeathed to them by the Spanish Crown. *Uti possidetis de jure* in turn presupposes the legal-geographic concept of *terra nullius* ('empty land'), which had, at the time of the Chaco War, evolved into the principle of effective occupation (or, *uti possidetis de facto*) (Anaya, 2004). Taken together, the three discourses can be understood as technologies of indigenous dispossession in that they normalized and rationalized the appropriation of indigenous lands.

The Discourse of the Doctrine of Just War

The doctrine of just war is a moral doctrine and has a long history in the West. In the thirteenth century, St. Aquinas systematized the criteria for just war in terms of just cause, legitimate authority and right intention. The doctrine was further refined in the modern period by Francisco de Vitoria, Alberico Gentili, Hugo Grotius and Sameul Pufendorf, who sought to provide a secular basis for what had until then been a purely religious doctrine (May et al, 2006). The modern formulation was expanded in order to allow for war as a just response to

unprovoked aggression, as a method for the restoration of rights that had previously been violated and as a way of punishing an offender. Modern discourses of the just war tradition are predicated on the Westphalian legalist paradigm, which holds, first, that international society is made of independent states. States are the members of this society, as opposed to individual persons or other types of political groups. Second, international law establishes the rights of states to territorial integrity, political sovereignty and the inviolability of borders. Third, any use of force or any threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression. Fourth, aggression justifies violent response—either a war of self-defense or a war of law enforcement on the part of the victim. Fifth, only aggression can justify war. The only just cause for war is therefore a "wrong received." Sixth, once the aggressor state has been militarily repulsed, it can also be punished (Walzer, 1977).

The doctrine of just war provides a moral justification for violent conflict on the part of states. It is a discourse of dispossession, however, in that it does not consider the perspectives of non-state indigenous actors whose lands are often at the centre of a dispute. The doctrine is rooted in the Westphalian legalist paradigm, meaning that the territorial rights of rights of states take precedence over the land rights of indigenous peoples. This is because indigenous forms of political and social organization do not conform to the state-centric Westphalian paradigm. As a result, indigenous land claims are not recognized under international law. Indigenous peoples are neither accorded the rights of territorial integrity nor of political sovereignty. Historically, the doctrine of just war has enabled the acquisition of indigenous territories in one of two ways. During the colonial period, warring states held that indigenous peoples did not legally exist. Thus, a just war could be fought between two colonial powers and the indigenous lands at the centre of the dispute could legally be acquired by the victor and held as state possessions. The second view is that indigenous peoples did once legally

exist but they were inferior. Their right to occupy their homelands could be extinguished. Under the first reading, indigenous peoples were regarded as non-existent under international law, meaning that their territories were open to acquisition. Under the second reading, indigenous peoples did once legally exist and at one time did exercise territorial ownership, but this territorial control was extinguished with the arrival of European colonizers in their lands (Gilbert, 2006). Importantly, the right authority criteria states that only politically organized states can engage in a just war. This means that, by definition, indigenous peoples cannot engage in a just war against their colonizers. The doctrine of just war has therefore historically been a discourse of indigenous dispossession, with the modern state system and the just war traditional facilitating the colonial patterns of European states (Ayana, 2004).

The Legal Principle of *Uti possidetis de jure*

The modern formulation of *uti possidetis de jure* ("as you possess, so you shall continue to possess") is a principle of international law that first developed during the Latin American decolonization process during the early nineteenth century. The principle holds that newly independent states are to inherit the borders that were set by the previous colonial powers. This means that boundary disputes are to be settled with reference to originary colonial title and colonial land division (Gilbert, 2006). The former Spanish colonies agreed to adhere to *uti possidetis de jure* as a way of guaranteeing the territorial rights of the newly decolonized countries. The newly formed states would then have a legal right to the territories that they had originally possessed as provinces under the Spanish crown (Hensel et al, 2004). In this way, the independent Latin American states were able to claim territorial sovereignty based on clearly defined borders, while simultaneously being assured that no new claims based on *terra nullius* ("land

belonging to no one") or by extra-regional powers could arise. The Latin American states were to keep their old colonial administrative boundaries and these boundaries were to serve as international borders (Lalonde, 2002).

Uti possidetis de jure is considered a stabilizing force and was elevated into a general principle of international law on the grounds that it is a way of avoiding territorial conflict (Hensel et al, 2004). It is a legal norm that provides for the settlement of boundary disputes between decolonizing states and in theory enables states to avoid resorting to force when consolidating their territories. At the same time, however, territorial disputes between states did not necessarily disappear and states still engaged in military conflict to settle their border conflicts. In fact, many states engaged in military conflict precisely because of *uti possidetis de jure*. Conflicts arose when warring states, as in the case of Paraguay and Bolivia, interpreted the colonial administrative boundary in different ways. The problem was that the territories under dispute were largely unexplored while other parts were only vaguely known to the colonial powers and their subsequent national governments. Maps were imperfect and colonial administrative units were enacted in ignorance of the geography of the area. In addition, the colonial boundaries were almost always poorly drawn and did not necessarily correspond to the inhabitant populations (Sumner, 2004).

Uti possidetis de jure also fails to take the territorial claims of non-state indigenous actors into account. States borders were imposed on indigenous territories without any regard for their laws and customs. As with the doctrine of just war, *uti possidetis de jure* privileges the territorial claims of states over the territorial claims of non-state indigenous actors. The principle freezes the territorial title in accordance with the colonial heritage—it preserves internal colonial boundaries, each of which corresponds to the colonial entities that are now to be considered as having achieved statehood (Majinge, 2012). This means that indigenous land claims were ignored and also that indigenous land was

integrated into the territories of the newly independent states. The principle was not addressed to the indigenous peoples of a given territory, but rather to the settlers of the colonized territories. The principle of *uti possidetis de jure* assumed, for instance, that the colonizers of settler states (the descendants of the original colonizers) were the country's "people" and therefore had a primary claim to the land and territory of the country (Weissner, 2008, p. 1150). Political decisions were made in favour of the Spanish (creole) colonial elite, thereby overriding indigenous territorial divisions in favour of colonial administrative ones (Gilbert, 2006).

Uti possidetis de jure is a technology of indigenous dispossession. The principle ensured that the colonial *status quo* continued into the era of independence as it allowed the new South American states to consolidate their territories through a Westphalian definition of national territory. As such, *uti possidetis de jure* is strongly grounded in the Western worldview. The positivist international law of the nineteenth and early twentieth centuries acted as a force for the consolidation of indigenous lands on the part of states. This is because, first, international law is concerned only with the rights and duties of states. Second, international law upholds the exclusive sovereignty of states as equal and independent entities. Third, international law is between states, not above or below. Fourth, states possess rights and duties that prima facie exclude the concerns of indigenous peoples. Indigenous peoples were held to be outside the mold of European civilization. This means is that indigenous laws and historic patterns of land use were ignored, as per the Western framework of international law (Ayana, 2002).

The Legal Concept of *Terra nullius* and Effective Occupation

Terra nullius was an influential doctrine of the nineteenth-century international law that defined indigenous territories as "land belonging to no one." The doctrine held that if indigenous society did not meet European standards of social organization, their land could be considered unoccupied and could therefore be acquired by colonial occupation (Duffy, 2008). As with *uti possidetis de jure*, the concept was based on the idea that indigenous peoples did not legally exist and therefore did not have any right to territorial ownership. *Terra nullius* referred to territory that had no form of 'civilized' and recognizable government. The colonial powers did not recognize the territorial sovereignty of indigenous communities and considered territorial rights as valid only within state-run political organizations. *Terra nullius* does not mean that the territory is literally uninhabited. Rather, it means that indigenous societies were incapable of exercising proper territorial sovereignty, as their systems of political organization did not conform to those of a European government. An empty territory was therefore a territory that was not under the jurisdiction of a state, in the sense of belonging to one of the defined actors of international law (Gilbert, 2006).

At the time of Spanish colonization, the Americas were defined as legally empty and as such open for conquest—the "New World" was vacant. This allowed the Spanish colonizers to provide a legal justification for the consolidation of indigenous lands. With the Wars of Independence of 1810 and the decolonization of South America, these so-called empty territories were then transferred from the Spanish Crown to the newly emerging states on the basis of *uti possidetis de jure*. *Uti possidetis de jure* was then combined with the doctrine of "effective occupation" (or, *uti possidetis de facto*), which is, arguably, a continuation of *terra nullius* by other means. The refinement of the doctrine came about in South America in response to the need on the part of the new independent states to declare that all Latin American territories were occupied

territories. At this stage, the South American states agreed that even though they did not effectively control their national territories, the territories could no longer be considered as *terra nullius*. The newly independent states needed to ensure the transfer of title from the Spanish Crown. It was officially declared that no lands were to be considered *terra nullius* so that the lands could not be open to conquest by extra-regional European powers. The right of conquest instead fell to regional states (Gilbert, 2006).

The extinguishment of the European right to conquest was therefore coupled with a regional right to acquire indigenous territories not yet under state control. Effective occupation was defined through different international arbitrations and tribunals throughout the 1920s that sought to deal with the competing claims of ownership and possession over an area. The central principle was that the conqueror, after arriving in a "free" and "empty" territory, must organize its effective occupation. This could be done through the establishment of a settlement, the building of a fort or any other act that could show that the state controlled the territory it was claiming. For disputed territories, the role of international law was to evaluate the degree of occupation. While *uti possidetis de jure* referred to legal possession, as stipulated in treaties and legal documents, *uti possidetis de facto* gives priority to conquest or settlement. The distinction between *uti possidetis de jure* and *uti possidetis de facto* is important as it reflects a conflict between two types of boundaries—the abstract lines drawn in boundary treaties and the boundaries defined on the ground by forces of occupation (Parodi, 2002). As with *terra nullius,* the basic presupposition of effective occupation was that indigenous communities could not "effectively" own their lands because their systems of ownership were not civilized enough to enable them legal occupation (Gilbert, 2006). The doctrine entailed the denial of indigenous peoples' capacity for territorial ownership.

Summary of Methodological Approach

The League of Nations' Report on the Chaco War does not provide an objective, disinterested portrayal of reality. Rather, the language used in the document is a reflection of particular political as well as cultural attitudes and interests (Hazburn, 2005). The Report is a political document and its truth claims are constitutive of the particular political order of which it is a part (Gallaher et al., 2009). The overall theoretical framework guiding this thesis is critical border studies and its understanding of bordering practices and border performances. Critical border studies also allows for an understanding of the League's Report as a bordering practice that is performed through text, rendering it amendable to discourse analysis. The three border discourses under review in this thesis are the doctrine of just war, the legal principle of *uti possidetis de jure* and the legal concept of *terra nullius*. The discourses are related in that both Paraguay and Bolivia appealed to the doctrine of just war as a way of justifying their engagement in the Chaco War. Their arguments in favour of just cause were in turn based on their respective interpretations of *uti possidetis de jure* and *uti possidetis de facto* (effective occupation), as each side attempted to prove that they were the rightful owners of the Chaco territory. *Uti possidetis de jure* and *uti possidetis de facto* in turn presupposes *terra nullius* and a conception of the Gran Chaco as empty land that could be appropriated through further colonization and occupation.

