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Introduction

> I've been thinking about 'space' for a long time. But usually I've come at it indirectly, through some other kind of engagement. The battles over globalisation, the politics of place, the question of regional inequality, the engagements with 'nature' as I walk the hills, the complexities of cities. Picking away at things that don't seem quite right. Losing political arguments because the terms don't fit what it is you're struggling to say. Finding myself in quandaries of apparently contradictory feelings. It is through these persistent ruminations – that sometimes don't seem to go anywhere and then sometimes do – that I have become convinced both that the implicit assumptions we make about space are important and that, maybe, it could be productive to think about space differently.
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> Doreen Massey, *For Space*[1]

In recent decades, international lawyers have sought to make sense of the development and entrenchment of the many processes and phenomena associated with globalisation and global law and governance and their effects on the role and importance of everything from the likes of the concept of sovereignty, the role of the state, and the place of domestic and international law. This surge of interest has sparked many interesting debates. In the scholarship emerging from these, globalisation and global governance is typically seen to present a problem for international law – a legal order which 'articulate[s] around the system of sovereign and independent states'[2] and its operative concepts, such as sovereignty and territory – because it signals the displacement of competences, powers, and functions away from their typical assembly inside territorial states.

Lying underneath the surface of much of these discourses is a conceptual and theoretical indeterminacy deriving from the, often unperceived, conflicting nature of the spaces of globalisation and the space of state

[1] Massey (2005) at 1.
[2] Hinojosa-Martínez (2019).

sovereignty. Globalisation is often understood as having changed the 'importance and meaning of space, place, distances and borders' since it is 'not hindered or prevented by territorial or jurisdictional boundaries'[3] of states. Globalisation and global governance are habitually imagined as taking place in a smooth global space of continual movement, a space that never settles, a space that is often imprecise and taken as a totality. This is fundamentally at odds with state space, understood as a static phenomenon, which is of vital importance to international law's implicit geography. This radical contrast between state space and the spaces of globalisation, between territorial space and the spaces of flow, between the spaces of modernity and spaces of, dare I say, postmodernity, is more or less present at the surface of much of contemporary international law writing. Yet, little attention seems to have been given to many of the basic background assumptions driving this way of thinking. What is the relationship between space, law, and power? What constitutes state territorial practice and thought? What is the concept of territory's spatial characteristics? What sort of spatial logic informs the exercise of governance by non-state actors? This failure to undertake a sustained in-depth critical examination of international law's implicit theory of space and the role it plays in constituting its theory of power and of law has resulted in a persistent tendency, even among those international law scholars whose capacity for critical reflection in other contexts remains unprecedented, to prejudge the nature of territory and unintentionally prioritise the importance of state space.

Space is a factor of law that is often assumed in international legal discourse and legal reasoning, and the question 'what is the relationship between law and space?' is taken for granted. Yet concepts such as statehood, jurisdiction, and sovereignty are deeply spatialised theoretical categories – in the sense that they are mediated and informed by a very specific set of spatial assumptions. Not only this, but their inherent spatial outlook directly structures the discipline's broader theoretical framework and engagement with all manner of political and economic phenomena and processes, from war and refugee flows to capital and markets. Indeed, assumptions about the space and time of international law, what I call international law's spatial imaginary, are fundamental to international law's constitution and operationalisation. If the structure of the international legal system is indeed undergoing such a radical

[3] Hudson (1998) 89, 90.

transformation due to global governance and globalisation, as is often asserted, it seems all the more crucial then that the geographies and spatial frameworks implied and produced by the various processes of globalisation are subjected to critical scrutiny, as orthodox concepts must be too. But while the subject of globalisation – and concerns about whether this means the end of sovereignty or the state as we know it – has been addressed in the discipline of international law, the question of its geographic and spatial constitution has received less study. Where space is discussed, state territory tends to be the space in focus; the old statocentric conceptions of legal spatiality provide the governing model. This is reflective of a wider issue as, generally, where the subject of space is raised in any international law context, the course of theoretical discussions typically turns either to a surface-level analysis of the concept of state territory or to spaces whose construction is a direct reference to the concept of state territory, such as, for example, the High Seas, *terra nullius*, cities, or the common heritage of mankind (CHM).

