STREAM READINGS

MAPPING GEOGRAPHIES OF AUTHORITY AND POWER

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Mapping Geographies of Authority and Power

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Description

The iconic "World Map" has conditioned the way international lawyers visualize the relationship between authority and global space. Yet, that geopolitical picture is losing real-world traction.When the United Nations Charter was signed in 1945, New York was the only megacity on the earth with a population of over 10 million. By the year 2030, two-thirds of humanity and three-quarters of the globe's corporations will be located in 40 megacities. International order is rematerializing beyond what modern cartography has long insisted is the map of geopolitical and geo-economic reality. This interdisciplinary stream seeks to conceptualise and visualise the unfolding materialism and inscription of international order today.

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When Territory Deborders Territoriality

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Abstract The focus is on the misalignment between territory and the legal construct encasing the sovereign authority of the state over its territory—territoriality. The aim is to make visible that territory cannot be reduced to either national territory or state territory, and thereby to give the category territory a measure of conceptual autonomy from the nation-state. Beyond an intellectual project, this analysis seeks to enable a conceptual mobilizing of the category territory, here understood as a complex capability with embedded logics of power/empowerment and of claim making, some worthy and some more akin to power-grabs.

Extracto La atención se centra en el desfase entre el territorio y la construcción legal que encierra la autoridad territorial soberana del Estado, es decir, la territorialidad. La finalidad es hacer ver que el territorio no puede reducirse a un territorio nacional o territorio estatal, y de este modo otorgar a la categoría de territorio una medida de autonomía conceptual del estado-nación. Más allá de un proyecto intelectual, con este análisis pretendemos facilitar una movilización práctica del territorio como una capacidad compleja con lógicas de poder/empoderamiento y de reivindicación, algunas valiosas y otras más bien tomas de poder.

摘要　本文聚焦“领土”以及“将国家主权包覆入领土中的法律建构——领土性”之间的错误结合，旨在揭露“领土”不可化约为“国族的领土”或是“国家的领土”，藉此赋予“领土”此一范畴在概念上独立于国族国家之外的主体性。除了做为一项知识计画，此一分析更寻求在概念上调动领土的范畴，亦可理解为铭刻着权力／赋权与提出主张的逻辑之复杂能力，其中有的具有适切性、有的则更近似权力攫取。

Résumé L'article porte sur un décalage entre le territoire et la notion juridique qui embrasse les droits souverains de l'État sur son territoire – à savoir, la territorialité. On cherche à montrer que le territoire ne peut être réduit ni à la notion de territoire national, ni à la notion de territoire d'État et, par la suite, à rendre à la catégorie de territoire un brin d'autonomie conceptuelle par rapport à l'État-nation. Au-delà d'être un projet intellectuel, cette analyse cherche à permettre une mobilisation conceptuelle de la notion de territoire, entendue ici comme une compétence complexe dotée des logiques intégrées de pouvoir/responsabilisation et de revendications, dont certaines sont valables et d'autres plutôt des prises de pouvoir.

Keywords Jurisdiction bordering capabilities informality capability

INTRODUCTION

The effort here is to understand aspects of territory that came to be buried, operationally and formally, with the ascendance of the territorial nation-state. The latter may well have given us one of the most complex and achieved formats for territory, a fact that

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may have led to the analytic flattening of territory into that single meaning. Some of what I examine here concerns old and long-standing trends, only vaster now or ensconced in a different operational space. And some, I will argue, emerge out of the specific institutional and structural rearrangements of our epoch, often given distinctive forms through the law. I posit two types of major formations, both of which can take on formal and informal instantiations. One is the making of non-national jurisdictions inside the state's territorial jurisdiction itself. The other is the making of new types of bordered spaces that cut across the traditional interstate borders. Thus, while I agree with, and use the scholarship on the impacts of cross-border flows on sovereign state borders, I do so with another project in mind: what this tells us about the category territory itself, rather than about the state's authority over its borders.

Such an inquiry requires a conceptual shift away from the borders of the nation-state as the site of change and of meaning. The overriding of borders is an important focus in the scholarship, including my own, about the weakening of state authority over its territory (e.g. Taylor, 1994; Anderson, 1996; Sassen, 1996; Keohane *et al.*, 2000; Berman, 2002; Agnew, 2005; Miller and Zumbansen, 2011; Cutler and Gill, 2013). More generally, writing on the state has tended to focus on the earlier battles to gain territory and the ongoing work of securing the sovereign's authority over its territory (see Krasner, 1993; Helleiner, 1994, 1995; Cerny, 1997; Weiss, 1998; Pauly, 2002; for a more analytic approach see Jessop, 1999). To exaggerate for the sake of clarity, the focus on the state's authority over its borders has led to a naturalizing of territory as what is encased in national borders. And this, I find, leads to an analytic pacifying or neutralizing of the category territory. In much scholarly writing, territory has largely ceased to work analytically because it has been reduced to a singular meaning—national-state territory.

Critical political geographers, critical political scientists, and critical legal scholars have been among the most important contributors to more analytic versions of territory (see Gottmann, 1973; Sack, 1986; Agnew, 1994, 2005; Taylor, 1994, 1996; Berman, 2002; Brenner, 2004; Raustiala, 2005; Elden, 2010; Painter, 2010; Kratochwil, 2011). This is crucial for avoiding what Agnew (1994, 2005) has punctually called 'the territorial trap', one evident in much writing about the state and the international system. This has also become an issue in the legal scholarship, for example in Raustiala's critique of what he labels 'legal spatiality', namely the notion that 'The scope and reach of the law is connected to territory, and therefore, spatial location determines the operative legal regime' (2005, p. 106).

Elden (2010) has one of the most thorough and theorized examinations of the term 'territory', which, he notes, is 'often assumed to be self-evident in meaning, allowing the study of its particular manifestations—territorial disputes, the territory of specific countries, etc.—without theoretical reflection on the "territory" itself' (2010, p. 1). I fully agree with this observation, and elsewhere (Sassen, 2008) have examined the variable instantiations of territory across time, long before the nation-state came about. In contrast, recent efforts to theorize territory in political science, legal scholarship, and political geography have generally equated it to the bounded spaces of national territorial sovereignty. Even where territory is allowed to escape this specific encasement, it has been construed as simply a matter of stretching or contracting of the boundaries demarcating spaces of territorial power or the deregulation of national borders (Krasner, 2009; Buxbaum, 2010). Though still rare, we now have a developing scholarship that constructs a more complex relation between territory and the state (e.g. Walker, 1993; Cutler, 1997, 2001; Berman, 2002; Brenner, 2004; Agnew, 2005; Raustiala, 2005; Gill, 2008; Elden, 2010; Painter, 2010; Kratochwil, 2011; Teubner, 2011, 2012).

In my own work (Sassen, 2008, Chapters 1, 2, 5, 7, 8), I have sought to escape this analytic flattening of territory into one historical instantiation, national-state territory, by conceptualizing territory as a capability with embedded logics of power and of claim-making. As a capability it is part of diverse complex organizational assemblages, with variable performance in relation to authority and rights, depending on the properties of such assemblages. For instance, territory is far less significant in Medieval Europe than is authority,[1] but it gains importance with the emergence of the modern national state, and reaches its formal fullness in the twentieth century. And, as a capability, territory instantiates through a broad range of formats, including counterintuitive cases such as nomadic societies and complex systems that mix land sites and digital spaces, e.g. global finance.

Building partly on this earlier work, here I continue this interrogation of the category "territory" by focusing on its misalignments with the state's sovereign authority, and, further, the making of types of territory with few resemblances to national territory. The substantive rationality guiding this inquiry is that a focus on processes that cut across national borders does not only tell us about the weakening of sovereign authority over its territory, but also can make visible that territory takes on more formats than that of the national.

Specifically, I will focus on two types of misalignments. The first concerns the different types of instruments used by states to construct territoriality. For example, the USA uses mostly private law and avoids international law while Germany uses mostly public law and maximizes the use of international law (e.g. Buxbaum, 2010). I use these differences to make visible that territoriality, the legal construct, is not on a one to one with territory –the latter can deborder the legal construct and in this process show us something about the territorial itself.

This raises a major issue, and is the second misalignment at the heart of this paper. When some segment of a state's territory deborders its authority, as per current conceptualizations of territoriality, it leaves us with an unmarked kind of territory; this is a contradiction in terms since territory is a constructed condition. In other research, I have argued that some such segments cease being territory in that they are not a complex capability, as I define territory (Sassen, 2008, Chapters 1 and 8). They seem more akin to what old maps show as empty land because it is *unknown*. This *terra nullius* also matters to the larger project behind the current paper (see Sassen, 2013), because it may well signal the conceptual invisibility of territories that exit the state's territorial authority. In this case, we need to expand the meaning of territory beyond that of the national territorial state. One such meaning explored here is that of non-state jurisdictional encasement, including informal jurisdictions.

Empirically, a first step to address such deborderings is to recognize emergent jurisdictions and orderings that override the state's territoriality. The most familiar instances are those of the World Trade Organization (WTO), the International Criminal Court (ICC), and the United Nations' humanitarian system. But there are multiple lesser known orderings as well (e.g. Berman, 2002; Schwarcz, 2002; Agnew, 2005; Merry, 2006; Painter, 2010; Teubner, 2011, 2012; Fredriksen, 2012). I use the fact of such jurisdictions and orderings to argue that they enable the making of new transversally bordered spaces that not only cut across national borders but also generate new types of formal and informal jurisdictions, or structural holes, deep inside the tissue of national sovereign territory. Theoretically I take it a step further, and interpret these spaces as elements in the making of a more complex and charged condition: distinct territories inside national-state territory itself.

THE UNSTABLE ALIGNMENT BETWEEN TERRITORY AND TERRITORIALITY

Territory is not 'territoriality'. But territoriality as a legal construct that marks the state's exclusive authority over its territory has become the dominant mode of understanding territory. Historically, territoriality was a powerful innovation, and it has worked well to legitimate and cement the power of the modern state over a territory.[2] It has traditionally been recognized as the primary basis of an international system, where the key organizing jurisdiction is that of the state's exclusive authority over its territory (e.g. Ruggie, 1993; Krasner, 2004; Brownlie, 2008). This holds even when the focus might concern the nationality of individuals outside the territory of a state making claims on that state (e.g. Joppke, 1998; Cutler *et al.*, 1999; Knop, 2002).[3]

In what follows, I address four aspects of territoriality that matter for my analysis.

A first is the emerging instability of traditional versions of territoriality, partly as a consequence of globalization. Such instability is one window into asymmetries between territory and territoriality. While concerned with different questions from mine, Kratochwil (2011; see also 1986) illuminates a particular aspect that matters to my argument about a growing asymmetry between territory and territoriality. He finds problematic the common assertion that the state constitutes an exclusive sphere of jurisdiction, writing

> Usually we imagine the international system as consisting of sovereign units that all claim an exclusive space but whose writ does not go any further. In a way this notion is correct in that no jurisdictional claim against a foreign sovereign acting in official capacity can be sustained, but it is incomplete and thus misleading. States have traditionally interfered with each other through competing jurisdictional claims, precisely because states claim jurisdiction not only on the basis of territoriality, but—among other things—of 'nationality'. (2011, pp. 12–13)

Practically speaking, for many countries, territoriality is largely formal, a fact that becomes legible when conflict or competition arise with leading powers. This is evident in the many formally recognized nation-states today that can best be conceived of as being in a condition of 'coloniality', that is, post-historic colonialism (e.g. Sassen, 1996, Chapter 1; Quijano, 2000, 2007; Maldonado-Torres, 2007; Mignolo, 2007). Writing on coloniality posits that the legacy of European colonialism marks deep hierarchical inequalities found in the modern nation-state. Quijano, for example, writes that the

> specific colonial structure of power produced the specific social discriminations which later were codified as 'racial', 'ethnic', 'anthropological' or 'national', according to the times, agents, and populations involved … This power structure was, and still is, the framework within which operate the other social relations of classes or estates. (Quijano, 2007, p. 168)

A very different partial overriding of state authority came about with the formation of the global economy that emerged in the 1980s, specifically through a variety of actors and instruments with a growing influence over the state (Sassen, 2008, Chapter 5). There is a vast range of analyses and interpretations about the impacts of these new types of global regulators and global firms on the state's exclusive jurisdiction.[4]

An important issue for my analysis is the ongoing transformation of territoriality itself. Historically, Buxbaum notes, territoriality

> referred to the exclusive authority of a state to regulate events occurring within its borders … Over the course of the twentieth century, the concept expanded to include authority over certain conduct that took place elsewhere but whose effects were felt within the regulating state. (2009, p. 636)

There are several other elaborations and revisions that have had the effect of making territoriality more responsive to changed conditions (see, e.g. generally Gottmann, 1973; Aman, 1995; Miller and Zumbansen, 2011). But overall, it remains close to its core meaning of exclusive state sovereign power over its territory.