The three border discourses are also related in that they function as technologies of indigenous dispossession. Taken together, they amount to a denial of indigenous peoples' capacity to possess territory and provide the mechanisms for the consolidation of territorial sovereignty on the part of Paraguay and Bolivia. Carl Schmitt's *nomos* is one way of understanding the relationship between these three discourses as it shows how international law and bordering practices are rooted in primary processes of land appropriation, land

division and land cultivation. Schmitt traces the rise of the *jus Publicum Europaeum* (European public law) from the Christian Middle Ages through the colonial period to its eventual collapse in 1919 with the end of the First World War. He is specifically concerned with the "spatial chaos" of the era of League of Nations and the conflict between its humanitarian ideals and its upholding of the Westphalian state system. The tension between the League's adherence to the spatial system of sovereign states, on the one hand, and it claims toward being a universalist organization on the other are apparent with regard to its treatment of the territorial attachments of indigenous peoples.

Chapter Five: Land Appropriation, Morality and the Doctrine of Just War

Bordering practices are activities that constitute, sustain or modify the border and include both the act of war and the discourses justifying the war. With regard to the latter, bordering practices are performed through geographic language and imaginaries and are performative of particular social and political realities. The purpose of this chapter is to consider the doctrine of just war as a border discourse and as a technology of indigenous dispossession with reference to the spatial imaginaries that are at the basis of the League of Nation's Report on the Chaco War. The doctrine of just war addresses three central concerns: *jus ad bellum* (the conditions under which a war can be justifiably initiated), *jus in bello* (the tactics that may be justifiably employed in war) and *jus post bellum* (the terms necessary to bring about the just end to a conflict) (Ramsey, 2002). In other words, the doctrine of just war is a moral doctrine. The justness of a war is determined with reference to the reasons a war is fought, to the way in which the war is fought and to the way the war is concluded (Nabulsi, 2013). The doctrine—specifically *jus ad bellum*—underlies many of the arguments made by Paraguay and Bolivia in support of their territorial claims and was used by both sides to justify their military engagement. Section I of this chapter discusses the just cause condition of doctrine of just war and its use by Paraguay and Bolivia to establish their territorial claims and the settlement of the Chaco boundary. Section II details these issues with reference to indigenous dispossession and Section III considers Carl Schmitt's theory of the *nomos* in relation to the Westphalian legalist paradigm and the League of Nations attempt to "outlaw war" as an instrument of national policy (Bugnion, 2002).

Jus ad Bellum **and the Origins of the Chaco Dispute**

On May 10th, 1932 Paraguay declared war against Bolivia. Bolivia in turn protested to the Council of the League Nations and argued that that Paraguay was placing itself outside of Article 16 of the Covenant. The declaration of war meant that Paraguay had, in theory, committed "an act of war against all other Members of the League" and was to therefore be subjected to economic and military sanctions (The Covenant, 1924). As signatories to the Covenant, both Paraguay and Bolivia were under an obligation to settle the dispute by pacific means and were to "entrust the final settlement of the dispute to an impartial authority" who would "fix the frontier between the two countries" (Report, p. 138). The League's response was to form a Commission of Reconciliation, composed of an ambassador from Italy, an ambassador from Spain, a French General, a Mexican Major and a Brigadier-General from Britain, along with the Legal Advisor to the Secretariat of the League of Nations and a Counselor from the Secretariat's Political Section (p. 140). The Commission arrived in South America with the stated intention of putting an immediate halt to the military conflict. The long-term goal was to resolve the border conflict and to prepare, in consultation with representatives from Paraguay and Bolivia, an agreement to submit the dispute to further arbitration.

The League of Nations Report proceeds from a presumed position of neutrality as it lays out the main points of contention between the two parties. The League considered itself an objective, third party observer with no vested interest in the region, working "in the name of humanity" to end the war and bring about a final resolution to the boundary dispute. The Report positions its authors as disinterested bystanders whose purpose was to document the evolution of the Chaco dispute, from its origins in the failed attempts at diplomacy to the military conflict itself. The document is both reflective of a particular set of socio-political values and constitutive of those values. It is imbued with border

imaginaries and border languages that normalize and rationalize the subject position of the League as an apolitical international institution. It also normalizes and rationalizes the subject positions of the states themselves, considering them unified Westphalian actors with legitimate goals and aspirations. At the same time, the document normalizes and rationalizes the erasure of the indigenous peoples of the region. The Report is silent with respect to indigenous land claims and makes only one mention (in an 80 page document) of the indigenous groups whose tribal territories were at the centre of the dispute, stating that the region had at once time been occupied by "savage tribes" who had "defied for three centuries the authority of the conquistadors" (p. 153).

This silence is a reflection of the dominant discourses of the time and reinforces the precepts of a form of international law that posits the rights of states as taking precedence over the rights of non-state indigenous actors. The erasure of the indigenous of the Chaco is also evident in the League's restatements of Paraguay and Bolivia's appeals to the doctrine of just war, specifically the *jus ad bellum* condition. The references to *jus ad bellum* (the justness of going to war) throughout the Report are unavoidable as armed struggles between states are almost always supported and sustained by discourses of justification (Murphy, 1990). The principles of *jus ad bellum* hold that a war is just if it has a just cause, if it is undertaken as a last resort, is declared by a proper authority, has a reasonable chance of success and has an end that is proportional to the means used (Moseley, 2013). In terms of just cause, Paraguay and Bolivia both argued that they were righting a historical wrong and were acting against the aggression of the opposing party. Paraguay and Bolivia each held that the war was a war of last resort as it was undertaken after the failure of a long series of diplomatic wrangling. Following the traditional doctrine of just war, it was undertaken by a proper authority, in this case, decided upon by the acting governments of the two respective states. The war was fought with right intention in that its aim was to

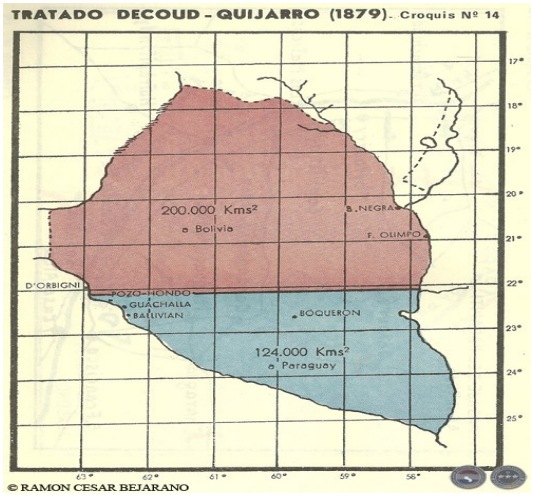
solidify the boundary and to achieve lasting peace. Finally, the war was proportional—however destructive it may have been, Paraguay and Bolivia argued that the ends justified the means. An inviolable border is an essential component of political sovereignty and territorial integrity.

The League's Report provides a description of the evolution of the border dispute and in doing so uncritically replicates Paraguay and Bolivia's respective understanding of their right to the appropriation of indigenous lands. The first two chapters of the Report—"The Geographical Facts Concerning the Chaco" and "The Chaco Dispute"—are related to the just cause and last resort conditions of *jus ad bellum*. They provide an overview of the arguments given on both sides for engaging in the Chaco War and also highlight how the doctrine of just war functions as a discourse of indigenous dispossession. The Report begins by stating that during the first half of the nineteenth century, there was in fact no territorial dispute between Paraguay and Bolivia over the Chaco. In the decades after the 1810 South American Wars of Independence, Paraguay existed in "a state of complete isolation and [was] deliberately held aloof from the outside world." (p. 155). It was not until 1842, however, that the Paraguayan Congress approved the Act of Independence of the Republic and concluded a Frontier and Navigation Treaty that specified that the River Paraguay "shall belong from bank to bank in full sovereignty to the Republic of Paraguay down to its confluence with the Paraná." (p. 156). The Act was immediately protested against by the Bolivian Chargé d'Affaires at Buenos Aires, who argued against the treaty on the grounds that no mention had been made of Bolivia's right, as a riparian State on its western bank, to the River Paraguay between parallels 20, 21 and 22 (p. 156).

The Bolivian argument countered the Treaty by arguing that provision was prejudicial against the rights of the Bolivian nation with respect to the waters of the River Paraguay. In response, Bolivia enacted a law that held that the waters of all of the "navigable rivers flowing through her territory into the

Amazon and the Paraguay to be open to the trade and merchant shipping of the whole world" (p. 156). Port Magariños on the Pilcomayo, Bahia Negra and Fuerte Borbón on the western bank of the River Paraguay were declared "free ports" and open to "the trade and shipping of all merchant vessels irrespective of the flag they flew, their origin or their tonnage" (p. 156). Relying on their presumed right to navigate these rivers down to the Atlantic, the Bolivian Government also "invited all nations to make use of them" and promised to grant territory to any individuals or companies who succeeded in reaching the aforementioned ports from the Atlantic and who subsequently created agricultural and industrial establishments there.

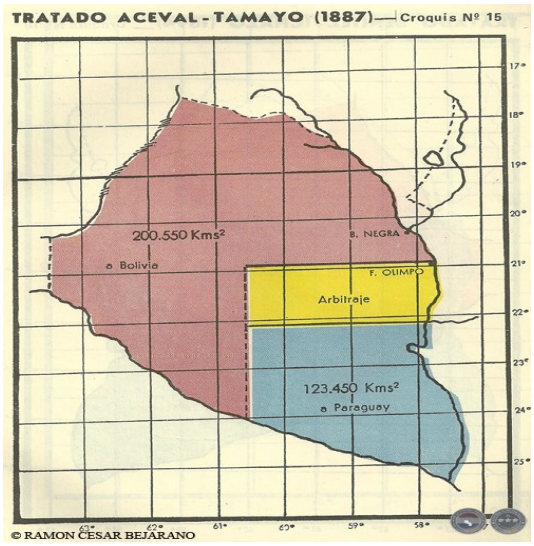
The Doctrine of Just War and Indigenous Dispossession.



Map 4: Proposed border line of Tratado Decoud-Quijarro (1879). Bejarado, 1982.

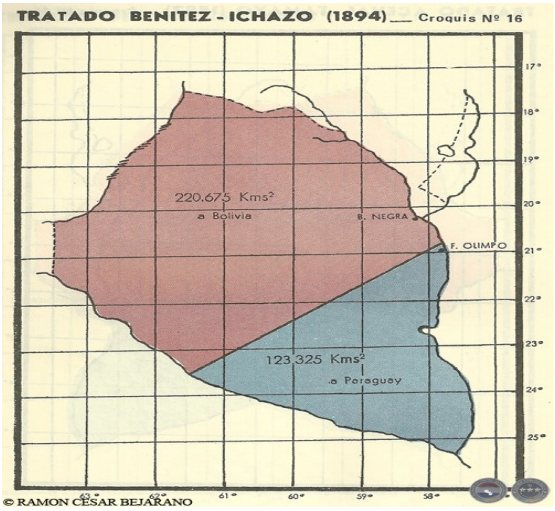
The Frontier and Navigation Treaty was a way of appropriating indigenous territory through state-defined law. The League's Report makes no mention of the indigenous peoples whose lands were at the centre of the boundary dispute. Nor, according to the document, did Paraguay or Bolivia as they engaged in what was close to two centuries worth of diplomatic wrangling over the Chaco Boreal. Representatives for the Paraguayan and Bolivian governments signed three different agreements for the settlement of the boundary dispute, none of which were ratified and none of which came into force (p. 157). The treaties were the Decoud-Quijarro Treaty of 1879, the Aceval-Tamayo Treaty of 1887 and the Benites-Ichaso Treaty of 1894. According to the League, these attempts to

reach a settlement by compromise were "subsequently regarded as dark pages in the national history of both countries" (p. 158). The negotiators accused one another of having "sacrificed indisputable titles" as "ever wider research by historians and jurists brought to light documents from archives and… legal arguments which convinced both nations that they possessed rights that were being disregarded by the other party" (p. 158). This led to a series of protocols and acts of mediation on the part of the Argentine government that aimed to settle the frontier between the two countries as well as the *status quo* of their respective possessions. Instead of solving the frontier problem, the acts of mediation and arbitration instead gave rise "to a long quarrel which has continued to this day" (p. 159).