The continuing theoretical hegemony of the concept of state territory prevents the discipline from being able to make sense of the new territories created by globalisation and global governance, resulting in an enduring sense of confusion and disorientation. The limited spatial imaginary of international law misdirects attention and prompts the proliferation of questions such as: 'are borders still relevant?' or 'has territory been replaced by other logics of organising governance?' If global governance processes no longer rely on a legal geography centred around state territories, does that mean that states are declining in significance?[4] One does not need to go far to find evidence of such inquiries in international law scholarship.[5]

The discipline of international law is not alone in grappling with questions about the decline or continuing relevance of the state, territory, and borders. The same inquiries are also present in other disciplines and in the broader arena of public discourse.[6] Indeed, according to some

[4] Sassen (2000) 109, 109.

[5] Schachter (1997) 7, 7; Krieger and Nolte (2016); Ryngaert and Zoetekouw (2014); Bethlehem (2014) 9; Koller (2014) 25; Douglas (1997) 165; Kwiecień [2012] 45; Buzan and Little (1999) 89; 'Spaces beyond Sovereignty' (2019).

[6] Syal (2016); Dalrymple (2012); Hanson (2016); Davis (2008); Setser (2008). Indeed, Massey highlights that 'If once it was "time" that framed the privileged angle of vision, today, so it is often said, that role has been taken over by space . . . One of the moving forces in social science thinking in recent years has been an urge to respond positively: to "spatialise". For reasons which range from a deeply political desire to challenge old

theoretical traditions, many of these questions have been with us for some time. Already in 1848 Marx and Engels, for example, wrote that the 'expanding market . . . chases the bourgeoisie over the entire *surface* of the globe' and observed that 'all fixed, fast-frozen relations . . . are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air.'[7] Underlying this narrative, although never explicitly acknowledged, is the idea of a fundamental clash between the spatial logics of the market contained within state territory – with its presumed centralised framework of state control and state law-making processes – and global markets with their supposedly uncontainable, dynamic, and unpredictable political and economic flows. The static state territory versus spaces of flow assumption is clear here. This thinking, however, is also structured by the same geographic imaginary of the world that operates in international law; it is a geography that can only observe state territories and the globe at large.

One response seeking to make sense of the changes and challenges globalisation and global law and governance have supposedly brought to the territorial paradigm is Teubner and Fischer-Lescano's influential idea of the move from territoriality to functionality. They argue that the organising logic of legal regimes is changing such that they now 'define [] the external reach of their jurisdiction along issue-specific rather than territorial lines'.[8] As part of this, they suggest there has now emerged a model of a 'global society without an apex or centre'.[9] Teubner and Fischer-Lescano's account has been taken up in different disciplines including political science, international relations, and geography.[10] In international law discourse, a good example of its adoption can be found in the writings of Brölmann,[11] Arcuri and Violi,[12] Milano,[13]

formulations, through a characterisation of "postmodern" times as "spatial rather than temporal" . . . much serious attention has been devoted to what has been called "the spatialisation of social theory" . . . for a number of authors "globalisation" has been the prime form taken by this effort to spatialise sociological thinking' (Massey (2005) at 62). The 'spatial turn' more broadly therefore seems related to this 'postmodern shift'.

[7] Emphasis added, from Marx and Engels (2010) at 16.
[8] Teubner and Fischer-Lescano (2004) 999, 1009.
[9] ibid at 1017; quote originally in Luhmann (1981) at 22.
[10] Palan (1998) 625; Helmig and Kessler (2007) 240; Sassen (2013) 21; Mezzadra and Neilson (2013).
[11] Brölmann (2007).
[12] Arcuri and Violi in Kuijer and Werner (2017) at 175–216.
[13] Milano (2013).