In earlier periods of Western history, the constitutive elements for establishing jurisdiction, even after the Peace of Westphalia,[5] often included rather more dynastic orderings than territoriality per se (Ford, 1999; Sassen, 2008, Chapters 2 and 3; Kratochwil, 2011). Indeed, while political scientists tend to see all that followed the Peace of Westphalia as involving what Krasner refers to as state territory (e.g. Krasner, 1999, 2004), this often obscures the many other criteria in play. The earlier period brings to the fore the asymmetric quality of territory and state authority, thereby, again, making visible that territory is not reducible to territoriality. It is with the modern state, and its full realization in the twentieth century, that our current understandings of the legal construct that is territoriality emerges as a dominant formal criterion.[6]

Territoriality as a legal construct—as territorial jurisdiction—Ford (1999) argues, is a relatively recent development linked to the emergence of modern cartographic science and the normative ideology of a rational, humanist government. This meant that 'we can speak of jurisdiction as a technology that was "invented" or "introduced" in a given social setting at a particular time' (1999, pp. 866–867). Moreover, Ford links the emergence of territorial jurisdiction to the rise of a discourse that

> encourages individuals and groups to present themselves as organically connected to other people and to territory in a way that requires jurisdictional autonomy. It requires that citizens assert, emphasize and even exaggerate their organic connection if they are to present a compelling claim for the creation and protection of their jurisdiction. (1999, p. 899)

In other words, the legal construct of territoriality as jurisdiction not only relies on the idea of a state's exclusive authority over a territory, but on the construction of people as a nation within that territory hence bringing nation-territory together with state territory in the socio-historical construction of the nation-state territoriality.

Brighenti, moving more toward territory and away from jurisdiction in the narrow sense, posits that 'law can be explored integrally as a territorial and territorialising device' where territories are conceived as acts of territorialization and deterritorialization, rather than as spaces (2010, p. 225). Acts of de/territorialization are also, according to Brighenti, acts of inscription, that is,

> an act of drawing or tracing, a movement that is defined by its magnitude and direction. The intersection of movements corresponds to the moment of visibilisation of territorial boundaries. … And every such act of territorialisation or deterritorialisation bears a biopolitical significance, because it opens up the space in which the management of possible events taking place inside an irreducible multiplicity unfolds. Just like every other form of notation and writing, law, too, deals with lines, barring some and allowing others. (Brighenti, 2010, p. 225)

Brighenti conceptualizes territory as 'a way of materially defining, inscribing and stabilising patterns of relations' within society such that 'territory is the effect of the material

inscription of social relationships which are immaterial, or better, affective' (2010, p. 223). Territories, for Brighenti, 'exist at the point of convergence, prolongation and tension between the material and the immaterial, between spaces and relationships, between extensions (movements) and intensions (affections and passions)' (2010, p. 223).

Critical geographers have made some of the most important contributions to the disentangling of territory, space and territoriality. The close examination of territory by Gottmann (1973) and Sack (1986) provides two early examples of the effort to specify the category of territory. Gottmann's analysis traces the historical development of territory and its association with the state authority back into antiquity while Sack systematically explores territory both at different scales—from nation-states down to individual work spaces—and across three broad historical periods—primitive, pre-modern and modern. While contributing greatly to the understanding of territory as a socio-historical construct, for both authors territory and territoriality are consistently linked to one another. I would agree with this, but only insofar as territoriality can be conceptualized in a more generic sense than its current narrow meaning as the state's exclusive territorial authority.

Among the most theoretically developed contemporary scholarship on the necessary intersection of state and territory is the work of Elden (2010)[7] and Brenner (2004). For Brenner (e.g. 2004) recent changes in the ordering of state spatial processes involve complex instances of deterritorialization and reterritorialization, which together reconfigure the territorial articulations of state policies and institutions. While its internal particulars may be undergoing reconfiguration, territory remains tied to state territorial sovereignty. Further, in their interpretation of Lefebvre, Brenner and Elden (2009) write that state, space and territory are all historical constructions.

> By this we mean not simply that the state, space and territory are combined in specific ways at different times, but that the social forms denoted by each of these terms emerge only at particular historical junctures and are mediated through tangled yet distinctive lineages. (2009, p. 364)

Territory, like space, is a social and historical product such that '… it is comprehensible only through its relation to the state and processes of statecraft' (Brenner and Elden, 2009, p. 363). Historically they find that territory is both a product and producer of state action. In fact, in their reading of Lefebvre, Brenner and Elden find territory so deeply entangled with state and space that 'each term reciprocally implies the others, both analytically and historically' (Brenner and Elden, 2009, p. 364).

Where for Brenner, current changes in the spatial ordering of political and economic processes are indicative of the ongoing reconfiguration of state space as territory, for Agnew (2005) such changes signal that aspects of national sovereignty have become *non-territorial* in nature. For Agnew (1994, 2005), space becomes the larger necessary category, one that includes territory as one of its instantiations. That is, to the extent that networks and other non-contingent spatial orderings are becoming more evident, territories—seen as bounded 'blocks of space' (2005, p. 441)—are losing their exclusive claim on state sovereign power. Here territory is understood as contingent, bounded space, which, though not necessarily national, is most powerfully demarcated along national-state territorial lines. Underlining this understanding, Agnew uses the phrase 'territorial trap' (1994) to describe analyses that fail to account for state-based processes that extend beyond the set boundaries of nation-states.

Taylor (1994, 1996) also allows for a notion of territory that can be organized around a vector that is not the state, notably wealth, thereby freeing up the category

territory from its national encasement. We see this when he defines territory as bounded space and territoriality as behavior associated with its use, and that the meanings of such use can change in the current global era. Regarding this current era, Taylor concludes that we are seeing 'the continuing use of territory but at different scales—the state as a power container tends to preserve existing boundaries; the state as wealth container tends toward larger territories; and the state as a cultural container tends toward smaller territories' (1994, p. 160). That is, to the extent that there are apparent 'leaks' in the national 'container', Taylor posits that these can be explained through a widening or contracting of the borders of territory-as-bounded-space depending on the diverse realms of social activity.

This type of conceptualizing goes in the direction of what I am after here. While Taylor develops this eventually in later work on cities in the global economy (e.g. 2000, 2004), in his earlier work he still sticks closely to the state. Specifically, he writes:

> Territoriality is a form of behaviour that uses a bounded space, a territory, as the instrument for securing a particular outcome. By controlling access to a territory through boundary restrictions, the content of a territory can be manipulated and its character designed. (1994, p. 151)

Using this definition, Taylor ties territory closely to the nation-state as historically constructed, writing that 'Across the whole of our modern world, territory is directly linked to sovereignty to mould politics into a fundamentally state-centric social process' (1994, p. 151); Taylor later develops this link in terms of 'absolute territorialism', for which, he posits 'anarchists make perfect formal opponents' (1996, p. 2), reflecting his particular world-systems anarchist position. Territory as bounded space or as place, moreover, is foundational to the linking of nation and state: it is through the 'territorial link between sovereign territory and national homeland' that the nation-state emerges (1994, p. 151). Here Taylor falls back into a tighter connection to the national state. It includes, even as it goes beyond, the classic understanding of territoriality that has held for a century and to variable extents prevails today—and thereby offers a strong base from which to capture the types of misalignments I am after in this essay. He writes:

> This awesome power [of the state] has been made possible by a fundamental territorial link that exists between state and nation. All social institutions exist concretely in some section of space but state and nation are both peculiar in having a special relation with a specific place. A given state does not just exist in space, it has sovereign power in a particular territory. Similarly, a nation is not an arbitrary spatial given, it has meaning only for a particular place, its homeland. It is this basic community of state and nation as both being constituted through place that has enabled them to be linked together as nation-state (Taylor, 1993, pp. 225–228). The domination of political practice in the world by territoriality is a consequence of this territorial link between sovereign territory and national homeland. (1994, p. 151)

Emerging analyses begin to expand the meaning of territory itself, going in the direction of what I am after. Elden (2010) does this when he examines periods preceding the formation of the modern nation-state. For Paasi (2003), territory is simultaneously a piece of land, a seat of power and a functional space: 'several important dimensions of social life and social power come together in a territory: material elements such as land, functional elements like the control of space, and symbolic dimensions like social identity' (2003, p. 109). Territories are not necessarily state spaces, but 'states play a major role in "territory-making" and in the naturalization of links between territories and people' (1997, p. 41; see also Paasi, 1996). By territory-making, he refers

to the institutionalization of regions; any particular territories 'should be understood as historically and socially produced entities which exist for a certain period and may disappear in the processes of regional transformation' (1997, p. 42).

A second aspect of the relation of territoriality to territory pertinent to my concern here are today's specialized differences across countries in terms of the instruments used to specify or construct territoriality (Zumbansen, 2012, pp. 115–127). These differences are one window into the disentangling of the two categories, territory and territoriality. Significant to this disentangling is that such differences are also present among countries that belong to the same geopolitical context and operate within the same larger geopolitical period. For instance, Buxbaum (2009) examines the different instruments used by the USA and Germany to constitute their territoriality. These are both liberal democracies that center statehood in this type of jurisdiction; further, over time both have elaborated the technical aspects of territoriality and in many ways arrived at similar modifications. Yet, and this is what matters to my argument, each uses very different legal instruments from the repertory of liberal democracies in constructing the relationship between territory and territoriality (Buxbaum, 2009). To simplify, and as already mentioned, the USA uses largely private law, and avoids international law when it can, whereas Germany uses largely public and international law.[8] This is not the place to engage in a detailed examination of these differences: my main concern is with how states have used distinct instruments to produce what at a more generic international level gets constituted as a standardized jurisdiction, today enshrined in the Hague Treaty.

Third, the fact that we see a growth in the number of cases and issues where territory is not part of jurisdictional rules is, for my purposes, yet another way of making visible today's asymmetries between territory and territoriality. Thus Teubner (2004, 2012) has argued for a global civilian jurisdiction autonomous from the state, partly picking up on the Luhmannian conception of distinct spheres through which a system is organized (e.g. Luhmann, 1995[1984]; see also Law, 1993; Sassen, 2011). Coming from a critical perspective, Raustiala argues against 'legal spatiality' (see above), noting that, today, states regularly assert jurisdiction beyond their national territory. In the case of the USA, he writes,

> The United States has many statutes that explicitly assert extraterritorial jurisdiction, and others that do not but have been so construed by the Executive branch and the courts. Other states have done the same. While such assertions of extraterritoriality are ever more common, in some cases, spatial location itself becomes hard to determine—as in many recent Internet cases. As technology evolves, legal spatiality becomes harder to apply and, increasingly, harder to justify as a jurisprudential principle. (Raustiala, 2005, pp. 111–112)

Given this emerging 'untethering' of jurisdiction from national territory, Raustiala questions what role spatiality should play in national, and particularly in American law. While ceding that it is not an easy question to answer, Raustiala concludes that 'The clear trend in American law and in international law—and the more compelling reading of the Constitution—suggests that a despatialized approach ought to be the default position, subject to exceptions based on functional and practical concerns' (2005, pp. 145–146). In other words, rather than starting from a position wherein national jurisdiction is coupled with national territory, law should start from the opposite position.