Map 5: Proposed border line of Tratado Aceval-Tamayo (1887). Bajarado, 1982.

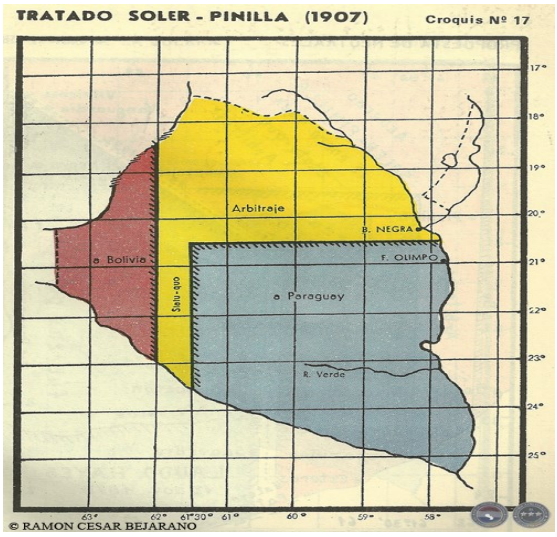
Then came a series of Protocols. The Pinilla-Soler Protocol of 1907 and the Ayalo-Mujia Protocol of 1913 were again disastrous and only led to further difficulties. Unable to come to a resolution, the 1913 Protocol was extended on several occasions. The turning point in the dispute came in 1915 when the Bolivian representative handed the Paraguayan representative "a voluminous historical and legal work, consisting of three volumes of exposition, five volumes of appendices, and various maps." This, according to the League of Nations, was "the definite beginning of the controversy concerning legal titles, the scope of the rule of the *uti possidetis* of 1810 in American law, the interpretation of the acts of the Spanish Crown before that date, the narrations of the expeditions of the conquistadors, the evidence of explorers and that furnished by geographical



Map 6: Proposed border line of Tratado Benitez-Ichazo (1894). Bajarado, 1982.

maps." (p. 161). The dispute intensified and had "only become more and more bitter, because it has been accompanied by controversies, magnified by the press, over inaccurate or truncated quotations, tendentious interpretations an the alleged deliberate "lies"" (p. 161). Accordingly, the conflict became "a battle of historians and jurists, convinced of the justice of their own cause and of the adversary's bad faith" which in turn "helped to create the noxious atmosphere surrounding the dispute." (p. 161).

Neither Paraguay nor Bolivia could definitively establish which of the states was the rightful owner of the Chaco Boreal and, in 1927, serious military incidents began to take place. On February 16th, a Paraguayan patrol was captured at the Bolivia fort Sopresa. The Bolivian Chargé d'Affaires at Asuncion protested against "the violation of his country's territorial sovereignty" (p. 162). The patrol leader was later killed when attempting to escape (according to the Bolivians), which thus "helped to raise the question of the *status quo* in an acute form." The Paraguayans then



Map 7: Proposed border line of Tratado Soler-Pinilla (1927). Bajarado, 1982.

argued that it was the Bolivian army that had violated Paraguay's territorial sovereignty by capturing the patrol. This led to yet another attempt at solving the border dispute, again with the Argentine government acting as mediator. Once more, "the arguments or proposals to be put forward for determining the frontier line might include relevant legal documents or precedents, and also suggestions for a compromise solution or territorial compensation." (p. 162). It was further provided that the plenipotentiaries would specify the exact area that was to form the subject of an award by an arbitral tribunal, that is, if they failed not reach an agreement otherwise.

Again, the League's Report is silent with respect to any territorial claims that indigenous peoples may have had to the territory in question. The silence is odd considering that historical justifications played such a large role in Paraguay and Bolivia's respective formulation of the just cause condition. The exchange of historical documents and historical maps was undertaken in order to prove their respective territorial rights of possession (Murphy, 1990). Arguably, the reason for the failure of diplomacy was that neither side could offer definitive proof that they were in fact entitled to the Chaco Boreal. As one Paraguayan observer at the time remarked:

> The boundary question with our brothers on the west [Bolivia] has recently become a historic point and the Bolivians are covering us with dust and wisdom as we do ourselves, digging like rats in the worm-eaten archives in search of documents and more documents to prove with the clearness of noon our respective rights to the accursed Chaco, which, after all, really belongs to the Tobas, Lenguas, Mbayaes and the rest of the tribes that populate its broad expanse… (Editorial, "In Joke or in Earnest: The Third Bolivian-Like Incident," *El Orden* (Ascuncion), cited in McCormack, 1999, p. 296).

The League's restatement of Paraguay and Bolivia's justifications for going to war replicates the silence of the two countries concerning the indigenous of the

Chaco. The League of Nations, Paraguay and Bolivia uncritically accepted the notion that indigenous lands were open for the taking. This is because the doctrine of just war is predicated on the Westphalian legalist paradigm, which holds that only independent states have a right to territorial integrity and political sovereignty. By erasing indigenous peoples and their territorial claims from the landscape, Paraguay and Bolivia could use the doctrine of just war as a way of claiming the Chaco Boreal as their own and could argue that the other side had violated their territorial integrity. They could each claim that they were fighting a war of self-defense and that they were each the recipient of a "wrong received" (Walzer, 1977).

"Spatial Chaos": Carl Schmitt and The League of Nations

Carl Schmitt's theory of the *nomos* allows for a deeper understanding of the relationship between the doctrine of just war, bordering practices and the performative content of the League's Report. Schmitt was highly critical of the League of Nations, condemning the institution for its 'spaceless' universalism as being emblematic of a new reign of 'spatial chaos.' For Schmitt, the League of Nations engendered a spatially chaotic world order in that it continued to uphold the principles of the Westphalian legal order while simultaneously adhering to the principles of universalism. The Westphalian order is predicated on a spatial division between states, understood as having territorial sovereignty and inviolable borders. A universal order both transcends and undercuts the Westphalian order as calls territorial sovereignty into question on humanitarian grounds. In Schmitt's view, the League represented "the worst of individualism, liberalism, normativism, an attempt to eradicate the 'political' from internal and external politics" (Legg, 2011, p. 111). The League was emblematic of the demise of the *jus Europaeum publicum* (European public law) in that it ushered in an era of allied powers that were no longer bound by a common spatial order (p.

241). The problem was that the League sought to uphold the old spatial order of the Westphalian legalist paradigm while simultaneously introducing a humanitarian element. For Schmitt, the League's contradictory claims to being both an international and a universalist organization that led to a form of international law that was 'spaceless,' which in turn had the result that it "further hemmed in the possibility of bracketed wars" (Legg, 2011, p. 111).

'Bracketed wars' are limited wars with clearly defined rules, such as those of the earlier epoch of the *jus Europaeum publicum*. They are based on a clear spatial order that equates state sovereignty with the inviolability of state borders. War was a justifiable way of settling international disputes. It was not a crime. Nor was it considered that the only justifiable war was a war undertaken "in the name of humanity." Rather, with the spatial order of the *jus Europaem publicum* was predicated on the "the rationalization and humanization of war, i.e., the bracketing of war in international law." Such bracketing was possible because the problem of just war was determined by formal juridical categories (Schmitt, 2003, p. 141). What this meant was that during the epoch of the *jus Europaeum publicum*, war could only be authorized and organized by those states that were territorially defined. Conflicts were between spatially defined units conceived of as public persons, making it possible for each side to recognize the other as a *justis hostis* (just enemy). The belligerents had the same political character and the same rights, and both sides recognized the other as states. The enemy was not someone who must be annihilated, but someone with whom it was possible to conclude treaties of peace.

Schmitt does not address issues related to indigenous peoples or their land claims and it appears that Schmitt idealizes the Westphalian spatial order, supporting Paraguay and Bolivia's efforts to claim the Chaco through the violent appropriation their traditional territories. It would be better, however, to think of Schmitt's critique with reference to his opposition to the League's attempts at

intervening in the conflict. For Schmitt, the spatial order engendered by the League's universalist aspirations was ultimately destabilizing and in fact allowed for the escalation of wars. The problem with the League of Nations, for Schmitt, was that it considered itself a universalist organization while at the same time continued to assert the primacy of state sovereignty. As such, it neither abolished states nor abolished wars. Rather: "It introduces new possibilities for wars, permits wars to take place, sanctions coalition wars, and by legitimizing and sanctioning certain wars, it sweeps away many obstacles to war" (Schmitt, 2003, p. 79). International law is not supposed to abolish war. Rather, the point of international law should instead be to avoid wars of annihilation.

For Schmitt, the bracketing of war is only possible under the spatial regime of the *jus Europaeum publicum*. With the League of Nations, the comprehensive spatial order of European public law was undercut by its humanitarian ideals and through the criminalization of war. The League was clearly not intervening in the Chaco War on behalf of indigenous groups *qua* indigenous groups, nor did it seem to acknowledge that it was the indigenous of the Chaco who bore the brunt of the conflict. Rather, the League's attempt at intervening in the Chaco dispute was undertaken in the name of international peace and security, on behalf of humanity as a whole. Humanity includes indigenous persons as persons, but the League of Nations was not concerned with indigenous groups as a whole. Schmitt, of course, was not any more concerned with the specific content of indigenous land claims than was the League of Nations. Schmitt's point was more that the criminalization of war on the basis of humanitarian ideals ends up placing states, such as Paraguay and Bolivia, outside the law as opposed to being contained by law. And it was this, from the perspective of Carl Schmitt, that allowed Paraguay and Bolivia to treat one another as criminals and therefore as entities to be annihilated through any means possible. The result was unlimited, total war.