Pistor,[14] and others, who apply the functionalist hypothesis to study various aspects of the contemporary international legal system. The term 'deterritorialisation' is often used to capture the idea of this movement away from territoriality towards functionality.

There is much to be gained from these perspectives. However, the spatiality on which they all rely – that the system of global governance has moved from the logic of territoriality to functionality – has always seemed to me to reproduce the same underlying spatiality of the present understanding of spaces in international law. This was something, like Massey, I wanted to keep picking at. It seemed to me that state space dominates the landscape to such an extent that scholars often struggle to see past or through it. As a result, several issues arise. In presenting the global society as a political system without apex or centre, this narrative portrays the corresponding political spaces as smooth, wild, and abstract, which fundamentally misrepresents, indeed fails to notice, their spatial logics.

Drawing such a stark contrast between a territoriality model centred around the concept of state territory and a functionality model centred around the concept of 'no territory' also leaves little room for the notion that the logic of global governance in this age of globalisation can ever be reconciled with the enduring relevance of state territory. Witness the repeated objections and assertions that one might call the 'territory still matters' counter-narratives produced as frequently by international lawyers as by scholars from other disciplinary backgrounds.[15] For example:

> The State remains central to modern-day public international law and contemporary international relations, and territoriality is one of the most characteristic features, if not the most characteristic feature, of the State. *Territoriality still significantly shapes our contemporary legal system.* Most treaties still take State territory as the spatial application, but more importantly in the absence of a centralised international authority the functioning and enforcement of international law is largely dependent on effective territorial control to avoid a situation in which no entity responds to infringements of rules of international law.[16]

[14] Pistor (2017) 491.

[15] This may appear in different words, but the underlying idea is still the same, see: Kuijer and Werner, 'The Paradoxical Place of Territory in International Law', Bílková, 'A State Without Territory?', and Arcuri and Violi, 'Reconfiguring Territoriality in International Economic Law' in Kuijer and Werner (2017).

[16] Emphasis added, from Kuijer and Werner (2017) at 4.

The phrasing is not always as direct as this. Sometimes the argument is cloaked in more indirect language – for example, 'the global legal order is still significantly shaped along territorial lines'[17] – but it comes down to the same basic idea that 'territory still matters'. Scholars have found analyses claiming the 'end of geography',[18] or the advent of full deterritorialisation[19] problematic, drawing attention to the many ways in which (state-)territory is still relevant. Many highlight how territorial reasoning remains central: 'while it might be more difficult for States to defend their territory in the era of globalization, the territory of the State clearly remains the main unit of security . . . in times of crisis people turn back to territory'.[20] Others have emphasised its continuing role in the broader operationalisation of the legal system,[21] or in the context of jurisdictional practices.[22]

However, it would be more accurate to think of both Teubner and Fischer-Lescano's hypothesis, as well other scholars', as being less a claim about full deterritorialisation, or the wholesale replacement of territory with functionality, and more of an attempt to acknowledge the advent of a process where territory matters *alongside* the move to functional ordering; where territory is not fully displaced or wholly irrelevant. Moreover, it is conceivable, on this view of things, that practices creating deterritorialisation are uneven among the different fields of law: perhaps territory matters 'more' for international refugee law than, say, for international economic law.

But this nuanced hypothesis only partly addresses the problem. There is a further, more important, reason why the functionalist and deterritorialisation responses are incomplete, beyond the idea that evidently state territory still seems to matter. However, the argument requires an analysis of the spaces assumed in functionalists' accounts

[17] Arcuri and Violi in Kuijer and Werner (2017) at 180.
[18] Bethlehem (2014); Koller (2014); Landauer (2014) 31.
[19] Brölmann (2007); Elden (2005) 8.
[20] Bílková in Kuijer and Werner (2017) at 38–39. This was a theme in the recent pandemic. Many felt they saw the apparatus of the state more clearly than ever. The return to the local was prominent in our everyday lives, especially during 'lockdowns'. Rather than 'the nation state striking back', Christian Tams and I proposed 'viewing the response to Covid-19 as a multi-layered regime of governing public health in operation. This regime integrates different levels of decision-making, from the global to the local', but our experience was of the local delivery of this, not the global coordination; Lythgoe and Tams (2020) 3.
[21] Arcuri and Violi in Kuijer and Werner (2017) at 180.
[22] Bílková in Kuijer and Werner (2017) at 39.