This type of analysis has a kind of obverse pertinence to my analysis: national-state jurisdictions that deborder territoriality and non-state jurisdictions that escape the grip of national-state territoriality. One example of the second type is the environmentally

driven recognition of the 'natural habitat of fisheries'. When such habitats cut across interstate borders, it can lead to some of the more intractable international disputes, given the difficulty of adjusting such habitats (read territories) to existing territorial state authority (e.g. the long-standing legal dispute between Canada and the USA).

Berman (2002) makes a similar argument to Raustiala's, asserting that, in the current global age, national jurisdiction should not be automatically coupled with national territory. In making his argument, Berman emphasizes the various attachments to territory which give it meaning, only one of which is national, writing 'In our daily lives, we all have multiple, shifting, overlapping affiliations. We belong to many communities. Some may be local, some far away, and some may exist independently of spatial location' (2002, p. 543). Jurisdiction, he goes on, 'is the way that law traces the topography of these multiple affiliations … Conceptions of jurisdiction become internalized and help to shape the social construction of place and community. In turn, as social conceptions of place and community change, jurisdictional rules do as well' (2002, p. 543).

Agnew also weakens the link with the state when he defines territory as 'blocks of space' (2005, p. 441) and territoriality as 'the use of territory for political, social, and economic ends' (2005, p. 437). As noted above, for Agnew territory is not necessarily 'state space' (cf. Brenner, 2004), even though it is necessarily a contingent, bordered area of space. In this view, territory can be demarcated at many levels, including the national, but also the local, regional, continental, and so on (see also Sack, 1986). Critically, however, Agnew does not include networked or otherwise non-continuous spaces in his definition of territory.

Also moving in the direction of my concerns is Painter's (2010) argument against formulations of territory that tie it to state sovereign space or see it as otherwise clearly bounded and non-overlapping. I also agree with Painter's proposition that territory is enacted through extensive networks of human and non-human actors. Using the empirical example of UK administrative regions, Painter shows how territories are brought into being through extensive networks involving international accounting standards, models, maps, material and digital infrastructures, accountants, statisticians, clerks, technicians, researchers, journalists, and myriad other human and non-human actors. He suggests that the geographies of these networks—being widely dispersed in space and time—differ from the geographies of the territory they generate, 'which is usually understood to involve a bounded and continuous portion of space' (Painter, 2010, p. 1096). He writes that,

> The phenomenon that we call territory is not an irreducible foundation of state power, let alone the expression of a biological imperative. It is not a transhistorical feature of human affairs and should not be invoked as an explanatory principle that itself needs no explanation: territory is not some kind of spatio-political first cause. (2010, p. 1093)

But I part direction with Painter a bit when he calls for understanding territory as 'the effect of networked relations'. For Painter 'territory must be interpreted principally as an *effect*: as *explanandum* more than *explanans*. Adapting Bruno Latour, like other enduring and seemingly solid features of our world, this effect can best be understood as the outcome of networked socio-technical practices' (2010, p. 1093, emphasis in original). I agree that this is also happening, but I see it merely as one instantiation of territory.

Fourth, the dilution of the state's formal power over its territory tends to take on specific forms and produce specific redistributions of power across diverse state branches. Very briefly, national legislative jurisdictions have lost their grip on a growing range of domains over which they once had regulatory power, or at least formal authority. One mode of adapting to this loss has been to pass laws that deregulate and privatize what was

once regulated and public and where legislatures were the key state branch. Deregulation and privatization have led to a widespread understanding that the 'national state' loses authority with globalization. Elsewhere (Sassen, 2008, Chapter 4), I have examined how this has reduced the power of national *legislative* jurisdiction, even as it has allowed a relatively greater concentration of unaccountable power in the executive.

Out of this mix of transformations, I (Sassen, 1996, Chapter 1; 2008, Chapters 4 and 5) have emphasized two features in my prior work. First, sovereignty is being partly disassembled, including *formally,* over the last 20–30 years, depending on the country. While much remains formally included in the national state and sited in national state territoriality, some of it has shifted to other institutional spaces. Sovereignty remains a key systemic property but its institutional bases diversify. The second point is that even as globalization has expanded, territoriality remains a key ordering in the international system. But it does so with one difference, it now feeds above all, the power of the executive branch of government, a power that becomes increasingly privatized (Sassen, 2008, pp. 165–220). Some components of the state's territorial authority, especially of the legislature, shift to other institutional homes, notably an emergent jurisdiction of global regulators.

In this article, I build on both of these earlier propositions, but the focus is different. I examine how territoriality can make visible what it formally hides: that territory is much more than national-state territory. And through the recovery of this expanded meaning, we can make territory work analytically, in contrast to its current univocal meaning in most of the scholarship about the state and about globalization. The effort is a more careful tracking of emergent conditions and dynamics that signal that the cages of national territorial authority are breaking, and that in a few instances this becomes materially visible and in others this visibility is inferential. To capture the meaning and import of this breakage, I use the notion of the making of informal jurisdictions because what I seek to capture either escapes established jurisdictions or worms itself into the latter and can easily be confused with such established jurisdictions.[9]

This is the subject of the next section.

TRANSVERSALLY BORDERED SPACES AND THEIR TERRITORIAL ENGAGEMENTS

A state border is not simply a borderline. It is a mix of regimes with variable contents and geographic and institutional locations.[10] Different flows—of capital, information, professionals, undocumented migrants—each constitute bordering through a particular sequence of interventions, with diverse institutional and geographic locations. The actual geographic border matters in some of these flows and does not in others. That geographic borderline is part of the cross-border flow of goods if these come by ground transport, but not of capital, except if actual cash is being transported. Each border-control intervention can be conceived of as one point in a chain of locations. In the case of traded goods, these might involve a pre-border inspection or certification site. In the case of capital flows, the chain of locations will involve banks, stock markets, and electronic networks. In short, the geographic borderline is but one point in the chain. Institutional points of border-control intervention can form long chains moving deep inside the country. Yet notwithstanding multiple locations and diverse levels of control, the national border has a recognizable point of gravity.

Beyond this familiar mix of regimes and locations for border-control functions, what concerns me here is the formation of new types of bordering *capabilities* that shape bordered spaces transversal to traditional state borders. These transversal spaces are to be distinguished from the more general growth in cross-border flows which are governed by national states even if in the form of deregulated national borders; this includes most of the international trade and finance, migration, cultural exchanges, and much more. The novel bordered transversal spaces that I focus on here enable an emergent segment of actors, including firms, professionals, and a sub-species of money and goods, to move across traditional borders and to do so under very specific conditions: the making of internal borders within the larger framing that is state territoriality. In some cases, these new types of internal borders are impenetrable. No coyote can take you across these borders even though they are inside the geographic space of the nation-state. They also function as formal borders vis-à-vis the national state itself, even if the latter has the power to violate the treaty laws or informal arrangements that are at their origin (Sassen 2009).

These transversally bordered spaces entail the making of distinct, albeit elementary territories and jurisdictions inside nation-states. Some of this making is as yet informal, not fully recognized nor knowingly authorized, such as the new types of (still) legitimate private financial networks referred to as 'dark pools'. But some of it is now part of international treaty law, such as the WTO General Agreement on Trade in Services (GATS) 'Mode 4'. And much of it is in a process of becoming, such as the global operational space that allows firms to conduct themselves as if they are global even though there is, as of now, no such legal persona as a global firm (Sassen, 2008, Chapters 5 and 8).

Such distinctive types of jurisdictions inside national territory make legible a second type of asymmetry between territory and territoriality besides that discussed in the previous section. The diverse regimes that constitute the border as an institution can be grouped, on the one hand, into a formalized apparatus that is part of the interstate system and, on the other, into an as yet far less formalized array of novel types of borderings lying largely outside the framing of the traditional law governing the interstate system and outside the geography of state borders. The first has at its core the body of regulations covering a variety of international flows—flows of different types of commodities, capital, people, services, and information. No matter their variety, these multiple regimes tend to cohere around (a) the state's unilateral authority to define and enforce regulations on its territory, and (b) the state's obligation to respect and uphold the regulations coming out of the international treaty system or out of bilateral arrangements.

The second major component, the new type of bordering dynamics arising outside the framing of the interstate system, does not necessarily entail a self-evident crossing of borders. It includes a range of dynamics arising out of specific contemporary developments, notably emergent global legal systems and a growing range of globally networked digital interactive domains.[11] Global legal systems, still rare, are not centered in state law—that is to say, they are to be distinguished from both national and international law. And global digital interactive domains are mostly informal, hence outside the existing treaty system; they are often basically ensconced in sub-national localities that are part of cross-border networks.[12] The formation of these distinct systems of global law and globally networked interactive domains entails a multiplication of bordered spaces. But the national notion of borders as delimiting sovereign territorial states is not quite in play. Rather, the bordering operates at either a trans- or supranational or a sub-national scale. And although these spaces may cross national borders, they are not necessarily part of the new open-border regimes that are state-centered, including such diverse regimes as those of the global trading system and legal immigration. Finally, insofar as these are bordered domains, they entail a novel notion of borders.

These emergent conditions do not necessarily override sovereignty. But its institutional location and its capacity to legitimate and absorb most of the power to legitimate have become unstable. The politics of contemporary sovereignties are far more complex than notions of mutually exclusive territories can capture. Elsewhere I have argued that

> Sovereignty and territory … remain key features of the international system. But they have been reconstituted and partly displaced onto other institutional arenas outside the state and outside the framework of nationalized territory. … sovereignty has been decentered and territory partly denationalized. (1996, pp. 29–30)

Among the better known instruments that have enacted some of these shifts are WTO law, Human Rights law, the new ICC, and the specialized national regimes giving firms guarantees of contract and private property protections in most countries.

In what follows, I first briefly describe some quite elementary but formalized instances of these bordered transversal spaces that insert another jurisdiction inside national territory, one that can override that of the national state, or, at the minimum, that national states have been forced to sign onto. Next I focus on some more complex and ambiguous developments that may or may not become fully formalized. At its most abstract, the fact of supranational jurisdictions inside national territory is not new. Extraterritoriality can be seen as a major long-standing feature of the interstate system, as are specific jurisdictions concerning organized religions, among others. There are vast bodies of scholarship about these and other long-standing special jurisdictions; this is not the place to review them. My concern here is with newly established jurisdictions that emerge out of the features and conditionalities of the post-1980 world, and my aim, to repeat, is to detect the distancing between territory and territoriality as these have come to be understood in the literature about the national state.

WTO GATS 'Mode 4'

A first formalized instance of a transversally bordered space comes in the form of the fourth mode through which services may be traded under the WTO GATS. Commonly referred to simply as 'Mode 4', it governs the movement of people across national borders for the purposes of the transnational supply of services. Aside from the principle of *non-refoulement* in international refugee law,[13] Mode 4 is the only binding mechanism on the matter of admitting foreigners within national sovereign territory that operates outside of national authority (Panizzon, 2010, 2011). As such, Mode 4 partly overrides national territorial sovereignty, but only partly. To start, it is only a very narrow category of transnational movement that Mode 4 governs: Mode 4 only applies to individuals moving for the purpose of working in one sector—services—and only allows individuals to move across borders for a specific purpose (i.e. to fulfill a specific contract or work for a specific company) (IOM, 2012). In addition, Mode 4 covers only 'temporary movement' and, therefore, does not apply to the transnational movement of people seeking citizenship, residence or employment on a permanent basis. Most transnational movement of persons, then, remains under national jurisdictional control.