The *nomos* of the League of Nations was, according to Schmitt, spatially chaotic, with the tension between its humanitarianism and its support for the Westphalian legalist paradigm having additional implications for the doctrine of just war. Schmitt makes five basic points. First, he argues that no moral idea can ever justify killing. There is no such thing as a "just" war—a war can never be *morally* justified, although it can be justified on non-moral grounds. In particular, Schmitt holds that war is justified if it is waged to protect and preserve one's way of life. War can also be justified as a way of appropriating land. Second, the doctrine of just war fosters the notion that the enemy is evil and as such leads to the disregard for all rules of conduct in war. The notion of just war assumes that one party has morality on its side ("good") and the opposing party is morally defective ("evil"). This allows war to escalate. Just wars are therefore crueler, more intense and more inhumane that other wars. Third, in Schmitt's view, there is no transcultural or transhistorical notion of justice that can be invoked to claim that a war has a just cause. Any appeal to justice is nothing more than political rhetoric or a propaganda device (Stomp, 2006). Fourth, justness in war (*jus in bello*) can only be followed if one abandons the just cause criteria (*justa causa)*. When the *jus publicum Europaeum* acknowledged the rights of states, acting as states, to wage war, just cause no longer had a moral foundation. The result was the development of the rules of war. For Schmitt, the idea of just cause needs to be dismissed and a juridical (as opposed to moral) right to wage war ought to be acknowledged instead. The fifth argument is related to the League of Nations. For Schmitt, a war in the name of humanity denies that the enemy is a human being and so any war waged in the name of justice, progress or civilization uses a universal concept in order to claim these as one's own and to deny the same to the enemy (Stomp, 2006).

The Chaco War is instructive. Paraguay and Bolivia both used the rhetoric of the just war tradition as a justification for engaging in what was the

first South American instance of total war—that is, a war that made no distinction between combatants and civilians and also included the indiscriminate bombing of military and non-military targets. Both sides saw themselves as having just cause and as having the moral right to fight against the aggressor. This was not a legal right, as it would have been under the conditions of the *jus Europaem publicum*. Over time, the war intensified and the categories of enmity and enemy became increasingly more entrenched. At the same time, the League's intervention was justified on the basis of the Covenant, to which both Paraguay and Bolivia were members: Article 10 states that League members are to respect the territorial integrity and political independence of all League members; Article 11 states that "any war or threat of war… [is] a matter of concern to the whole League;" Article 12 states that members are to agree that disputes are to be submitted to the League for arbitration (Covenant, 1924). Article 16 states that if "any Member of the League resorts to war in disregard of its covenants… it shall ipso facto be deemed to have committed an act of war against all other Members of the League" (Covenant, 1924). Taken together, the articles attempted to halt the possibility of external aggression as well as any military action that violates the territorial integrity of its member states.

The League furthermore invoked "humanitarian sentiments" (Report, p. 178) which, according to Schmitt, contradicts its continued support for the Westphalian legalist paradigm. Schmitt's critique is that the League's roots in "international legal disorder" which leads to wars of annihilation when "when the structure of a spatial order becomes unclear and the concept of war is destroyed." Instead of bracketing war and clarifying it to be justified on non-moral grounds, "a new set of intentionally vague, formal compromises and cautiously worded stylized norms was assembled, and, in turn, was subjected to an ostensibly purely juridical interpretation." (Schmitt, 2003, p. 243). The point, for Schmitt, was that the jurisprudence of war ought to be restricted to the observance of certain

recognized forms of legitimate state-conducted warfare. It would exclude traditional distinctions among more or less just causes of war, which was impossible given the universalist foundations of the League of Nations system (Nakhimovsky, 2010).

Schmitt also argues that "no comprehensive order of international law can be founded without a clear concept of spatial nomos" and "no system of norms so laboriously conceived and interpreted can replace this need" (Schmitt, 2003, p. 243). For Schmitt, "the ambiguous and internally irreconcilable nature of this peculiar League's basic concept of space was evident also in its concept of war." (Schmitt, 2003, p.246). On the one hand, the League remained committed to the interstate, military war of traditional European international law. This is evident in the League's restatement of Paraguay and Bolivia's articulation of the doctrine of war. While the League did not accept Paraguay and Bolivia as having a right to go to war to settle their competing territorial claims, they remained committed to the Westphalian legalist paradigm. However, traditional Westphalian international law sought to prevent wars of annihilation and, to the extent that war was inevitable, to bracket it. On the other hand, the League is committed to the abolition of war, which, without true bracketing, only results in new, worse types of war. For Schmitt, this leads to "spatial chaos" and to "the dissolution of 'peace' into ideological demands for intervention lacking any spatial concreteness or structure" (Schmitt, 2003, p. 246).

Conclusion

The purpose of this chapter has been to sketch out the doctrine of just war with respect to the arguments used by Paraguay and Bolivia to justify their engagement in the Chaco War. Both sides saw themselves as fighting a just war as they both considered the territory of the Chaco to be rightfully theirs as a matter of historical and legal title. The League of Nations did not support

Paraguay and Bolivia's reliance on war as a way of settling the border conflict, but it also did not repudiate the legalist paradigm of the Westphalian state system. For Carl Schmitt, this is a contradictory position and is problematic to the extent that the League "lacked any decision with respect to, or even any idea of, a spatial order" (Schmitt, p. 243). It wanted to be simultaneously a state-centered and a universal institution. As such, not only did it fail to abolish war but it also failed to bracket war. What this means is that it did not develop principles for the containment of war and its excesses. This led to the rise of total war in the twentieth century, of which the Chaco War is preeminent example on the South American continent. Moreover, while this humanitarian element may have acknowledged the rights of indigenous persons as individuals (i.e., the right of an individual to not to die in a brutal territorial war), it does not include an acknowledgement of the rights of indigenous peoples as organized groups with distinctive land claims.

Chapter Six: Land Division, International Law and *Uti Possidetis de Jure*

Uti possidetis de jure ("as you possess, so you shall possess") is a principle of international law and is taken to be a defining factor in the determination of territorial title. It holds that boundary disputes are to be settled with reference to colonial title and colonial land division (Majinge, 2012). The doctrine is problematic, however, in that the appeal to colonial land division on the part of states means that there is no recognition of indigenous people's territorial entitlements (Gilbert, 2006). It further implies that the lands occupied by indigenous peoples are to be included within the boundaries of any newly emerging states. The purpose of this chapter is to discuss *uti possidetis* in relation to the Chaco dispute, as it was used by both Paraguay and Bolivia in order to assert their claims over Chaco territory. It also played a role in their respective formulations of the doctrine of just war as both sides of the dispute considered the territory to be rightfully theirs as a result of historical and legal title, even if this title was ultimately a source of controversy. Section I contextualizes the League's restatement of Paraguay and Bolivia's use of *uti possidetis de jure* in relation to South American boundary discourses in general. Section II shows how the doctrine of *uti possidetis de jure* is related to the legal concept of the *status quo* and how it is predicated upon a denial of indigenous territorial attachments. Section III frames these issues with reference to the writings of Carl Schmitt and his critique that the League of Nations lacked any understanding of the principles of *inter dictum uti possidetis* (prohibition of change of possession).

Uti Possidetis de jure and the Chaco Dispute

Uti possidetis de jure is an international legal norm that originally developed within the context of the early nineteenth-century Latin American decolonization process. The Spanish colonies agreed to use *uti possidetis de jure* as a general rule for the settlement of their various frontier disputes. Its purpose

was to ensure that each new state would be recognized as having claim to the boundaries and the territories they originally possessed as provinces under the Spanish crown (Hensel et al., 2004). In this way, the new South American states were able to claim territorial sovereignty based on what were presumed to be clearly defined borders, while simultaneously assuring that there would be no new claims based on *terra nullius* ("territory belonging to no one") or any new claims by extra-regional states (Hensel et al., 2004). The idea was that, upon decolonization, newly formed states were justified in keeping their old colonial administrative boundaries. The colonial-era divisions were to serve as international borders, thus guaranteeing that the new states were accorded territorial integrity and all of the trappings of modern statehood.

The League's Report outlines the arguments used by Paraguay and Bolivia to bolster their respective claims to the Chaco territory. Paraguay argued on the basis of *uti possidetis de jure* that it was entitled to keep the historical boundaries that were bequeathed to it by the Spanish Crown. Paraguay further argued that the historical boundaries coincided with the "natural boundaries" of the Chaco, thereby separating their country from Bolivia in the north by both the Chochi Mountains and the Rio Negro. The boundaries were, according to Paraguay, the boundaries of the Province of Paraguay as they existed prior to the Wars of Independence of 1810 (p. 148). The Bolivian side argued, on the other hand, that neither the natural nor the historical boundaries were clearly delimitated. Bolivia countered the Paraguayan claims with an argument that the boundaries ought to be decided with reference to a northern parallel and a southern meridian. It was a compromise. Bolivia aimed at fixing the border at parallel 21 (between Olimpo and Villa Montes), conceiving the Chaco as a triangle with its apex to the south and its eastern and western sides formed by the Rivers Paraguay and Pilcomayo.

When the Bolivian proposal was rejected by Paraguay, Bolivia also began to invoke *uti possidetis de jure*. According to the Report, the turning point in the

dispute occurred in 1915 during the extended negotiations of the Ayalo-Mujia Protocol of 1913. It was at this point that the controversy arose over legal titles and the scope of the rule of *uti possidetis* of 1810. The two sides sought to establish their claims on the basis of the acts of the Spanish Crown prior to decolonization, the narrations of the expeditions of the conquistadors, the evidence of explorers and by geographical maps in order to prove their respective claims (p. 161). The League's Report precise definition of *uti possidetis de jure* is as the principle "whereby the boundaries of the Spanish-American Republic are the boundaries corresponding to the former colonial demarcations from which they took their configuration, subject to the modifications made in some of these demarcations by the War of Independence." (p. 161, note 24). This is in keeping with the dominant discourses of the South American states by which each border location were considered to be clearly defined in accordance with colonial-era administrative lines. The claim was that newly independent states were to inherit their pre-independence administrative boundaries as set by the former colonial power, with the title to colonial territory falling to 'provincial' authorities and prevailing over any competing claims based on effective occupation.

The further assumption was that internal, administrative borders were functionally equivalent to international boundaries (Sumner, 2004). The doctrine was considered a stabilizing force and was elevated into a general principle of international law as it was thought that its implementation was in some measure responsible for the avoidance of territorial conflict (Hensel et al., 2004). In the case of the Chaco War, however, the application of *uti possidetis de jure* did not, of course, prevent the war—rather, it exacerbated it, as the Bolivian side was correct in its original assertion that the boundary had never been clearly drawn in the first place. This was a problem throughout South America as, one the one hand, *uti possidetis de jure* was used by states to uphold the colonial *status quo* of 1810. On the other hand, the lack of clarity with regard to the precise location of