which has not yet been made. Indeed, one of the objectives of this book is to make that argument. The starting point of this argument, in a nutshell, is this: the functionalist hypothesis loses sight of, and fails to account for, the spatial character of global governance and its political and legal realities. Functionalist theories propose that there has been a move away from a territorial logic to one of functions. The ordering of the international legal and political systems is conceived without an account of the corresponding space in which these systems exist and operate as if the corresponding processes, competences, and functions are not now exercised with regard to any specific territorial framework. Put simply, there is a move from theories of an international system with an overly determined spatial logic, to one without any account of space. I do not share this view. These competences and functions continue to exist and are exercised *somewhere*. Once we understand this, we have two further insights: first, that many deterritorialisation theories lose sight of the 'spatial' – offering an aspatial and certainly an aterritorial narrative; and second, that they do so because they think of territory only as state territory. Territory is associated only with the spaces of states.

It could, of course, be argued that the 'new' space presumed by the functionalist narrative is the space of the 'global'. But such a solution creates more problems than it seems to resolve. Firstly, it implies that the different functionally ordered regimes operate equally and simultaneously in a single, smooth, uniform space. Secondly, it implies that calling this space 'global' automatically settles the question of its spatial structure and configuration. Both of these suggestions are inaccurate, and one only needs to consider the actual exercise of governance functions traditionally associated with the concept of sovereignty by non-state actors, such as the European Union (EU), African Union (AU), Organisation for Economic Co-operation and Development (OECD), World Bank, or the International Seabed Authority (ISA), to name but a few, to see why. None of these organisations, strictly speaking, has a global reach, nor are their legal spaces uniform and equivalent.

This point leads me to a further observation regarding the shift to deterritorialised functionalist ordering: this account of contemporary global governance is essentially incomplete. For the most part, the accounts tend to focus only on *the move away from* territory to functions. In my view, this only presents the beginning of the story. No account is given of the ongoing spatial dynamics of functions within the new legal and political regimes. There is little to no discussion about *where* functions go nor of the spatial logics of the new spaces in which they are

exercised. In short, the spaces of relocation or reterritorialisation are missing. As a result, functions and powers now exercised 'outside', 'beyond', or 'between' state territories appear to be 'floating free' of the highly specific territorialised legal order that is international law. This leads me to another claim I make in this book: such theories cannot account for reterritorialisation because the territories of non-state actors are invisible to international legal thought *because* its orthodox spatial imaginary only makes visible state territories.

The debates regarding what is happening to 'territory' and 'sovereignty' or 'states' in the face of globalisation and increasing global governance are intriguing, as is the counter-narrative 'territory still matters'. The discourse seeking to make sense of and respond to the effects of globalisation on the international legal order caused me to question how we think about the concepts of territory and sovereignty in this age. Clearly, territory still matters and yet acknowledging this fact does not undo any of the challenges recent trends in global governance have raised to international law's arrangement of space as a framework built around stable, fixed units of state territory 'over which' sovereignty is exercised.

The answer to many of these questions, I suggest, begins with the recognition that the discipline of international law, by and large, operates on the basis of an outdated spatial paradigm. The discipline's understanding of territory is objectified or 'thingified', and much of the knowledge developed in other social sciences to apprehend space, including the space of territory, as relational and constructed is absent. The concept of territory is unproblematised, both in international legal theory and in mainstream international law discourse. Territory is understood as simply existing as a fact of life. Further, concepts like subjecthood, sovereignty, territorial sovereignty, and jurisdiction are themselves fundamentally structured by this outdated conceptualisation of territory. The very role of territory in structuring the operationalisation of these concepts is also significantly underappreciated in international law discourse. As a result of this outdated spatial paradigm, the discipline becomes incapable of recognising the possibility of the emergence of any new territories. Where the state is the only referent for territory in orthodox international legal theory, and all international legal spaces – such as those designated as *terra nullius* – are understood and constituted only in relation to state territory (the fact that they *are not state territory*), other legal spaces and territories are unknowable.