National authorities retain a say in how Mode 4 is applied within their national territories. That is, they may negotiate the practical terms by which their national visa system will be made to comply with Mode 4. One major outcome of this interplay between national authorities and the authority of Mode 4 is that the emergent bordering of territory enacted by Mode 4, as it extends into national sovereign territories, is marked by its exclusion of non-elite workers. While in principle Mode 4 is meant to apply to all private service sector workers, in practice, Mode 4 is used to facilitate the transnational movement of highly skilled and educated service workers, especially intra-corporate transferees with 'essential skills' (i.e. managers, technical personnel) and high level business professionals, largely to the exclusion of unskilled service workers (WTO, 2009). Thus for the unskilled workers of the world, who of course vastly outnumber the highly skilled, the transversal space bordered by Mode 4 is one they cannot access; instead for these workers, territory remains largely tied to national sovereignty —to territoriality.

The ICC

A second formalized instance of a transversally bordered space is that constituted through the ICC. The ICC is an independent and permanent court of criminal justice seated in The Hague. In contrast with the International Court of Justice (the judicial arm of the UN system which settles disputes between states), the ICC does not try states, but individuals. The ICC also breaks with other regimes of international criminal justice in its provision for the rights of individual victims, giving individual victims the right to have their voices heard before the court and, where judged appropriate, to receive reparations for their suffering. Cases are brought before the ICC following investigations by the ICC Prosecutor and approval by a pre-Trial Chamber of ICC Judges. Investigations can be initiated by the ICC Prosecutor based on a referral from any State Party, referral from the UN Security Council, or *propio motu*, meaning on his/her own initiative. *Propio motu* investigations follow preliminary examinations of situations brought to the attention of the Prosecutor by individuals and/or organizations and must gain approval from a pre-Trial Chamber before they can proceed. Critically, individuals and organizations can bring situations directly to the attention of the Prosecutor and present evidence in support of their claims without having to pass through any national channels.[14]

The scope of the ICC's jurisdiction is limited to crimes of genocide, war crimes and crimes against humanity committed after the Rome Statute came into force on 1 July 2002. Moreover, the reach of ICC's jurisdiction is limited to crimes committed by nationals of, or within the national territory of, State Parties or states otherwise accepting the court's jurisdiction (which may occur on an *ad hoc* basis for particular situations)—notably, as of 1 July 2012, the USA, Russia and China were *not* among the 121 State Parties to the Rome Statute. At the same time, an exception to this can be made in cases where a situation is referred to the ICC by the UN Security Council, which can refer situations regardless of the nationality of the perpetrators or the national territory in which the alleged crime was committed.[15]

While the jurisdiction of the ICC borders a transversal space that cuts across national territories and overrides national sovereign authority, it also depends on national sovereign authorities to maintain and enforce its borders. That is, the ICC relies on State Parties to the Rome Statute and on the UN for assistance in arresting persons wanted by the Court, providing evidence for use in proceedings, relocating witnesses, and enforcing the sentences of convicted persons. Accordingly, it has been suggested that the ICC be thought of as a global system that is reliant on the interaction of and cooperation between international and national authorities (Rastan, 2007).

Fairtrade

A third formalized transversally bordered space is the Fairtrade system. Though formal and recognized, it lacks the legal enforcement of Mode 4 or the ICC. Most contemporary food certification and labeling schemes—including certifications such as 'organic'

and 'GMO-free'—are functional only within the bounded, contingent space of national territory; all aspects of their administration, regulation, production and so on, are spatially ordered and governed in accordance with the spaces of national territorial sovereignty. In contrast, Fairtrade (not to be confused with the generic term 'fair trade') is a specific assemblage constituted around the Fairtrade certification and labeling system and its associated FAIRTRADE® Mark, which acts within and across national territorial borders (Stiglitz and Charlton, 2005; Rodrik, 2011, Chapter 10). It draws together farmers, farms, products, markets, consumers and civil society actors around a logic of making global trade in specified goods more fair. In so doing, Fairtrade constructs a transversal bordering in which non-contingent spaces from within national territories are aligned with each other and with global NGOs (in this case Fairtrade International, or FLO, and its subsidiary FLO-CERT).

However, while Fairtrade's bordering applies its own governing logic—of making trade fairer—separately from sovereign state authority, it does not compel sovereign authorities to act in accordance with its authority, as is the case with Mode 4. Fairtrade sets its own standards for labor practices and trade, governed by its own logic of fairness, separate from national labor laws and trade regulations. But while Fairtrade standards are generally more exacting than national laws, they are not in opposition to national legal authority. Instead, Fairtrade's distinct logic marks out a novel voluntary jurisdiction that inserts itself simultaneously in several sovereign state territories.

Cross-Border Mobilities of Forced Migrants

In addition to the three examples of *formalized* transversally bordered spaces given above, a number of *informal* spaces are also becoming apparent. One such space is being enacted through the informal movement of forced migrants after their initial displacement. Until recently, the movements of forced migrants have been conceptualized by UN agencies and international organizations as involving the unilinear movement of people into camps during an emergency, followed by their movement out of camps for return or resettlement during recovery. This pattern of movement fits into a traditional understanding of the roles of national territorial sovereignty and citizenship in forced displacement. This is particularly so for refugees, for whom the act of crossing an international border bestows a special international legal status—one that is removed once they re-cross the border to return home at the end of a crisis. However, a growing body of research contradicts this understanding as it shows that forced migrants engage in complex strategies of mobility between camps and places of return or resettlement (Bartlett, 2007; Fredriksen, 2012). Further, refugees go back and forth across international borders in order to pursue livelihoods, manage their social, cultural and political networks and identities, and react to changing security situations (e.g. Hovil, 2010; Kaiser, 2010; Long, 2010, 2011), while maintaining access to services like schools, health care, and water, food and material distributions linked to residence in the camp (AVSI and UNHCR, 2009, p. 14).

Long (2010, 2011) suggests that these strategic movements of forced migrants back and forth across borders and in and out of displacement camps signals an emergent, informal re-bordering of citizenship along lines of complex support and livelihood networks rather than traditional lines of national territorial sovereignty. Correspondingly, we can detect in this movement an emergent, informal bordering of a space that cuts across national territories and elides sovereign authority. It is defined, instead, by transnational social, cultural, political and economic networks and affective attachments. In some cases, this transversal space partly replaces national sovereign authority, such as where

national authority has been weakened to the extent that it can no longer exert control over its national borders (this is the case, for example, in Somalia and the Democratic Republic of Congo). In other cases, this transversal space is dependent on national authority, as where host governments legislate the so-called 'freedom of movement' for forced migrants enabling them to move freely in and out of camps (as did the government of Uganda in the mid-2000s).

Off-Exchange or Over-the-Counter Trading: 'Dark Pools'

A very different type of informal transversal bordered space is that constituted by the private global trading networks run by individual banks or brokers known as 'dark pools'. These networks for off-exchange trading or over-the-counter trading are in competition with public stock exchanges and operate in ways not allowed on public exchanges. Dark pools allow anonymous buyers and sellers to trade directly with each other away from public exchanges and without having to make prices available to all investors as they would have to on a public exchange. Data on dark pool trades are published only after trades are completed, so that investors can take, or offload, large positions in quoted companies without alerting the wider market. (*The Economist*, 2011; TABB). Meanwhile the broker-dealers and banks that set up their own dark pools are able to capture transaction fees from clients that would otherwise be paid to public exchanges.

Dark pools have proliferated in the past six years (see Figure 1). Originally meant for large institutional investors, they increasingly attract high-frequency traders, who make huge numbers of trades at low amounts. The Federation of European Stock Exchanges recently said that its members were concerned that these private trading venues were 'operating in an environment that is turning increasingly less transparent, more fragmented and less regulated' (quoted in Grant, 2011). Thus dark pools, even while formally

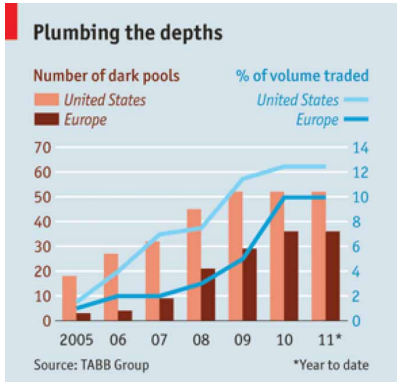

Figure 1. Proliferation of dark pools
Source: The Economist (2011).

not in violation of any law, are a bordered space of private financial transactions that is increasingly free from national and international regulatory authorities.

EMERGENT TERRITORIAL FORMATIONS[16]

Let me next turn to instances that are broader and less clearly defined than the five cases discussed above. They are part of the same transversalizing of territorial encasings that cut across national borders and are not fully, if at all, subsumed under national-state jurisdiction. They unsettle the institutional framing of territory that gives the national-state exclusive authority in a very broad range of domains. The territory of the national is a critical dimension in play in all these instances: diverse actors can exit the national institutionalization of territory yet act within the geographic terrain of a nation-state. Further, I argue, this exiting is not simply an exiting into nowhere. It entails an active making of a territory (inside an already existing territory, that of the nation-state) and an informal jurisdiction that is legible to the national state (e.g. WTO GATS Mode 4, Fairtrade) or not so (e.g. the so-called 'dark pools' discussed above). These emergent formations are not part of existing extraterritorial arrangements. What gives weight to these formations is not simply a question of novelty but their depth, spread, and proliferation. At some point, all of this leads to a qualitatively different aggregate. We can conceive of it as emergent institutionalizations of territory that unsettle the national encasement of territory.

A first instance is the development of new jurisdictional geographies. At one extreme are new and highly formalized jurisdictions, such as the ICC discussed above. At the other, are experimental jurisdictions, assembled out of bits and pieces of established, often older, jurisdictions. Legal frameworks for rights and guarantees, and more generally the rule of law, were largely developed in the context of the formation of national states. But now some of these instruments are strengthening interests that are not necessarily national, such as those of multinational firms and global finance. As these older legal frameworks become part of new types of transnational logics they can alter the valence of older national-state capabilities, e.g. marking as negative a broad range of regulations that might constrain the search for profits. Further, in so doing, they are often pushing these national states to go against the interests of national firms. A second instance is the formation of triangular cross-border jurisdictions for political action, which once would have been confined to the national. Electronic activists often use global campaigns and international organizations to secure rights and guarantees from their national states. Furthermore, a variety of national legal actions involving multiple geographic sites across the globe can today be launched from national courts, producing a transnational geography for national lawsuits. The critical articulation is between the national (as in national court, national law) and a global geography outside the terms of traditional international law or treaty law.

A good example is the set of lawsuits launched by the Washington-based Center for Constitutional Rights in a national court against nine multinational corporations, both American and foreign, for abuses of workers' rights in their offshore industrial operations. The national legal instrument they used to launch and legitimate these lawsuits was the Alien Torts Claims Act, one of the oldest in the USA, originally designed to deal with overseas pirates, which had not been used with a few exceptions for many decades (Sassen, 2008, Chapter 8). With this old instrument they constructed a global three-sited jurisdiction, with several locations in at least two of those sites: the locations of the headquarters of the firms being sued, which included both US and foreign firms, the locations of the offshore factories (several countries), and the court in Washington

where the lawsuits were submitted and accepted. Even if these lawsuits fail to achieve their full goal, they set precedents showing it is possible to use a national law in a national court to sue US and foreign firms for questionable work practices in their offshore factories. Thus, besides the new courts and instruments (e.g. the new ICC, the European Court of Human Rights), what this case shows is that components of the national rule of law that once served to build the strength of the national state, can today contribute to the formation of transnational jurisdictions.