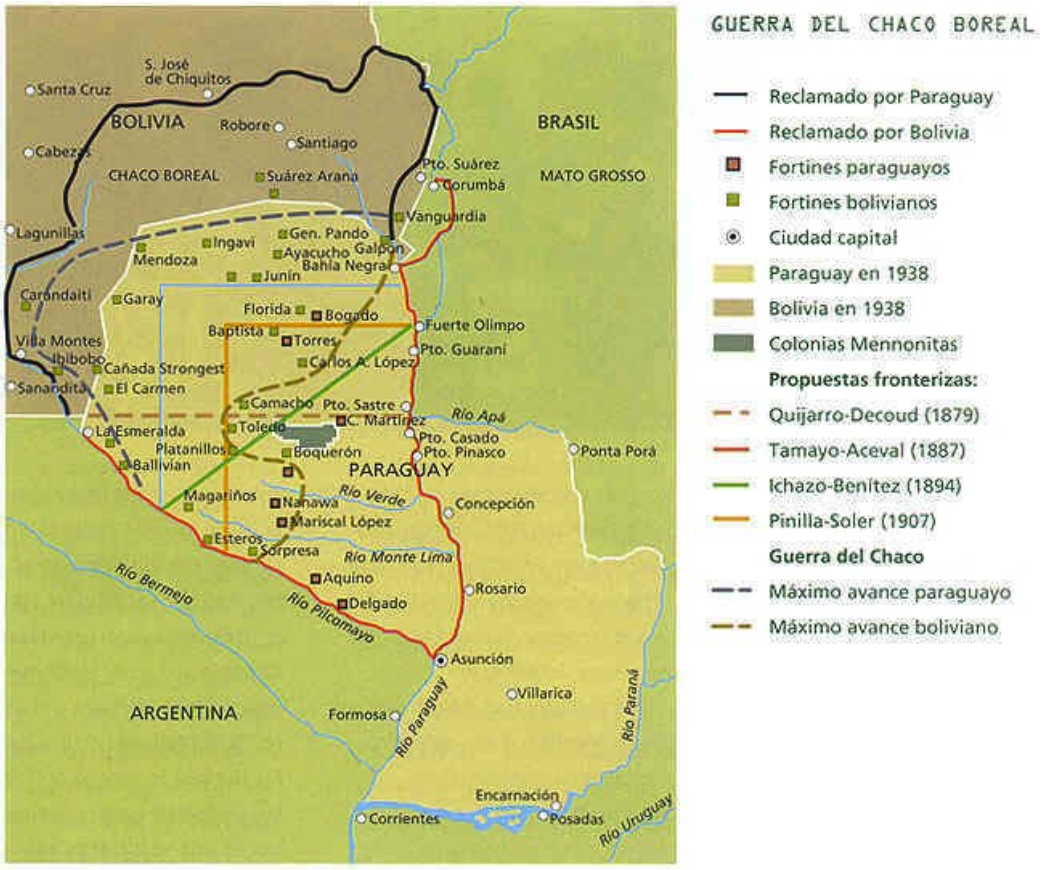
the boundaries meant that the doctrine did not actually resolve the underlying territorial disputes but simply delayed their resurfacing. Administrative colonial boundaries are almost always vaguely drawn and often did not correspond to the inhabitant population, meaning that *uti possidetis de jure* often lead to boundary disputes instead of mitigating them (Sumner, 2004).

The use of the doctrine in South America was plagued by several serious problems. The Spanish Crown had employed a variety of administrative units, meaning that different borders often delimited different but overlapping military, political and religious entities. Paraguay and Bolivia could therefore—with reason—claim possession of the Chaco based on their rights of inheritance from different Spanish entities. Another issue was also that the Spanish Crown often changed the borders of their administrative units over time, through seemingly arbitrary royal decrees from Madrid, which in turn raised questions about which state's colonial predecessor actually possessed a given territory under Spanish rule. Finally, many borders were never clearly marked as a result of ignorance of local geography. The continent was never entirely explored or settled under Spanish rule. In the case of the Paraguay-Bolivia borders, they were defined only vaguely and incompletely in Spanish documents and maps, which allowed each to argue that its colonial predecessors had explored and administered territory beyond the presumptive borderlines that were inherited at independence (Hensel et al, 2004).

These problems are evident in the League's description of the beginning of the military incidents between Paraguay and Bolivia. The military skirmishes began when a Paraguayan patrol was captured at a Bolivian fort. On the Bolivian side, the crossing of the border by the Paraguayans meant that they had violated Bolivian territorial integrity; for the Paraguayan's the very existence of the Bolivian fort was a violation of Paraguayan territorial integrity (p. 162). With both sides claiming territorial title on the basis of the *uti possidetis de jure* of

1810, the escalation of the conflict was all but inevitable. For Paraguay, the Chaco was "a territory with natural boundaries that could be determined by appropriate methods" (p. 176) and the territory was rightfully theirs insofar as they were "the lawful owner of the whole of the Chaco" (p. 179). The Chaco, then, was "not a vague and undefined area, but a territorial denomination the meaning of which was perfectly specific both geographically and historically." Hence, according to Paraguay, legal settlements made on the basis of *uti possidetis de jure* must respect the "geographical and historical unity" of the Chaco and any compromise with Bolivia would lead to "an arbitrary and unreasonable division" (p. 180). As the rightful owner of the Chaco, Paraguay saw no reason to cede a part of it to Bolivia. Bolivia, of course, held that they too were entitled to a portion of the Chaco and they had no reason to cede it to Paraguay.

The lack of clarity with respect to the original colonial boundary also had consequences for the League's attempt to determine the primary aggressor in the war and which side should be held responsible (Chapter IV). The League held that both Paraguay and Bolivia did in fact share "a common responsibility" in that they were both obstinate in their refusal to settle the dispute through peaceful means. The determination of responsibility was nevertheless difficult for the League as "each party claims ownership over the Chaco, and therefore maintains that it is waging a defensive war in its own territory." As the Report asks: "How is the aggressor to be determined in such a conflict? No international frontier has been crossed by foreign troops, since the Chaco question will only be settled by a delimitation of this disputed frontier." (p. 201). Hence, one might say that *uti possidetis de jure* did not in fact contribute to the settlement of the war but rather was a cause of it. For Paraguay, Bolivian troops infringed upon the *status quo* of the *uti possidetis* of 1801; according to Bolivia, Paraguayan troops did the same (p. 201).



Map 8: Borderlines of the Chaco War. Geografía iberoamerica, 2012.

Uti Possidetis de Jure, the *status quo* and Indigenous Dispossession

Uti possidetis de jure is technology of indigenous dispossession. It is a state-centric principle that fails to take the territorial claims of non-state actors into account. More specifically, the principle privileges the territorial claims of states over the territorial claims of non-state indigenous actors. The doctrine ensured that the lands occupied by indigenous peoples would be part of the new state. Indigenous laws and historic patterns of land use are ignored, as per the Western framework of international law. Indigenous peoples are not recognized as 'peoples' capable of enjoying sovereign status in the international regime, leaving them vulnerable to practices endorsed by international law. In essence,

modern international law continued to govern patterns of colonization and legitimized the colonial order (Duffy, 2008). Again, the Spanish colonies that invoked *uti possidetis de jure* without any regard for the land claims of indigenous peoples, meaning that the principle benefited the Creole or local elites of European extraction. The elites of the new states used the doctrine in order to effectively preclude any recognition of the rights to the lands that the indigenous peoples had historically inhabited. *Uti possidetis de jure* also gave an aura of historical legality to the expropriation of indigenous lands. The new elites, in other words, divided territory among themselves in exactly the same way as the former imperial powers had, i.e., without regard to the claims or interest of the aboriginal inhabitants (Reisman, 1995).

The doctrine of *uti possidetis* is therefore related to the colonial patterns of empire and conquest that engulfed indigenous peoples. There is no room within the doctrine for an understanding of indigenous peoples as self-determining communities. The League of Nations Report on the Chaco War exemplifies this complex of ideas. At no time, in any of the descriptions of the negotiations undertaken by Paraguay and Bolivia, is there any acknowledgement that the territory under dispute was the traditional indigenous territory. The proceedings are addressed to heads of states, ambassadors, plenipotentiaries and lawyers. The central concern was to delimit the boundary in accordance with *uti possidetis de jure* and to establish the *status quo* of the two countries' respective "possessions" as guaranteed to them in accordance with international law. The *status quo* is "the existing state of affairs," more specifically "the last actual and uncontested state of affairs that preceded a controversy and that is to be preserved by preliminary injunction" (Merriam-Webster Dictionary of Law). This *status quo* was, of course, interpreted in two different ways. According to the Paraguayan side, they were "the lawful owner of the whole of the Chaco." The Chaco "was not a vague and undefined area, but a territorial denomination the meaning of

which was perfectly specific both geographically and historically" and as such "any legal settlement must respect that geographical and historical unity" (p. 180). Accordingly, if Paraguay was rightful owner of the Chaco, then there was no reason to cede any part of it to Bolivia and, if Bolivia had sovereign rights, then Paraguay must be totally excluded. Bolivia replied that the conflict could only be resolved on the basis of *uti possidetis de jure* of 1810 and that "an agreement between the parties for legal arbitration on the basis of title inherited from the Spanish crown was essential for the settlement of the conflict" (p. 181).

The Report's discussion of *uti possidetis de jure* and the *status quo* replicates the subject positions of the League of Nations as a neutral, third party observer and the positions of Paraguay and Bolivia as unified, territorial actors with legitimate claims to the Chaco Boreal. It also erases indigenous peoples from the landscape and ignores their territorial claims. The Report repeatedly refers to the *status quo* of Paraguay and Bolivia's territorial possessions, a doctrine that presupposes that Paraguay and Bolivia were fully justified, as states, in appropriating and dividing indigenous territories for themselves. As per the Westphalian legalist paradigm, the 1907 Pinilla-Soler Protocol was the "first act for the settlement of the question of the "status quo." In this early treaty, Paraguay and Bolivia had accepted the mediation of the Argentine Republic, an act that aimed at settling two questions: first, "the question of the frontiers between the two countries" and second "that of the *status quo* of their possessions" in the Chaco. The problem was that the *status quo* was uncertain, and Paraguay and Bolivia kept making new claims as they constructed new posts that were drawing nearer and nearer to one another (p. 158-159). The following Protocol of 1913 once again attempted to determine the *status quo* of the two countries so-called possessions. The Protocol of 22 April 1927 also saw the representatives of Paraguay and Bolivia meeting in Buenos Aires, where they again put forth arguments and proposals for determining the frontier line on the

basis of previous legal documents and precedents. The aim was to "reach an agreement on the final tracing of the frontier" and, once again, the native peoples of the Chaco were all but forgotten in the consideration of the dispute, that is, with regard to the question of the sovereign territorial boundary between Bolivia and Paraguay (p. 162).

After Paraguay officially declared war in 1932—with the war continuing to escalate—the League repeatedly attempted to reconcile Paraguay and Bolivia's territorial claims and have the dispute submitted for arbitration. Matters were complicated by the fact that Paraguay and Bolivia were themselves at odds at how to end the war. Paraguay argued that it was necessary that a final cessation of the hostilities occur before arbitration, whereas Bolivia argued that arbitration must occur before the final cessation of hostilities:

> It found itself faced once more with the same irreconcilable standpoints. Paraguay was not prepared to cease hostilities except under agreement the essential purpose of which would be the safeguarding of security, leaving the settlement of the substantive question for future negotiations, unless Bolivia was prepared to abandon at one all claim to a very large part of the Chaco. Bolivia insisted on the conclusion of an agreement for the settlement of the substantive question, the security clauses being in her opinion a secondary issue (p. 145-146).

The League of Nations saw itself as "essentially a negotiating Commission" whose task was to bring about a peaceable end to the war, with conditions that would be accepted by all relevant parties. Of course, the relevant parties were narrowly defined, as the League counted only the interests of Paraguay and Bolivia as nation-states and excluded the interests of non-state indigenous actors.