Solving this problem requires a systematic deconstruction and rethinking of this overly determined conception of territory. One way to achieve

this goal is to examine how the concept has developed in other disciplines. By doing so, we can undetermine international law's conception, reconstitute its understanding of spatiality more generally, and as a result make visible the spaces and territories currently unfamiliar to international legal thought. To do this, however, we need to re-examine not only the concept of territory but also those fundamental building blocks of international law which are spatially mediated: concepts such as subjecthood, sovereignty and territorial sovereignty, and jurisdiction. By so doing, because of this study and rethink, I propose that it is possible to 'territorialise' that which is thought to have floated 'free' into abstract global space.

1.1 Terminology

Before explaining the structure of the argument in this book, let me first outline some considerations relating to terminology.

1.1.1 Territory

By far the most troublesome term is 'territory'. It is problematic because 'territory' refers both to a certain specific concept, understood and imagined in many ways, and it will also be the name of a certain kind of space. The interpretation I advocate uses territory to refer to *a space created for and by the exercise of power*, without prejudging which actor or institution exercises that power. This is not how most international lawyers tend to understand the concept. In Chapter 3, I evidence that international lawyers tend to use territory to indicate an object. But while 'territory' is a noun, there is a tendency in many disciplines 'of overemphasising its apparent "thingness" and . . . neglect [] its relations to a range of social phenomena, most especially the social activities, practices, and processes that are implicated in its production and transformation.'[23]

To recognise this distinction, at times I use the phrase 'territory as understood by international lawyers'; most of my discussion of 'territory' throughout Chapters 2 and 3 uses territory in this sense. As I show in Chapter 3, the traditional concept of territory assumed by most international lawyers has a dominant meaning and configuration: when international lawyers use territory, by and large, it stands for *state*

[23] Delaney (2005) at 13.

territory, even if territory is also sometimes used to discuss territorial administration by international organisations. I therefore often use the term '(state-)territory' to represent this.

The concept of territory I propose is based on a rethinking of space that was carried out in philosophy and geography in the 1970s onwards, but which does not yet seem to have impacted the discipline of international law greatly. I propose this concept in some detail in Chapter 4, which is written in a way to hopefully enable those working with international law to start recognising the existence of an entirely different concept of space. This conceptualisation understands territory as neither container nor object but as something that does not exist without the social relations which provide the conditions for its constitution. It is a space created because of control and also the space in relation to which control is exercised.

To avoid terminological overlap, I might have called this 'second' concept something else, currently invisible in the eyes of international law, avoiding the vocabulary of territory and territoriality altogether. But alternatives were problematic. No other term 'fits'. Territory 2.0 might have implied a more advanced territory, and yet, in a way, I advocate a more basic, less normative, less statocentric, and 'de-reified' understanding. Distinguishing the concept of territory proposed here from the traditional understanding used in the discipline by, for example, capitalising one as 'Territory' and the other simply 'territory', seemed unusable in practice and to have negative ramifications if picked up and used on an ongoing basis. I do not want to think of one as more important than the other, which is usually implied by capitalisation. I might have given the legal and political spaces produced and inhabited by international organisations an entirely new name altogether, but that would be inventing a term for the sake of it – not least because there is an entirely suitable word with a matching definition already available. Such duplication was nonsensical to me when there is a perfectly good definition of territory applicable to the territories of all institutions, state and otherwise. One could, of course, just call them *the spaces* of international organisations, but I want to give these spaces an equal footing to the spaces of states since they really deserve to be understood thus. These territories are produced in much the same way as state territory and are used to structure the exercise of control – consisting in the assertion or performance of *some kind of governance function* – in relation to a specific geolocatable space. They are therefore rightly named territories rather than simply referred to as the spaces of international organisations.