On the other hand, and this is a second case, states can be active participants in the making of protected jurisdictions for firms operating globally. In this case, state instruments are used to make such global actors more autonomous from the regulatory power of the state by granting them guarantees of contract, private property protections, and, often, diverse exemptions from taxes and other obligations (and in so doing, they often go against the interests of local national firms). This has been critical in strengthening the global economy, as it has *de facto* constructed a standardized global space for the operations of national firms as there is no such legal persona as a global firm. Firms have pushed hard for the development of new types of formal instruments, notably intellectual property rights and standardized accounting principles that have further strengthened that global operational space. These various state interventions have contributed to produce an operational space that is increasingly denationalized even as it is inserted in the sovereign territory of a growing number of national states. I see here much more than the weakening of interstate borders: it is an instance of a non-national territory inside national-state territory. These are the elements of an organizing logic that is not quite part of the national state even as that logic installs itself in that state, and does so in what is now a majority of national states worldwide. This is a very different way of representing economic globalization than the common notion of the withdrawal of the state at the hands of the global system. Indeed, to a large extent, it is the executive branch of government that is getting aligned with global corporate capital and ensuring this work gets done (Sassen, 2008, Chapter 4).

A third case is the formation of a global network of financial centers. We can conceive of financial centers that are part of global financial markets as constituting a distinct kind of territory, simultaneously pulled in by larger electronic networks and functioning as territorial micro-infrastructures for those networks. These financial centers inhabit national territories, but they cannot be seen as simply national in the historical sense of the term, nor can they be reduced to the administrative unit encompassing the actual terrain (e.g. a city), one that is part of a nation-state. In their aggregate, they house significant components of the global, partly electronic market for capital. As localities, they are denationalized in specific and partial ways. In this sense, they can be seen as constituting the elements of a novel type of multi-sited territory, one that diverges sharply from the territory of the historic nation-state.

What this participation of the state means is that components of legal frameworks for rights and guarantees, and more generally the rule of law, largely developed in the process of national state formation, can now strengthen non-national organizing logics. As these components become part of new types of transnational systems, they alter the valence of (rather than destroy, as is often argued) older national-state capabilities. Where the rule of law once built the strength of the national state and national corporations, key components of that rule of law are now contributing to the partial, often highly specialized, denationalizing of particular national-state orders (Sassen, 2008, Chapter 5).

A fourth type of emergent jurisdiction can be found in the global networks of local activists and, more generally, in the concrete and often place-specific social infrastructure

of 'global civil society'. Global digital networks and the associated imaginaries enable the making of that social infrastructure. But localized actors, organizations, and causes are also key building blocks. The localized involvements of activists are critical no matter how universal and planetary the aims of the various struggles. Global electronic networks actually push the possibility of this local–global dynamic further. Elsewhere I have examined the possibility for even resource-poor and immobile individuals or organizations to become part of a type of horizontal globality centered on diverse localities. When supplied with the key capabilities of the new technologies—decentralized access, interconnectivity, and simultaneity of transactions—localized, immobilized individuals and organizations can be part of a global public space, one that is partly a subjective condition, but only partly because it is rooted in the concrete struggles of localities. I see here an emergent global informal jurisdiction centered in localities, constituted by local, mostly immobile actors engaged in specific struggles or projects—getting rid of the torturer in their local jail, or the factory polluting the water in their community. There is here then a strong territorial moment deep inside the state's territory but which belongs to a multi-sited global horizontal space for struggle. It is in some ways a parallel to the global multi-sited operational space of finance, marked by its struggle —maximize profits.

We can conceive of these minor formations as shaping an emergent field of forces inside national territory whose interactions with the state's jurisdiction are as of now ambiguous and even invisible to the eye of the law. Strictly speaking, I would argue that they constitute distinct territories, each with its specific embedded logics of power and of claim-making. In the larger picture of authority, they are minor and some at least are informal jurisdictions. Minor and informal as they are, I want to use them as lenses onto the question of territory and its expanded meaning beyond national territory. What is compelling about these cases is that they take shape and roots deep inside what has been constructed, and continues to be construed, as national territory.

These emergent assemblages begin to unbundle the traditional territoriality of the national, historically constructed overwhelmingly as a *national unitary* spatio-temporal domain.

CONCLUSION

The question of a bordered territory as a parameter for authority has today entered a new phase. States' exclusive authority over their territory remains the prevalent mode of final authority in the global political economy; in that sense, then, state-centered border regimes—whether open or closed—remain foundational to our geopolity. But at least some of the critical components of this territorial authority are actually no longer national in the historically constructed sense of that term. They are, I argue, denationalized components of state authority: they look national but are actually geared toward global agendas, some good, some not so good at all.

State borders, with all their continuing formal weight and practical flexibility, are merely one of several key elements in a larger operational space that began to take shape in the 1980s and today deborders the interstate system. This type of debordering needs to be distinguished from older types, some still ongoing, such as the presumptions of dominant powers to violate the sovereignty of weaker countries. It is a debordering that constitutes new types of bordered spaces inside national territory itself. These may be internal to a state's territory or cut across state borders. To give them conceptual visibility I argued that they are a distinct, albeit partial jurisdiction not generated by or dependent on the state itself. In so doing, they make legible asymmetries between the

state's sovereign jurisdiction and the territory itself. Thus, the making of this formation needs to be distinguished from the mere fact of cross-border flows, whether pre- or post-deregulation.

This does leave us with a question as to what forces shape these diverse meanings of territory that go beyond the still prevalent and dominant national-state meaning. Defining territory as marked by embedded logics of power and of claim-making helps make visible the jurisdictional features of both the new internal and transversally bordered spaces examined in this article. These spaces can be elementary (the spaces of the Occupy movements) or complex (the territory of global finance, a mix of digital networks and global cities). Thus, it is not illuminating to see Wall Street as simply a national territory, nor is it useful to confuse the Occupy movements with a demonstration. Each is a project that makes a distinct territory.

These diverse meanings put the category territory to work analytically. And they bring to the fore the issue of who has border-making capabilities.

If there is one sector where we can begin to discern new stabilized bordering capabilities and their geographic and institutional locations, it is in the corporate economy. Strategic agents in this shifting meaning of the territorial and of bordering are global firms and financial networks. Most sovereign states in the world have now formalized the right of such firms and networks to cross-border mobility. This, in turn, has produced a large number of highly protected bordered spaces that cut across the conventional border, are exempt from significant elements of state authority, and while known to state authorities are actually marked by considerable regulatory invisibility; the so-called dark pools of finance discussed here are one major example.

We see a simultaneous shift to increasingly open geographic state borders along with transversally closed bordered spaces. The former are far more common and formalized for major corporate economic actors than they are for citizens and migrants; the growing exception is the emergent global class of individuals who are top-level global economic players. Neoliberal policies, far from making this a borderless world, have actually led to a new type of bordering that allows firms and markets to move across conventional borders with the guarantee of multiple protections as they enter national territories. Firms and this new global class are now enveloped in multiple new types of institutionalized protections through these new transversal bordering capabilities, while citizens and migrants lose protections and have to struggle to gain such new types of transversal protections.

My effort here was to argue that these transversally bordered spaces are not merely a sub-species of cross-border flows, but constitutive of distinct territorial capabilities. These capabilities can be mobilized for a broad range of dynamics, including some with scale-up potentials that can unsettle the territorial authority of the state. They signal that territory, as an analytic category, cannot be confined to its *national* instantiation, even if this is the dominant one. This confinement keeps this category from working analytically. Conceived of as a complex capability, it can be shown to have more meanings than are signaled by prevalent notions of territoriality. It deborders territoriality—that singular encasement that constitutes it as national territory. In so doing, a focus on territory makes legible conditions that are at risk of remaining blurry, in the shadow of national-state territoriality.

NOTES

1. As Gottmann (1973) notes, in Medieval Europe the concept of patria (fatherland) preceded that of territory.

2. While exclusive territorial rule existed in Greek city-states (Gottmann, 1973), in Europe of the Middle Ages territoriality was weak because a given territory was more often than not subject to overlapping and even competing authorities and a lack of clear borders (Sassen, 2008, Chapter 2). In a non-Western example, Ford uses the case of Thai rule to point to 'a non-bounded, fluid and ambiguous notion of territory' prior to the establishment of territorial jurisdiction in the nation-state model during the late nineteenth century (Ford, 1999, p. 868)
3. Kratochwil identifies four principles invoked by states in claiming jurisdiction based on nationality, writing

> When claims concern the protection of their nationals, the *passive* nationality principle supplies the reasons; when states subject their subjects to the extraterritorial reach of domestic legislation, the *active* nationality serves as a basis. Furthermore, states claim jurisdiction over activities beyond their boundaries if those activities threaten their existence or proper functioning as a state (*protective* principle). Finally, jurisdiction can be claimed against perpetrators of international crimes on the basis of the *universality* principle, to leave aside the possibility of jurisdiction on the basis of a *special treaty* (stationing agreements). (2011, p. 13, emphasis original)

4. This generated a strong and cross-disciplinary debate beginning in the 1990s and continuing today about the traditional bases of state power and authority over its territory. See, for example, Cerny (2000), Gill (1996), Cutler and Gill (2013), Hirst and Thompson (1996), Helleiner (1999), Pauly (2002), Held and McGrew (2007) and Miller and Zumbansen (2011).
5. One of the primary tenets of the Peace of Westphalia was the recognition of each party's exclusive sovereignty over their lands and people, which is why it has often been identified as the beginning of the nation-state system although I (Sassen, 2008, Chapter 2), along with others (e.g. Wallerstein, 1974; Ford, 1999), would locate the emergence of territorial state sovereignty in Europe earlier, in the thirteenth century, with the rule of the Capetian kings in what is now France.
6. A separate issue is that of the state as 'representer' of its people and of the domain, a condition that also took a while to happen; on the issue of an 'authorization' theory of representation, see Pittkin (1972), Neuman (1996), Sassen (1996, Chapter 2, 2008, Chapter 6).
7. Elden (2007, 2010) develops a Foucauldian approach to theorizing territory within political geography. He traces the genealogy of territory through the rise of technologies for mapping, ordering, measuring, and demarcating land and terrain. In Elden's analysis, territory is thus construed as 'a rendering of the emergent concept of "space" as a political category: owned, distributed, mapped, calculated, bordered, and controlled' (2010, p. 15; see also 2007). Rather than a wider conceptual category, then, Elden argues for seeing territory as a specific historical construction, produced largely through the national state project of measuring land and exerting state power over terrain and therefore primarily equivalent to the space of national sovereign biopolitical power for most of its existence. Here, once again, territory, though not necessarily national, is definitively entangled with the bounding of land and terrain.
8. Buxbaum writes that while the US approach

> relies heavily on private international law concepts in defining the scope of prescriptive jurisdiction, German courts and commentators view the problem through two very different lenses—public international law and international enforcement law. As a result, claims of territoriality and extraterritoriality resonate differently in the two systems (2009, p. 636).