Carl Schmitt and the Nomos of the *jus Publicum Europaeum*

Carl Schmitt's critique of the League of Nations is that it "lacks a spatial order" (p. 247). The common legal norms and traditions that had hitherto characterized the Westphalian order were in crisis, according to Schmitt, as the old European order had not been replaced by another spatial order, but only by the empty universalism of the League of Nations (Milano, 2013). As discussed in the previous chapter, Schmitt's position was that the League of Nations' humanitarianism was in conflict with its continued support of the Westphalian legalist paradigm. This led to a form of international law that did not and could not articulate a unified spatial order with clear principles that would in turn act to contain the excesses of war. It further means that the League of Nations was ineffectual when dealing with questions of land division, in particular with the problem of territorial change. For Schmitt, the League's inability to articulate the principles of a new spatial order meant that it's position on the territorial *status quo* was not based on a sound legal principle. In Schmitt's view, the League was forced to abide by the "mere fact of the given status quo," rendering it incapable of questioning and/or overturning the core structure of international law. The League of Nations did not have a clear sense of *inter dictum uti possidetis* (prohibition of change of possession) and did not adopt a provisional guarantee of state property, both of which are essential to the *nomos* and to unity of order and orientation as articulated through the principles of international law (p. 245).

The *nomos* of any given epoch is based on the tripartite processes of land appropriation, land division and land cultivation. Land is appropriated, with legal title coming about in one of two ways: a parcel of land is extracted from a space that has been considered free (as having no owner or master recognized by the foreign law of the land-appropriating group) or a parcel of land is extracted from a formerly recognized owner. In the case of the Chaco, the Spanish colonizers had already (in theory) claimed the indigenous lands for themselves as they had

viewed indigenous territories as being open and free spaces with no legally recognized owner. From the perspective of Schmitt, the principle of *uti possidetis de jure* and the question of land division after decolonization are rooted in an originary colonial land appropriation, as all property and every legal order have land appropriation as it precondition (Schmitt, p. 81). Every spatial order, then, contains a spatial guarantee of its soil. The spatial order of international law, for Schmitt, is a legal-philosophical and political problem. It is also a territorial matter because it derives from a comprehensive spatial order in which territorial change ought to be achieved without endangering the overarching spatial order.

The Great European Powers developed the procedures for territorial changes in international at the major peace conferences of the 18th and 19th centuries. With the League of Nations, however, the stress was on "peaceful change," which was problematic insofar as it was unable to articulate how, exactly, new land appropriations were to take place (p. 186). Within the *jus publicum Europaeum,* international law addressed itself to states as sovereign persons and the state was conceived of juridically as a vehicle the spatial order. The state was the legal subject of international law and only with a clear division of states into territories was the balanced spatial order possible. This spatial order was "comprehensive" and required firm borders as a guarantee of the individual states territorial status (p. 155). Changes of territorial possessions were, however, unavoidable, leading to one of the core problems of international law—how to allow for territorial change without endangering the spatial order (p. 186). The international law of the *jus publicum Europaeum* gave prominence to "more or less elastic principles or perspectives," such as territorial equilibrium, natural borders, national or popular rights of self-determination, delimitation of sphere of influence and interest, and affirmation and recognition of great spheres of special interests. These elastic methods and procedures were ways of legitimizing

territorial changes and new divisions, methods and procedures that served to preserve and to develop the existing spatial order as a whole.

The issue, from the standpoint of law and jurisprudence, was not so much about the moral or philosophical problem of war, but with changes in the territorial status quo and its effects on the given spatial order of an epoch. It was, for Schmitt, the "great problem of international law" and "cannot be disposed of as easily as can the pacifism of the League of Nations" (p. 187). For Schmitt, the League of Nation is nihilistic—it does not recognize nor safeguard true international law nor does it recognize the binding character of a comprehensive spatial order (p. 187). Whereas, for instance, territorial changes and the new formations of states in European interstate international law were achieved as collective agreements at European conferences, the League of Nations conferences "produced no true adjudications, because they had neither the content of the old, specifically European order nor the content of a new global order" (p. 192). Every order of international law must provide a guarantee of its fundamental *nomos* (its spatial structure and its unity of order and orientation). The problem with the League of Nations is that it lacked any ability to make decisions over the spatial order, such as an internally consistent and unifying principle of the territorial status quo. It did not presuppose a clear *inter dictum uti possidetis* (prohibition of change of possession) nor did it adopt a provisional guarantee of property. For Schmitt, every unity of order and orientation requires a concept of property guarantees, of the status quo and of *uti possidetis* (p. 245). The *nomos* is a historically driven process and implies a taking, a dividing and a making power that all lay within the performative appropriation, distribution and production of the legal-political order. The League of Nations conferences, such as those concerning the Paraguay-Bolivia boundary dispute, were therefore problematic it that it neither fully supported "the old, specifically European spatial order nor the content of a new global order" (p. 192). The League of Nations did

not fully support the principle of *uti possidetis de jure* nor was it able to articulate new principles with which to replace it.

Conclusion

The appeal to *uti possidetis de jure* on the part of Paraguay and Bolivia was an extension of the nineteenth century Latin American decolonization process, whereby the newly decolonizing states sought to redefine the rules of territorial possession within the framework of an international law that was created by the previous colonial regime. The original transfer of territory from the Spanish Crown to Paraguay and Bolivia proceeded without reference to the indigenous peoples of the Chaco, with the central problem for Paraguay and Bolivia then being a question of how to divide the traditional indigenous territories between themselves. The appeal to *uti possidetis de jure* on the part of Paraguay and Bolivia therefore functioned as a technology of indigenous dispossession as they attempted to establish legal and historical title what was originally indigenous territory (Gilbert, 2006). The paradox, however, that while *uti possidetis de jure* was used within the context of a sovereignty-based approach to international arbitration, it did not resolve the border dispute but rather contributed to its perpetuation (McCormack, 1999). The League of Nations, for its part, did not appear to be capable of intervening. For Carl Schmitt, this was because the League of Nations was 'spatially chaotic' and did not have a consistent view on how land appropriations and land divisions were to be articulated through the principles of international law.

Chapter 7: Land Cultivation, Colonization and *Terra Nullius*

Terra nullius was an influential doctrine of the nineteenth century that held that indigenous lands were free territories that could be acquired through colonial occupation alone. This was because indigenous society and forms of social and political organization did not meet European standards (Duffy, 2008). The point was that indigenous peoples did not legally exist and therefore did not have any right to territorial ownership. At the time of the Chaco War, however, the doctrine of *terra nullius* had evolved into new rules of territorial acquisition with the concept of effective occupation (Gilbert, 2006). Effective occupation is sometimes referred to as *uti possidetis de facto* and contrasts with *uti possidetis de jure.* The latter refers to legal possession, while the former refers to effective possession. *Uti possidetis de jure* reflects the idea that boundaries should be those of the former colonial jurisdictions, whereas *uti possidetis de facto* gives priority to the boundaries defined on the ground through processes of conquest or settlement (Parodi, 2002). The purpose of this chapter is to discuss the way in which the doctrine of effective occupation (*uti possidetis de facto)* is based on and presupposes the earlier concept of *terra nullius*. The first section discusses the way in which the border discourses of the League of Nation's Report produces and reproduces a vision of the Chaco Boreal as "empty land." The second section will discuss the erasure of the indigenous peoples of the Chaco with reference to the Report's discussion of the colonization of the Chaco and Paraguay and Bolivia's attempts to justify territorial ownership on the basis of effective occupation. The third section will discuss Carl Schmitt and his views on the League of Nations in relation to economic imperialism.

The Colonization of the Chaco Boreal

The League of Nations' Report is virtually silent with respect to the indigenous peoples of the Chaco. Their traditional territories are depicted as open

expanses of land, mainly unexplored, a vast area whose "wealth and possibilities of development" were uncertain (p. 147). Indigenous peoples had been discursively erased from the landscape, an erasure that mirrors their lack of status as actors whose interests could be considered from within the framework of international law. This erasure is linked to the League's restatements of the justifications given by Paraguay and Bolivia for both their territorial claims and for their decision to engage in the Chaco War. The Chaco dispute came about as a result of competing economic interests, capitalist exploitation and territorial nationalism. It also was a consequence of the articulation and re-articulation of conflicting interpretations of international law. There was a failure of conflict resolution and the century-long diplomatic wrangling over the Chaco highlighted the vagueness of the foundations of legal title (McCormack, 1999). Arguably, this vagueness was due to the erasure of indigenous land rights, which in turn was deeply rooted in the original colonial definition of the Chaco Boreal as a *terra nullius*. The legal concept of *terra nullius* allowed for a view of the Chaco as a vast and empty expanse of land that was free and open for colonial exploration and settlement. The doctrine did not hold that the Chaco was literally empty, but rather that its inhabitants did not have a recognized sovereign, a recognized system of property or a recognized system of land cultivation.

The League's Report stresses that Paraguay and Bolivia had been arguing that the border ought to be drawn (or, redrawn) in such a way that was most advantageous to their respective economic interests. Their differences in opinion were bolstered by Paraguay and Bolivia's arguments concerning the colonization and development of the Chaco. Accordingly, the League's Report states that the Chaco had originally appeared on "imperfect maps as full of blank spaces, with the significant remark 'wholly unexplored'" (p. 150). It was a *terra nullius* from the perspective of the Spanish colonizers. By the 1930s, however, there had been considerable development, particularly along the Paraguayan zone of occupation

along the River Paraguay. At the time of the Chaco War, the Chaco was "not, or at [was] by no means wholly, that uninhabitable 'green hell' spoken of in certain travel-books" as it had recently been opened to colonization. The forested area in the north and west—the Gran Selva—is "almost waterless, is forbidding" but neither "the central savannah nor the lower-lying or generally flat and marshy peripheral belt, which extends along the Rivers Paraguay and Pilcomayo and has an average depth of from 100 to 200 kilometres, can be regarded as uninhabitable" (p. 150). In both of these areas, "interesting experiments in colonization and development have been made, though almost all these took place in the eastern region, where Paraguay exercises *de facto possession*" (p. 150).