9. In *Territory, Authority, Rights* (2008) I first used this notion in dealing with medieval traders and craftsmen who through their inter-city traveling had 'produced a specific type of spatiality. This spatiality wormed its way into territories encased in multiple, formal, nonurban jurisdictions—feudal, ecclesiastical, and imperial' (Sassen, 2008, p. 29).
10. I have developed this at length in 'Bordering capabilities versus borders: implications for national borders' (Sassen, 2009). See also, Paasi (2012) for a discussion of the literature developing the concept of the border beyond the traditional line-centric view.
11. We can detect this in international legal cases of the last two decades where such cases rupture the dominant geopolitical system. For instance, legal scholars as diverse as Karen Knop, Susan B. Coutin, and Peter J. Spiro have written about the ambiguities in certain aspects of international law that become visible when the law is applied to cases involving a 'non-typical subject', such as women in international claims or immigrants in citizenship-related cases. See, e.g. Knop (2000, 2002), Spiro (2008), Coutin (2000). For a discussion of such ambiguities in the social science literature, see Beck (2000), Jessop (1999), Taylor (2000).
12. For a discussion of the broad consequences on law and regulation caused by the digitization of a growing range of domains, see Avgerou *et al*. (2007), Benkler (2006), Denning (1999), Goldsmith and Wu (2006), Rantanen (2005), Latham and Sassen (2005), Sassen (2008, Chapter 7).
13. The principle of *non-refoulement* forbids states under the 1951 Convention Relating to the Status of Refugees from returning 'legitimate' refugees to the state from which they have fled.
14. To date, in addition to several ongoing preliminary examinations, two ICC Prosecutor investigations have been launched on the basis of *propio motu*: (1) On 31 March 2010 an investigation was initiated into six Kenyan government officials for their alleged involvement in crimes against humanity committed between June 2005 and November 2009; and (2) on 3 May 2011, an investigation was initiated into crimes against humanity allegedly committed by Laurent Gbagbo since November 2010 in Côte d'Ivoire.
15. This occurred, for example, when the UN Security Council referred the situation in Darfur, Sudan—a non-State Party to the Rome Statute—to the ICC resulting in charges being brought against, and an arrest warrant issued for, then Sudanese President Omar Al Bashir along with six other high-ranking Sudanese officials. The controversy surrounding this case—notably the first time an arrest warrant was issued by the court for an acting head of State, an arrest opposed by many governments in the African Union—highlighted a critical question for the court over where, as Eric Blumenson puts it, 'legitimate moral diversity ends and universal moral imperatives begin' (2006, p. 871).
16. This section draws on my 2008 article 'Neither global [...] rights', published in *Ethics and Global Politics* **1(1–2),** 61–79.

REFERENCES

Agnew J. (1994) The territorial trap: the geographical assumption of international relations theory, *Review of International Political Economy* **1(1)**, 53–80.

Agnew J. (2005) Sovereignty regimes: territoriality and state authority in contemporary world politics, *Annals of the Association of American Geographers* **95(2)**, 437–461.

Aman A. C. Jr. (1995) A global perspective on current regulatory reforms: rejection, relocation or reinvention?, *Indiana Journal of Global Legal Studies* **2(2)**, 429–464.

Anderson J. (1996) The shifting stage of politics: new medieval and postmodern territorialities?, *Environment and Planning D: Society and Space* **14(2)**, 133–153.

Avgerou C., Mansell R., Quah D. and Silverston R. (Eds) (2007) *Oxford Handbook on Information and Communication Technologies*. Oxford University Press, Oxford.

AVSI and UNHCR (2009) *A Time Between: Moving on from Internal Displacement in Northern Uganda*. AVSI and UNHCR, Geneva.

Bartlett, A. (2007). The city and the self: the emergence of new political subjects in London, in Sassen S. (Ed.) *Deciphering the Global: Its Spaces, Scales and Subjects*, 221–243. Routledge, New York and London.

Beck U. (2000) *What Is Globalization?* P. Camiller (Trans). Polity Press, Cambridge.

Benkler Y. (2006) *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. Yale University Press, New Haven, CT.
Berman P. S. (2002) The globalization of jurisdiction, *University of Pennsylvania Law Review* **151(2)**, 311–545.
Blumenson E. (2006) The challenge of a global standard of justice: peace, pluralism, and punishment at the International Criminal Court, *The Columbia Journal of Transnational Law* **44(3)**, 801–874.
Brenner N. (2004) *New State Spaces: Urban Governance and the Rescaling of Statehood*. Oxford University Press, Oxford.
Brenner N. and Elden S. (2009) Henri Lefebvre on state, space, territory, *International Political Sociology* **3(4)**, 353–377.
Brighenti A. M. (2010) Lines, barred lines. Movement, territory and the law, *International Journal of Law in Context* **6(3)**, 217–227.
Brownlie I. (2008) *Principles of Public International Law*, 7th Edn. Open University Press, Oxford.
Buxbaum H. (2009) Territory, territoriality and the resolution of jurisdictional conflict, *American Journal of Comparative Law* **57(2)**, 631–676.
Buxbaum H. (2010) National jurisdiction and global business networks, *Indiana Journal of Global Legal Studies* **17(1)**, 165–181.
Cerny P. G. (1997) Paradoxes of the competition state: the dynamics of political globalization, *Government and Opposition* **32(2)**, 251–274.
Cerny, P. G. (2000). *Public Goods, States and Governance in a Globalizing World*. Routledge, London.
Coutin S. B. (2000) Denationalization, inclusion, and exclusion: negotiating the boundaries of belonging, *Indiana Journal of Global Legal Studies* **7(2)**, 585–593.
Cutler A. C. (1997) Artifice, ideology, and paradox: the public/private distinction in international law, *Review of International Political Economy* **4(2)**, 261–285.
Cutler A. C. (2001) Globalization, the rule of law, and the modern law merchant: medieval or law capitalist associations?, *Constellations* **8(4)**, 408–502.
Cutler A. C., Haufler V. and Porter T. (Eds) (1999) *Private Authority and International Affairs*. State University of New York Press, Sarasota Springs.
Cutler C. and Gill S. (Eds) (2013) *The New Constitutionalism and the Future of Global Governance*. Cambridge University Press, Cambridge.
Denning D. E. (1999) *Information Warfare and Security*. Addison-Wesley Professional, Boston, MA.
Elden S. (2007) Governmentality, calculation, territory, *Environment and Planning D: Society and Space* **25(3)**, 562–580.
Elden S. (2010) Land, terrain, territory, *Progress in Human Geography* **34(6)**, 799–817.
Ford R. T. (1999) Law's territory (a history of jurisdiction), *Michigan Law Review* **97(4)**, 843–930.
Fredriksen A. (2012) *Making Humanitarian Action Global: Coordinating Crisis Response Through the Cluster Approach*. Doctoral dissertation, Columbia University, Department of Sociology.
Gill S. (1996) Globalization, democratization, and the politics of indifference, in Mittelman J. H. (Ed.) *Globalization: Critical Reflections*, pp. 205–228. Lynne Reiner, Boulder, CO.
Gill S. (2008) *Power and Resistance in the New World Order*, 2nd Edn. Palgrave Macmillan, Basingstoke.
Goldsmith J. and Wu T. (2006) *Who Controls the Internet?: Illusions of a Borderless World*. Oxford University Press, Oxford.
Gottmann J. (1973) *The Significance of Territory*. University Press of Virginia, Charlottesville, VA.
Grant J. (2011) Bank and broker trading networks under attack, *Financial Times*, 7 April, London (available at: http://www.ft.com/cms/s/0/0db9f3da-6140-11e0-ab25-00144feab49a.html#axzz1kwDMuDHF) (accessed on 28 August 2012).
Held D. and McGrew A. (Eds) (2007) *Globalization Theory: Approaches and Controversies*. Polity Press, Cambridge.
Helleiner E. N. (1994) *States and the Reemergence of Global Finance*. Cornell University Press, Ithaca, NY.

Helleiner E. N. (1995) Explaining the globalization of financial markets: bringing the state back in, *Review of International Political Economy* **2(2)**, 315–341.
Helleiner E. N. (1999) Sovereignty, territoriality and the globalization of finance, in Smith D. A., Solinger D. J. and Topik S. C. (Eds) *States and Sovereignty in the Global Economy*, pp. 138–155. Routledge, London.
Hirst P. and Thompson G. (1996) *Globalization in Question: The International Economy and the Possibilities of Governance*. Polity Press, Cambridge.
Hovil L. (2010) *Hoping for Peace, Afraid of War: The Dilemmas of Repatriation and Belonging on the Borders of Uganda and South Sudan*. UNHCR New Issues in Refugee Research, Research Paper no. 196.
IOM (2012) GATS Mode 4 (available at: http://www.iom.int/jahia/Jahia/developing-migration-policy/migration-trade/GATS-mode-4 (accessed on 30 May 2012).
Jessop B. (1999) Reflections on globalization and its (Il)logic(s), in Olds K., Kelly P. F., Kong L., Yeung H. W. and Dicken P. (Eds) *Globalisation and the Asia Pacific: Contested Territories*, pp. 17–36. Routledge, London.
Joppke C. (Ed.) (1998) *Challenge to the Nation-State: Immigration in Western Europe and the United States*. Oxford University Press, Oxford.
Kaiser T. (2010) Dispersal, division and diversification: durable solutions and Sudanese refugees in Uganda, *Journal of Eastern African Studies* **4(1)**, 44–60.
Keohane R. O., Moravcsik A. and Slaughter A. M. (2000) Legalized dispute resolution: interstate and transnational, *International Organization* **54(3)**, 457–488.
Knop K. (2000) Here and there: international law in domestic courts, *Journal of International Law and Politics* **32(2)**, 501–535.
Knop K. (2002) *Diversity and Self-determination in International Law*. Cambridge University Press, Cambridge.
Krasner S. D. (1993) Westphalia and all that, in Goldstein J. and Keohane R. (Eds) *Ideas and Foreign Policy*, pp. 235–264. Cornell University Press, Ithaca, NY.
Krasner S. D. (1999) *Sovereignty: Organized Hypocrisy*. Princeton University Press, Princeton, NJ.
Krasner S. D. (2004) Globalization, power and authority, in Mansfield E. D. and Sisson R. (Eds) *The Evolution of Political Knowledge: Democracy, Autonomy, and Conflict in Comparative and International Politics*, pp. 60–81. Ohio State University Press, Columbus, OH.
Krasner S. D. (2009) *Power, the State, and Sovereignty: Essays on International Relations*. Routledge, New York.
Kratochwil F. (1986) Of systems, boundaries and territoriality: an inquiry into the formation of the state system, *World Politics* **39(1)**, 27–52.
Kratochwil F. (2011) *Of Maps, Law, and Politics: An Inquiry into the Changing Meaning of Territoriality*. DIIS Working Paper 2011:03. DIIS, Copenhagen.
Latham R. and Sassen S. (Eds) (2005) Digital formations: constructing an object of study, *Digital Formations: IT and New Architectures in the Global Realm*, pp. 1–34. Princeton University Press, Princeton, NJ.
Law J. (1993) *Organising Modernity: Social Ordering and Social Theory*. Blackwell, Oxford.
Long K. (2010) *Home Alone? A Review of the Relationship Between Repatriation, Mobility and Durable Solutions for Refugees*. UNHCR Policy Development and Evaluation Service.
Long K. (2011) *Permanent Crises? Unlocking the Protracted Displacement of Refugees and Internally Displaced Persons*. Refugee Studies Centre, Oxford University, Oxford.
Luhmann N. (Ed.) (1995 [1984]) *Social Systems*. J. Bednarz, Jr. with D. Baecker (Trans). Stanford University Press, Stanford.
Maldonado-Torres N. (2007) On the coloniality of being, *Cultural Studies* **21(2)**, 240–270.
Merry S. E. (2006) New legal realism and the ethnography of transnational law, *Law and Social Inquiry* **31(4)**, 975–995.
Mignolo W. (2007) Delinking: the rhetoric of modernity, the logic of coloniality, and the grammar of de-coloniality, *Cultural Studies* **21(2)**, 449–514.
Miller R. and Zumbansen P. (2011) *Comparative Law as Transnational Law: A Decade of the German Law Journal*. Oxford University Press, Oxford.