Roads and railways ran through the region, centers of agriculture and cattle grazing were emerging, along with tannin-producing establishments, stockbreeding estancias and refineries that were being built throughout the region by American, British and Argentinian companies (p. 151). Tannin production was an important industry in Paraguay. A red-brown liquid, tannin comes from the quebracho tree and was in high demand in Europe as it was used mainly to cure the leather of army boots (López-Fretes, 2013). In the Paraguayan zone of occupation along the River Paraguay, Villa Hayes was an established agricultural town of 10,000 people and had a large refinery. The Report makes note of the town as having capital of 100,000 gold pesos. Further north was Puerto Emiliano, also a centre of agriculture, which the Report notes had 30,000 head of cattle. Puerto Cooper was an estancia that belonged to the Argentine Cattle Company, and English company, and had a population of 7,000 inhabitants and two million gold pesos capital. Puerto Pinasco was the property of International Products Company, an American company with a capital of over four million gold pesos and a workforce of 2,300. Pinasco, according to the Report, produced 2,000 tons of tannin extract per month and the cattle on its estancia were estimated at 50,000. This town is described as "a complete self-supporting concern" which has "its

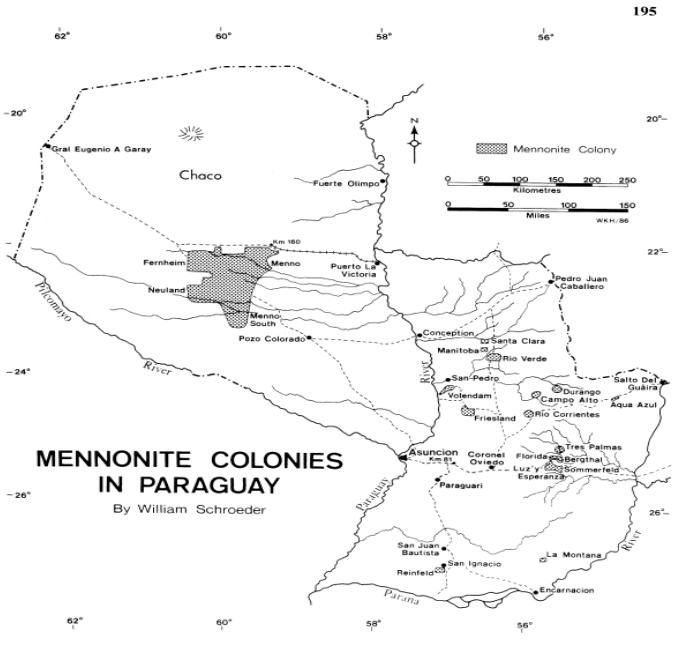
railways, its repair-shop, its telegraph and telephone lines, its fleet of tugs and barges, its hospital [and] its school, etc." (p. 150-151).

Puerto Casado is described as the property of an Argentine firm owned by Carlos Casado and covers more than four million hectares, with a population of 3,000. The land had been acquired by the Casado family in 1885, when the Paraguayan government was first parceling out the Chaco. Its capital was estimated at 1,500,000 gold pesos, there are 200 kilometres of railway connecting the forest with the port. There was likewise a tannin factory, a church, hospital, school and hotel. The estancias hold 80,000 head of cattle and the Casado Company was "also making interesting agricultural experiments in the Chaco (growing cereals, cotton, etc.)" (p. 151). Puerto Sastre, with 5,000 inhabitants, was the property of another Argentine company and had a capital of over two million gold pesos, while Puerto Guaraní had 2,500 inhabitants and was also the property of Argentine capitalists. Even further to the north were the agricultural community of Fuerte Olimpo and the town of Bahia Negra.

The Chaco interior also fell under the Paraguayan zone of occupation. The Report states that the degree of economic development was much less advanced than along the river where the exploitation of quebracho had attracted foreign capital. Stockbreeding and agriculture were "as a rule regarded by the foreign capitalist as subsidiary to the manufacture of tannin" (p. 151). The area was "still relatively unexplored" in comparison to other sections, although the Paraguayan Government had recently cut the area into vast quadrangular tracts and was in the process of parceling them off to foreign capital. The central Chaco was also under the Paraguayan zone of occupation, where the "most important work [was] being done by the Mennonites" (p. 152). The land had first been sold to the Casado colonization company, who then sold it to Mennonites of mainly Canadian or Russian origin. The Mennonites lived in approximately twenty villages. The Mennonites were granted "a special and very favorable position"

under Paraguayan law in that they were allowed religious freedom, the result being that they took no part in the war and instead continued to build their villages and clear the land (p. 152).

Paraguay therefore argued that, because of the foreign capital invested in the settlements along the river and the existence of Mennonite communities in the interior, the eastern part of the Chaco had been effectively occupied by Paraguay. The League's Report states that Bolivia countered these claims by arguing that the Paraguayan effort was "the work of foreign capitalists who, under the protection of the Paraguayan army, exploit the eastern Chaco and help Paraguay to retain a disputed territory" (p. 152). While Paraguay accused the Bolivian side of having only established military posts, as opposed to civilian settlements, Bolivia pointed to its agricultural community at Puerto Irigoyen. It was in this region—in the forest between the River Parapiti and the Upper Pilcomayo—where oil had presumably been discovered and the agents of Standard Oil had begun to conduct drilling exercises. In the northern zone, in the region close to the Brazilian frontier, a sparse Bolivian population was centered around Puerto Suarez, an area in which the Bolivians had once "placed great hopes" as an outlet



Map 9: Mennonite Colonies in Paraguay. Schroeder, 2004.

for the agricultural region of Santa Cruz, but which at the time of the League's Report was "dead' with no vessels calling (p. 155). Bolivia had hoped to establish a passage to the Atlantic Ocean and had sold land concessions to the Bolivian Oil and Land Syndicate, giving the company the right to prospect for oil and minerals and to construct ports and railways. The company went into liquidation in 1931. The reason, according to the Bolivian government, was that it did not possess any outlet on the River Paraguay further south.

***Terra nullius* and Effective Occupation**

There is only one reference in the entirety of the League of Nations' Report to the indigenous peoples of the Chaco and takes place within the context of a discussion of the Bolivian zone of occupation. The Report makes the point that "there can be no comparison between the development of the left bank of the Pilcomayo, a river which is incapable of carrying any important traffic, and the development of the right bank of the River Paraguay" (p. 153). It then proceeds to quote Father Julio Murillo, a Bolivian writer, who recognized that the "ethnography of the Chaco is a dark page in our national history," stating that the early administrative plan adopted by the Bolivian government was for "the occupation of the territories inhabited by savage tribes" and "the encouragement of immigration for the colonization of these territories" (p. 153). Accordingly, "in the Chaco, while the civilized population diminished instead of increasing, the indigenous population defied for almost three centuries the authority of the conquistadors and continually flouted the Republic." The survivors—"greatly reduced in numbers"—crossed over the Pilcomayo River to seek better condition in Argentina, with "the only effective work done among the uncivilized tribes in the past century—and then only on the threshold of the Chaco—was that of the Franciscan missionaries." It was, then, on this foundation that "it was possible to begin the effective occupation of the Chaco in present century" (p. 153).

Aside from this one brief statement, the League of Nations' Report makes no further mention of the indigenous peoples that were also residing in the regions where the development was taking place. There is no mention of indigenous forms of resource use or land cultivation or indigenous social and political organization. This is in keeping with earlier colonial discourses and the understanding of the Chaco as a *terra nullius,* a free space that was open to European settlement. And, again, while the Chaco may have been legally declared a *terra nullius,* that did not mean the Chaco Boreal was literally empty. Rather, the Chaco Boreal was a sparsely populated area with low levels of natural resource exploitation (Fitzmaurice, 2008). For European colonizers, however, the Chaco Boreal was empty in the sense that the indigenous peoples living there did not have a recognizable system of government, a recognizable system of property nor a recognizable system of land cultivation. For the conquistadors, it was a 'wasteland' and considered under-cultivated by its indigenous inhabitants (Boucher, 2010).

Terra nullius is important as it continues to operate at a discursive level in both official and popular discourse. In the case of the Chaco Boreal, it was used to justify the territorial expansion of the state and the appropriation of indigenous land. *Terra* means land, earth or ground and *nullius* means belong to no one. *Terra nullius* refers to vacant or empty land, or at least land unoccupied by anyone who is capable of ownership. This meant that it was available to others to acquire or appropriate. Again, "unoccupied" does not literally mean uninhabited, but instead means underutilized or under-cultivated (Boucher, 2010). The South American continent was filled with such pockets of land. With Wars of Independence of 1810, these so-called empty lands were first legally transferred from the Spanish Crown to the newly decolonized states on the basis of *uti possidetis de jure*. However, in the late-nineteenth century and early twentieth century, *terra nullius* was then transformed into the doctrine of "effective

occupation" (or, *uti possidetis de facto*). Effective occupation is, arguably, a continuation of a continuation of *terra nullius* by other means (Gilbert, 2006). It is a refinement of the doctrine of *terra nullius* and came about in response to the need on the part of the decolonized states to declare that the entirety of Latin America was occupied. The new states wanted to claim that no part of the Latin American territories—however "empty" from the perspective of the original European colonizers—could be considered as open to further colonization by states not already established on the continent.

It was accepted that even though the South American states did not effectively control the entirety of their national territories, the territories could no longer considered as *terra nullius*. The newly independent states needed to ensure the transfer of title from the Spanish Crown. It was officially declared that no lands were to be considered *terra nullius* so that the lands could not be open to conquest by extra-regional European powers. The right of conquest instead fell to regional states (Gilbert, 2006). The rejection of the European right to conquest was coupled with a domestic right to acquire indigenous territories not yet under state control. While external boundaries were being fixed through *uti possidetis de jure,* internally the conquest of indigenous territories continued a pace. Effective occupation therefore came about in response to the need on the part of the American states to organize international relations in accordance with the transfer and annexation of territory. The meaning of the doctrine was further refined through different international arbitrations and tribunals throughout the 1920s that sought to deal with the competing claims of ownership and possession over an area. The central principle was that the state, after being bequeathed the "free" territories, must have organized its effective occupation through the planting of a settlement, the building of a fort or any other act that could show that the state controlled the territory so claimed. For disputed territories, the role of international law was to evaluate the degree of occupation of the claimed

territory and involved organizing the accepted rules of colonization between competing states (Gilbert, 2006).

The rule of effective occupation was addressed to the newly emerging states, as they were the only ones capable of such occupation. As with *terra nullius*, underlying this conception was the understanding that indigenous communities could not "effectively" own their lands because their systems of ownership were not civilized enough to enable them legal occupation (Gilbert, 2006). Instead, indigenous peoples and their lands became the subjects of colonization. The doctrine of effective occupation was therefore coupled *uti possidetis de jure* and entailed a denial of indigenous peoples' capacity for territorial ownership. At the bottom of both doctrines is the initial presupposition of the Chaco as a *terra nullius*. Taken together, the legal doctrines functioned as technologies of indigenous dispossession. Indigenous peoples were effectively ignored as potential holders of territorial rights. This amounted to a denial of indigenous peoples' capacity to possess territory and provided the legal mechanisms for the incorporation of indigenous land into the territories of the newly independent states (Ayana, 2004).

Carl Schmitt, The League of Nations and Economic Imperialism

The *nomos*, according to Carl Schmitt, determines the juridical-political order, with its attendant border regimes being an expression of the tripartite process of land appropriation, land division and land cultivation. The border is conceived of as both a metaphysical space and a physical line, the visible result of a prior land appropriation that then appears as a concrete line in space. The border is a material and concrete manifestation of the political and social order and ties together nation, state and territory (Minca and Vaughan-Williams, 2012). At the same time, the border functions as "a sort of strategic fiction" based on a "fictional belief in the existence of a fundamental right to the land, of a pre-

existing order that must be maintained or reestablished" (Minca and Vaughan-Williams, 2012, p. 761). The fictional belief, then, at the basis of the League of Nations' Report was that Paraguay and Bolivia had a fundamental right to claim indigenous lands as their own, a right that was enshrined in the international law of the interwar period and as such a right that was endorsed by the League of Nations. In Schmitt's view, however, there was a fundamental tension between the League of Nations' humanitarianism and its upholding of the Westphalian legalist paradigm. As a consequence, the League failed to articulate in any clear sense under what conditions land appropriation was justified, what types of border regimes were legitimate and, following therefrom, what forms of land cultivation could be recognized as contributing to legal title.