NEUMAN G. (1996) *Strangers to the Constitution*. Princeton University Press, Princeton, NJ.
PAASI A. (1996) *Territories, Boundaries and Consciousness: The Changing Geographies of the Finnish-Russian Border*. Wiley, New York.
PAASI A. (1997) Geographical perspectives on Finnish national identity, *GeoJournal* **43(1)**, 41–50.
PAASI A. (2003) "Territory", chapter eight, in AGNEW J., MITCHELL K. and TOAL G. (Eds) *A Companion to Political Geography*, pp. 109–122. Blackwell, Oxford.
PAASI A. (2012) Border studies reanimated: going beyond the territorial/relational divide, *Environment and Planning A* **44(10)**, 2303–2309.
PAINTER J. (2010) Rethinking territory, *Antipode* **42(5)**, 1090–1118.
PANIZZON M. (2010) International law of economic migration: a Menage a Trois? GATS Mode 4, EPAs, and bilateral migration agreements, *Journal of World Trade* **44(6)**, 1207–1252.
PANIZZON M. (2011) Interfacing the temporary movement of workers in 'Mode 4 of GATS' with bilateral migration agreements, *American Society of International Law (ASIL) Proceedings*, Vol. 104, 2010; NCCR Working Paper No 2011/07.
PAULY L. W. (2002) Global finance, political authority, and the problem of legitimation, in HALL R. B. and BIERSTEKER T. J. (Eds) *The Emergence of Private Authority in Global Governance*, pp. 76–90. Cambridge University Press, Cambridge.
PITTKIN H. F. (1972) *The Concept of Representation*. University of California Press, Berkeley, CA.
QUIJANO A. (2000) Coloniality of power, Eurocentrism and Latin America, *Nepantla: Views from the South* **1(3)**, 533–580.
QUIJANO A. (2007) Coloniality and modernity/rationality, *Cultural Studies* **21(2–3)**, 168–178.
RANTANEN T. (2005) *The Media and Globalization*. SAGE, London.
RASTAN R. (2007) *The Power of the Prosecutor in Initiating Investigations*, Paper prepared for the symposium on the International Criminal Court, 2–4 February, Beijing, International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver (available at: http://www.icclr.law.ubc.ca/Site%20Map/ICC/PoweroftheProsecutor.pdf) (accessed on 28 May 2012)
RAUSTIALA K. (2005) *The Geography of Justice*, UCLA School of Law Public Law & Legal Theory Research Paper Series, Research Paper No. 05-7 (available at: http://ssrn.com/abstract=693924) (accessed on 13 August 2012) (Paper later published in *Fordham Law Review* vol. 73.).
RODRIK D. (2011) *The Globaliztion Paradox: Democracy and the Future of the World Economy*. W.W. Norton, New York.
RUGGIE J. G. (1993) Territoriality and beyond: problematizing modernity in international relations, *International Organization* **47(1)**, 139–174.
SACK R. D. (1986) *Human Territoriality: Its History and Theory*. Cambridge University Press, Cambridge.
SASSEN S. (1996) *Losing Control? Sovereignty in an Age of Globalization*. Columbia University Press, New York.
SASSEN S. (2008) *Territory, Authority, Rights: From Medieval to Global Assemblages*, 2nd Edn. Princeton University Press, Princeton, NJ.
SASSEN S. (2009) Bordering capabilities versus borders: implications for national borders, *Michigan Journal of International Law* **30(3)**, 567–597.
SASSEN, S. (2011). The global street: making the political. Globalizations **8(5)**, 565–571.
SASSEN S. (2013) *Ungoverned Territories*. Harvard University Press, Cambridge, MA.
SCHWARCZ S. L. (2002) Private ordering, *Northwestern University Law Review* **97(1)**, 319–350.
SPIRO P. J. (2008) *Beyond Citizenship: American Identity after Globalization*. Oxford University Press, Oxford.
STIGLITZ J. E. and CHARLTON A. (2005) *Fair Trade for All: How Trade Can Promote Development*. Oxford University Press, Oxford.
TAYLOR P. J. (1993) *Political Geography: World-Economy, Nation-State and Locality*. Longman, London.
TAYLOR P. J. (1994) The state as container: territoriality in the modern world-system, *Progress in Human Geography* **18(2)**, 151–162.
TAYLOR P. J. (1996) Territorial absolutism and its evasions, *Geography Research Forum* **16**, 1–12.

TAYLOR P. J. (2000) World cities and territorial states under conditions of contemporary globalization, *Political Geography* **19(1)**, 5–32.
TEUBNER G. (2004) Societal constitutionalism: alternatives to state-centered constitutional theory, in JOERGES C., SAND I. J. and TEUBNER G. (Eds) *Transnational Governance and Constitutionalism*, pp. 3–28. Hartford Publishing, Hartford, MA.
TEUBNER G. (2011) Constitutionalising polycontexturality, *Social and Legal Studies* **20(2)**, 209–220.
TEUBNER G. (2012) *Constitutional Fragments. Societal Constitutionalism in the Globalization*. Oxford University Press, Oxford.
THE ECONOMIST (2011) Some like it not: institutional investors either love dark pools or hate them, 20 August (available at: http://www.economist.com/node/21526387) (accessed on 28 August 2012).
WALLERSTEIN, I. (1974). *The Modern World-System*. Academic Press, New York.
WALKER R. B. J. (1993) *Inside/Outside: International Relations as Political Theory*. Cambridge University Press, Cambridge.
WEISS L. (1998) *The Myth of the Powerless State*. Cornell University Press, Ithaca, NY.
WTO (2009) *Presence of Natural Persons (Mode 4)*: Background Note by the Secretariat, Council for Trade in Services, S/C/W/301, 15 September.
ZUMBANSEN P. (2012) *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, Paper given at WBZ, Berlin Colloquium: *Rethinking Law in a Global Context: Rethinking the National/International Divide*, 29 May (available at: http://www.wzb.eu/sites/default/files/u273/zumbansen_2012_defining_the_space_of_transnational_law_wzb_hu.pdf) (accessed on 9 September 2012).

Article

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Geographical knowledge at work: Human rights litigation and transnational territoriality

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Abstract

In April 2013, the US Supreme Court left a mark on the spatiality of law. In a decision on human rights violations in Nigeria, state territoriality served as a technique to rule out the application of transnational law against private corporations. Paradoxically, the private actor turned out to be the primary beneficiary of this jurisdictional territorialism. Drawing on work in critical geography, the article argues that this was only possible against the background of a certain geographical knowledge as reproduced in the course of legal practice. The corporate production of space consisted of a 'private use of territoriality' to resist the extraterritorial application of law and thus transnational state regulation. During a spatial analysis of a number of the 82 amicus curiae briefs to *Kiobel v. Royal Dutch Petroleum*, the article reveals how the geographical configurations of our contemporary order not only withstand transnational challenges, but are even reproduced transnationally by a multiplicity of state and non-state actors. While international law builds upon and reproduces territoriality as a foundational principle of global normativity, it also provides the means for the doing away with territoriality. In order to demonstrate how legal practice contributes to a critical reproduction of normativity on different scales (national and international, local and global), the article establishes a spatial gaze on transnational relations at work.

Keywords

Alien Tort, corporations, courts, human rights, international law, Kiobel, space, territory, transnational, transnational relations

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Introduction

In April 2013, the US Supreme Court left a mark on the spatiality of law. *Kiobel v. Royal Dutch Petroleum*[1] was a class action against a transnational corporation (TNC) that had been accused of having aided and abetted a number of serious violations of human rights related to the extractive industry in Nigeria. Since the alleged incidents occurred 'abroad', in another country, thousands of miles away from the jurisdiction within which the case was brought to court, the established geographical knowledge of law and the amalgamation of law and the state were challenged. To enter the US court system, the petitioners had relied on the *Alien Tort Statute* (ATS),[2] which is part of a Judiciary Act from 1789, enacted by the First Congress of the United States. Following this statute, '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[3] While in previous stages of the lawsuit, the emphasis had been on the question of whether private corporations could be liable under international law,[4] the judges at the Supreme Court changed the main legal focus to a question of *territoriality* and thus for the geography of law. Finally, it was on 'territorial' grounds that the case was rejected. As the majority of the judges held, the claims that had been brought would not 'touch and concern the *territory* of the United States … with *sufficient force*'.[5] In the *Kiobel* judgement, an abusive form of public–private partnership — Royal Dutch Shell together with Nigerian public authorities — could escape the transnational rule of law by referring to the territorial logic of jurisdiction. Paradoxically, the primary beneficiary of this territorialism was a private actor. The judges strengthened the normative boundaries of the international state system in such a way that the corporation could not be held responsible for alleged violations of human rights.

Territorial jurisdiction is no doubt a basic feature of our contemporary normative order. However, under globalization, the principle of territoriality has come under pressure, and transnational litigation practice is one of the challenges. This stimulates questions as to how law and space are interrelated. The overriding normative issue at stake is whether or not lawsuits should be allowed to be brought to courts located far away from the place of conduct. Does it make sense to sue a conglomerate of British, Dutch and Nigerian corporations in a US court for violations of rights that have occurred in Nigeria? The aim of this article is to explore the geographical knowledge at work when such questions are raised and corresponding answers are given in legal practice. Drawing on work in critical geography, I address transnational human rights litigation practice as an episode of colliding 'politics of space' (Lefebvre, 2009a). The courtroom is addressed as a site of politico-legal encounters, worthy of study in order to establish a critical gaze on transnational relations.

International Relations (IR) theories have often characterized international law either as the normative glue of the international society (the latter in the sense of a society of states; see Bull, 1995) or as a mode of governance that tends to alter the meaning of nation-state boundaries (e.g. through human rights; see Risse and Ropp, 2013). The study of transnational law and space reveals that law can be both, and, paradoxically, both at the same time. While international law builds upon and reproduces territoriality as a foundational principle of global normativity, it also provides the means for the doing

away with territoriality. As a result, the triad of law, politics and space evolves as a matter of further scrutiny — with a number of benefits especially for the understanding of law in IR. The emphasis on the instrumentalist logic of legal knowledge (law as a *technique*) allows for an understanding of law as a critical surface of politics in general, as well as the 'politics of space' in particular. This brings back to light the nexus between politics and law — perhaps 'the' research desideratum of the collaborative debates between IR and International Law (IL) (Abbott and Snidal, 2013: 34–37; for insightful discussion on the 'politics of rights', see also Kratochwil, 2014: chs 7–8). What the geographical perspective reveals is that law is by no means the end of politics (depoliticization), nor is it necessarily channelling the paths of politics. The law serves different purposes, the perpetuation of as well as the emancipation from authority, and sometimes even the suspension of the law itself (Johns, 2005). Moreover, the all-too-often taken-for-granted amalgamation of law and the state can be used by a multiplicity of actors — even to the end of establishing spaces of non-state regulation and 'private authority' (Cutler et al., 1999; Hall and Biersteker, 2002). In the current state of normativity, public and private forms of authority are not opposed towards each other, but may form clusters of a still 'territorialized', though 'denationalized', mode of transnational governance (Sassen, 2006).

Before my argument takes shape, a methodological note is in order. Since 1980 and the *Filàrtiga* case,[6] ATS litigation has been taken up as a possibility of bringing abusive corporate conduct to US courts and thus as a means of global human rights advocacy.[7] Relatedly, the *Kiobel* case has been selected to scrutinize the geographical knowledge upon which the political use of global law builds. In addition, *Kiobel* plays a prominent role in jurisprudence since it is 'the' transnational human rights litigation lawsuit that made it into the Supreme Court. Thus, it has the potential to solve a number of — up to this point — unresolved legal issues, including the question of the spatiality and *extra-territoriality* of law (as domestic, international and global law). Although *Kiobel* has been rejected by the Supreme Court and became a *manifesto of state territorialism*, it is unclear whether the decision really marks the end point in modern ATS litigation practice.[8] Yet, from the perspective of IR, the main issue is not the future possibility to bring ATS lawsuits in US courts. Rather, *Kiobel* can be understood as case of a 're-territorialization' in a historical situation in which state territoriality is said to be under severe pressure. However, the aim of this article is not to search for and find normative change in the sense of an effective shift from a 'territorial' towards a 'non-territorial' order. Instead, I contest such dichotomist views of concepts like *international relations*, *state actors* and *territoriality* being necessarily opposed to *transnational relations*, *private actors* and *globalization*. The argument to be developed is that the geographical configurations of our contemporary order not only withstand transnational challenges, but are even reproduced transnationally. It is here where the article addresses a number of questions on the geographies of legal knowledge. How is geographical knowledge contested and (perhaps even more importantly) how is it stabilized? How are spatial categories like 'territory' and 'jurisdiction' used for different (legal, political and economic) purposes? How does geographical knowledge play into the politics of law and/or the international nexus of law and politics?