This point may appear contradictory, as it has been argued throughout this thesis that the League of Nations remained tied to the Westphalian legalist paradigm, thereby blinding the League to indigenous territorial claims. In Schmitt's view, however, the League's humanitarianism was in fact a form economic imperialism. The League of Nations' humanitarian work was not really being undertaken for the purposes of peace, but for profit and domination. Accordingly, Schmitt held that the concept of humanity was "an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism" (Schmitt, 1996, p. 54). The problem is not that the liberal internationalist law of the League of Nations was weak. Indeed, he argued that it could in fact be more oppressive than colonial domination. It was likewise dangerous in that it was aligned with "the spacelessness of a global economy that most benefited the Anglo-Saxon powers of the USA and Great Britain; the ushering in of a language of ethical-humanitarianism that masked Anglo-American economic imperialism and territorial colonialism" (Legg, 2009, p. 111). This can be seen in the League of Nations' upholding of the principle of effective occupation. On the one hand, the

League supported the efforts of Paraguay and Bolivia to colonize the Chaco Boreal and considered such colonization as essential to nation-building. On the other hand, this colonization was being undertaken by corporations as the two countries sought to expand their position with respect to global markets.

Long before the Chaco War, Paraguay and Bolivia were offering concessions to corporations and were already selling indigenous lands for purposes of capitalist development. The League was supportive of such efforts as it considered capitalist development as an essential component for the achievement of peace. For Schmitt, however, the League of Nations' position was problematic in that it was attempting to hold onto the principles of the *nomos* of the *jus Europaem publicum* while at the same time introducing a new spaceless-*nomos* based on the imposition of global liberal capitalism. There was, in other words, confusion within the League of Nations in that it continued to adhere to the principles of the former Westphalian legalist paradigm while also undercutting that paradigm with its support of liberal economic imperatives.

As an example, Schmitt contrasts the so-called confused *nomos o*f the League of Nations with the land appropriation regime of the colonial period. Under colonial rule, the appropriation of indigenous lands was legally justified on the basis of *terra nullius*. Land was free and open for the taking, providing it was not already the possession of a sovereign European state. Schmitt interprets colonial land appropriation with reference to property. Accordingly, he points to the fact that the colonial *nomos* allowed European to define indigenous land and the products of indigenous land cultivation as public, as opposed to private, property. Hence, the land-appropriating state did not need to consider indigenous peoples as having land rights, unless these rights had somehow been connected with the property of a "civilized state" as defined by the *jus Europaem publicum*. In the case of the Gran Chaco, indigenous peoples were not accorded any guarantee of property rights or any guarantee of acquired wealth. As Schmitt

argues, such guarantees did not exist on colonial soil (p. 199). In the international law of the colonial period, the land-appropriating state could "treat the public property (*imperium*) of appropriated colonial territory as leaderless, so it could also treat private property (*dominium*) as leaderless" (p. 199). Thus, the land-appropriating state could ignore indigenous property rights and declare itself the sole owner of the land. It could also ignore indigenous chieftain's power and their right to rule over their people. The land-appropriating state could also create private government property, or initiate public trustee-ownership of the state, or even rule over indigenous peoples through a kind of eminent domain. All these various possibilities were undertaken in the praxis of 19th and 20th century colonial land appropriation. For Schmitt, these were neither international interstate nor international private law matters, but even so they were not purely interstate matters. Rather, the special territorial status of colonies was clear, as was the division of the earth between state territory and colonial territory.

This division was characteristic of the structure of international law in colonial era and was inherent in its spatial structure. This came to an end when the former colonies decolonized and became equivalent in form and structure to European states. The *nomos* of a specifically European international law came to an end, only to be replaced with the confused and spatially chaotic *nomos* of the League of Nations. In Schmitt's view, the end of the *jus Europaeum publicum* signified a "completely disorganized world" (p. 241). On the one hand, it continued to adhere to a form of international law based on the Westphalian legalist paradigm. On the other hand, it undercut the Westphalian legalist paradigm by championing global capitalism as a path to world peace and prosperity. From this perspective, one can understand why Schmitt considers the League to have been operating with a confused sense of the *nomos* as there is a disjunction in international law. International law becomes divided between two poles: "a universalistic-imperialist, space-transcending global law" on the one

side and “a pathetically state-fixated law of a space-constricting nature bound to small territorial spaces” on the other (Schmitt, Raum/Grossraum, 1940, p. 251, cited in Axtmann, 2007). In this regard, the League of Nations was “totally helpless”:

> "An extraordinary league!... All the many internal impossibilities of a contradictory structure of this kind had their roots in international legal disorder, which is unavoidable when the structure of a spatial order becomes unclear and the concept of war is destroyed. Instead of bracketing war, a new of intentionally vague, formal compromises and cautiously worded stylized norms was assembled, and, in turn, was subjected to an ostensibly purely juridical interpretation." (243).

The League of Nations from 1919 to 1939 was "a typical example of the fact that no comprehensive order of international law can be founded without a clear concept of a spatial nomos. No system of norms so laboriously conceived and interpreted can replace this need" (p. 243). For Schmitt, the League “lacked any decision with respect to, or even any idea of a spatial order” (p. 243). It wanted to be simultaneously a European order and a universal order. Moreover, it appeared to believe that it could transcend territorial borders by supporting interventions in line with the global capitalist order (p. 258).

Conclusion

Terra nullius is a nineteenth-century doctrine that was predicated on an understanding of the indigenous lands of South America as being as being open and free for colonial occupation of indigenous lands. It is a doctrine that continues to work today, at least on a discursive level, as it underlies much of the current discussion on the development of the Chaco Boreal. In the early twentieth-century, the concept of *terra nullius* as a legal concept was transformed into a new doctrine, that of effective occupation. When two states were engaged in a border dispute, the onus was upon the two sides to prove that they had

successfully colonized the disputed territories. The League of Nation's Report replicates the arguments put forth by Paraguay and Bolivia, as each side pointed to the many instances of colonial development that they had engaged in throughout the Chaco Boreal. As has been shown, the Report refers only once to the indigenous peoples of the region. Otherwise, its discussion of Paraguay and Bolivia's competing zones of occupation is silent with respect to their land claims and their traditional methods of land cultivation. This latter point bolsters Carl Schmitt's claim that the League of Nations was, in fact, a "vehicle of economic imperialism" and also was working without "a clear concept of a spatial nomos" (Schmitt, p.243). What this mean is that, on the one hand, the League of Nations continued to subscribe to the Westphalian legalist paradigm and the principle of state sovereignty. The Westphalian state by definition has a right to claim the inviolability of its borders, otherwise it would not be a sovereign state. On the other hand, the League claimed to be a humanitarian institution and held that the path to peace was through continued capitalist development. This latter position, according to Schmitt, contradicts the first. In my view, a more important issue concerns indigenous land claims. Neither the League of Nations nor Carl Schmitt were concerned with the way in which the legal concepts of *terra nullius* and effective occupation functioned as technologies of indigenous dispossession.

Chapter Eight: Conclusion

The purpose of this thesis has been to analyze the League of Nation's Report on the Chaco War from the perspective of critical border studies. The League of Nations considered itself an apolitical international institution. Its intervention in the Chaco War was undertaken in order to bring about the end of hostilities and a final settlement of their shared international border. The League's Report is presented as a neutral retelling of the evolution of the Chaco dispute, from its origins in the 1810 decolonization of the South American states to the present day. The Report is anything but neutral, however, as is evident from the League's silence concerning the indigenous peoples of the Chaco and their territorial attachments. This is because the League remained tied to the Westphalian legalist paradigm and considered the territorial rights of states to take precedence over the territorial rights of indigenous groups. This position is inherently political, as opposed to apolitical. The League's upholding of the Westphalian legalist paradigm, in turn, normalized Paraguay and Bolivia's attempts to acquire indigenous lands and likewise to justify this acquisition on the basis of international legal principles.

The League's Report was taken to be a bordering practice that is discursively performed through text, rendering it amendable to discourse analysis. The three border discourses under analysis were the doctrine of just war, the legal principle of *uti possidetis* and the legal concept of *terra nullius*. These were shown to be technologies of indigenous dispossession in that the discourses addressed the rights of states at the expense of indigenous peoples. Again, they are predicated on the Westphalian legalist paradigm, which enabled traditional indigenous territories to be subsumed into the state system and allowed states to claim indigenous territories as their own. The silences within the Report with respect to the indigenous peoples of the Chaco is in keeping with the international law of the interwar period, which essentially held that indigenous peoples had no

right to their traditional territories. Their lands could be justifiably acquired and held as state possessions.

Paraguay and Bolivia both argued that they were fighting a just war and that they had just cause for their military engagement with one another. In this sense, the acquisition of indigenous land was permissible, provided that the war was undertaken by two entities whose political form took after the dominant Westphalian model. Paraguay and Bolivia based their arguments for just cause on the legal principle of *uti possidetis de jure* and on the legal doctrine of effective occupation. Both of these discourses are predicated on a prior colonial conception of the Chaco Boreal as a *terra nullius* and as land that was free and open for colonization. *Uti possidetis de jure* had the effect of dividing the indigenous lands of the Chaco according to the nation-state model and *terra nullius* ensured that possession of these lands was justified under international law. Effective occupation was a consideration to the extent that Paraguay and Bolivia had each made efforts to colonize the Chaco Boreal. Such colonization was predicated on the continued dispossession of the indigenous peoples of the Chaco, as Paraguay and Bolivia sold their territories to large companies and actively took possession by building military posts.

Carl Schmitt's critique of the League of Nations was used throughout this thesis to highlight how the League's so-called neutrality was also tied to its claims to being a humanitarian institution. For Schmitt, the League of Nations interventions were based on a confused sense of the spatial order. Schmitt was, of course, not concerned with either indigenous land rights or with indigenous dispossession. However, his criticisms of the League of Nations are valuable as it is indicative of the contradiction that holds between the League's upholding of the Westphalian state system and its presumed humanitarianism. The contradictions inherent in the League's sense of spatial order were discussed in relation to its inability to "bracket war" and thereby as contributing to the escalation of the

Chaco War into an instance of total war in which aerial bombing proceeded with no distinction between soldier and civilian. The League was also shown to have failed with regard to having a consistent view on how land appropriations and land divisions were to be articulated through principles of international law. It was unable to articulate a consistent view of the spatial order that lay at the basis of the international law of the interwar period. Thus, while the League of Nations appeared to support the principle of *uti possidetis de jure*, it nevertheless unable to address the question of how changes in the territorial status quo were to come about. Finally, in relation to the principle of *terra nullius* and effective occupation, it was shown how the League of Nations supported the development of the Chaco Boreal, and did so without any regard for such development on the indigenous peoples who territories were at the centre of the dispute.

The boundary discourses of the League's Report are not merely of antiquarian interest. The relationship that holds between international organizations, states and indigenous peoples is of importance today, as can be seen within the context of other Latin American boundary disputes. While it appears unlikely at present that any of the South American states will engage in the type of war fought by Paraguay and Bolivia in the 1930s, border disputes continue to linger. Examples include Argentina and Chile, Ecuador and Peru, Chile and Peru, Brazil and all of its neighbours, as well as Guyana, Venezuela and Colombia. In each of these cases, it is presumed that states have a right to claim indigenous territories as their own.

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