To establish a point of departure for a spatial analysis of transnational litigation practice, the second section will revisit the IR theme of transnational relations and suggest interlinking it with the notion of geographical knowledge in order to overcome a tautological equation of transnational actors and transnational normative space. Taking inspiration from critical geography, state territoriality can then be understood as a script that may be used 'transnationally' and by a multiplicity of actors (in the third section). In the empirical part of the article, I establish transnational human rights litigation and the *Kiobel* case as a site of observation (in the fourth section). During a spatial analysis of a number of the 82 amicus curiae briefs to the *Kiobel* case, the article demonstrates how territoriality is coupled to and/or decoupled from the state as actor — eventually leading to a state of transnational territoriality (in the fifth section). The conclusion re-links the spatial analysis to a broader discussion on transnational governance.

Transnational scales

While the territorial state is commonly understood as a given jurisdictional space and is thus 'naturalized' as a self-evident space of governance (Ford, 1999; Ruggie, 1993), transnational litigation practice represents a departure from the fixed state–law nexus. Where law turns transnational, it is undergoing an adjustment of scales. As Santos (1987: 283–284) puts it, a 'given phenomenon can only be represented on a given scale. To change the scale implies change of the phenomenon. Each scale reveals a phenomenon and distorts or hides others'. In this respect, I ask for the phenomena that are revealed, distorted or hidden in the course of transnational litigation practice. Where local struggles for human rights — or justice more generally — are extended to places remote from the places where putative rights violations occur, the seeking of justice may implicate challenges to established scalar narratives. The politics of human rights operate as a form of spatial resistance (see, generally, Soja, 1989: 128).

Although the monopoly of the state form of governance has long been questioned in IR scholarship (Nye and Keohane, 1971; Rosenau, 1992), debate in the field did widely neglect the meaning of space and the theoretical status of territoriality (but see Ruggie, 1993). John Agnew (1994) argues that IR and International Political Economy (IPE) have been stuck in what he calls a 'territorial trap'. However, in the meantime, a 'spatial turn' has gained some foothold in the field of IR too. Although still on the margins of the field, IR scholars have started to account for the 'geography of knowledge' in international affairs (Agnew, 2007). Space is increasingly understood as a necessary component in the legitimization of power (Shah, 2012: 60).

This more recent move to geography should not obscure the fact that scholarship in IR has long gone 'transnational'. However, since work on transnational norm dynamics has often focused on the emergence of particular (bodies of) norms (Risse and Ropp, 2013), the territoriality or — to use a wider concept — spatiality of norms remained a rather marginalized topic. While some historical-philosophical approaches to international relations (Bartelson, 1995; Walker, 1993, 2010) do consider space and territory as critical categories, and ask 'how complex practices of drawing lines have come to be treated as such a simple matter' (Walker, 2010: 6), the focus in this strand of work has been on the philosophical roots of spatial assumptions in IR rather than everyday spatial

practice in various social processes. In turn, the actor-centric research on transnational relations and norms altogether suffers from a lack of engagement with how geographies of knowledge serve as important 'explanatory schemes, frames of reference, crucial sets of assumptions, narrative traditions, and theories' (Agnew, 2007: 138). I argue that there is a notable potential in the interlinking of these debates with regard to a theory-guided strand of empirical work that takes into account the social meaning of space.

In the fields of IR and IL, the introduction of the term 'transnational' follows from a discontent with the more common term 'international'. At least in its narrow sense, the term '*inter*national relations' eventually fails to comprise the complexity of state and non-state actors operating across boundaries and beyond the normative confines of nation-states. Philip Jessup (1956: 1) holds that 'the term "international" is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)'. Instead of 'international law', he introduces 'the term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included.… Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups' (Jessup, 1956: 2–3). In IR, the focus on 'transnational relations' stems from a similar sensibility, that is, a vision to account for 'contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of governments' (Nye and Keohane, 1971: 331). Early IR scholarship on transnational relations adheres to a conventional understanding of societies as subordinated to 'their' national governments. While the authors reject the assumption that in international relations, societies only act through their governments, this concept of transnational relations does not conceptually relocate societies. The difference between international and transnational relations only stems from arguably changed interaction patterns. Transnational relations are understood within the state paradigm, that is, without considerable recognition of a shifting of scales. Although interaction patterns may affect the possibilities of state actors to pursue their policy preferences, the world in which such interactions take place is widely regarded as untouched or at least not affected in the sense of a significant change of the normative landscape.

Being interested in the domestic and international conditions of transnationalist practice, later IR studies on transnational relations have focused on how transnational actors succeed or fail under the given conditions of an interstate world (Risse-Kappen, 1995). This perspective has been improved upon, particularly with regard to transnational norm entrepreneurship and the processes of international norm diffusion (Finnemore and Sikkink, 1998; Risse and Ropp, 2013; Risse and Sikkink, 1999). While these works provide a welcome elaboration of the 'new' actors' role in international relations and the emergence of international norms, they do not tell us much about the global normativity resulting from changed interaction patterns. This is problematic since the normative context of *transnational* relations cannot just be taken for granted (Wiener, 2008). Since 'the world' is not a pre-given surface of governance practice, it is necessary to establish an analytical perspective on how 'the transnational' comes into being as an intelligible space. In the same way as the nation-state necessitates (and 'naturalizes') its construction as a space of governance, transnational space does not automatically follow from nation-state border-crossing transactions. As Peer Zumbansen (2012: 22–23) puts it with respect to transnational law:

> in addressing, on the one hand, the demarcation of emerging and evolving spaces and, on the other, the construction of these spaces as artifacts for human activity, communication and rationality, the term transnational is conceptual. To declare an activity as being transnational is not just the result of an empirical observation, say, of a border crossing commercial transaction.

Calling an interaction 'transnational' can be understood as conceptual practice because this already implicates a normative space that effectively transcends state space. It is only by this implication that 'transnational' relations are to be differentiated from 'international' relations. However, in so doing, we would already assume to 'know' that changed interaction patterns lead to a normative shift. Following this logic, a world constituted by state actors and by means of statecraft is an 'international' (in the sense of interstate) space, while a world constituted by a multiplicity of actors and by means of multiple public and private forces is a 'transnational' space. The shortcoming consists in the flawed assumption of an *actor–space nexus*. While a multiplicity of actors may, indeed, affect normative boundaries, we cannot assume that a particular type of actor leads to a particular change of normativity. Thus, the couplings of state actors and 'international' space, on the one hand, and non-state actors and 'transnational' space, on the other, can hardly be taken as unproblematic. As I will show in my empirical study of the *Kiobel* briefs, state actors may well produce 'transnational' spaces in the same way as non-state actors may produce 'international' spaces.

In sum, 'the transnational' points to a body of eventually paradoxical practice. An international space of 'private authority' (Cutler et al., 1999; Hall and Biersteker, 2002) and a 'transnational space' of state practice (Slaughter, 2004) are likewise possible. By no means are TNCs only playing the game of economic market power or 'threatening' state governments to move labour to another country with lower wages and standards of working conditions (Coyle, forthcoming). Private actors are deeply involved in the making of rules, as studies on private standardization reveal (Büthe and Mattli, 2011; Riles, 2011). On the boundaries between IR and IPE, a number of scholars have addressed the role of business with regard to the rise of *private authority* (Cutler et al., 1999; Hall and Biersteker, 2002). The main idea of this strand of work is to question the 'state-bounded notions of authority' (Cutler et al., 1999: 17) that would result in a problematic omission of normative developments on a global scale. In so doing, 'new' actors like TNCs are incorporated into the analyses not only in the sense of a broadened view on interaction patterns, but also with respect to these actors' role in the reproduction of global order:

> While these new actors are not states, are not state-based, and do not rely exclusively on the actions or explicit support of states in the international arena, they often convey and/or appear to have been accorded some form of legitimate authority.… In short, they do many of the things traditionally, and exclusively, associated with the state. (Hall and Biersteker, 2002: 4)

One important aspect of this critical perspective is that 'the transnational' is no longer addressed as a mere constellation of actors, but, as Cutler (2013: 723) puts it, is to be examined 'as a disputed ontological field of action, a disputed epistemological category, and a disputed normative aspiration and political project'. The emergence of private authority points to an ongoing process of a redetermination of various normative boundaries. The political distinction between the *public* and the *private* (Peterson, 2000) is

crisscrossing scalar boundaries like those between the local and the global — leading us back to the concept of scale mentioned earlier.

The global politics of space and the 'transnational state'

International and transnational law is commonly understood as belonging to the world of *global* governance, while the nation-state is equated with *local* governance. However, not even international law works along the lines of such 'clear-cut puzzle pieces' (Knop, 2012), and particularly the extraterritorial application of law (Buxbaum, 2009; Colangelo, 2014; Kaleck, 2009; Teitel, 2005) tends to undermine such clear-cut differentiations. In this respect, the *global–local* distinction can hardly serve as useful guidance (Sassen, 2006). Despite blurring normative boundaries and the multiplicities of actors at work, territoriality lingers on. As I will argue in this section, this is not (necessarily) because the state continues to be a powerful actor in the international system. Rather, it is the *concept* of the territorial state — or *state territoriality* — that seems to persist as a powerful idea of regulation, though the agents of corresponding regulatory games need not necessarily be state actors.

Arguing from a Marxist perspective, William Robinson (2001: 158, emphasis added) points to the '*transnational state* … that has been brought into existence to function as the collective authority for a global ruling class'. The thought-provoking figure of the 'transnational state' points to a theoretical possibility of thinking about the state beyond the common 'national' scale of governance — which may even point to the very limits of the concept of scale itself (Marston et al., 2005). Insightful examples are the detention camps in Guantanamo and elsewhere that are established as 'extra-legal zones', though by means of particular legal and territorial (or 'non-territorial') arrangements (Gregory, 2007; Johns, 2005). What these examples suggest is a conception of the state *as practice* — thus, radically challenging the fixed ontological assumptions of territory and the state (Sharma and Gupta, 2006). As Annelise Riles (2008: 629) puts it: 'the practice of making distinctions, compartmentalizing, cutting off and setting limits is an exercise in creating and manipulating legitimacy that has also long been one of the privileges, and the contributions, to the knowledge practices of the state'.

With respect to the role that territory plays in such processes, it is insightful to rely on the work of French philosopher Henri Lefebvre, who has recently been introduced to IR (Brenner and Elden, 2009; Mitchell, 2011; Shah, 2012):

> If space has an air of neutrality and indifference with regard to its contents … it is precisely because this space has already been occupied and planned, already the focus of past strategies of which we cannot always find traces.… space, which seems homogeneous, which appears given as a whole in its objectivity, in its pure form, such as we determine it, is a social product. (Lefebvre, 2009a: 170–171)

Such considerations of state space can well be extended to the productivity of territory. In this respect, Neil Brenner and Stuart Elden (2009) do read Lefebvre as a theorist of territory, particularly as regards the idea that 'the state and territory interact in such a way that they can be said to be mutually constitutive' (Lefebvre, 2009b: 228). From this perspective, territory is no longer understood as the given container of state politics — as is usually done in IR. The critical account furthers insight into the function of territory as part of the 'strategic-political projects associated with modern capitalism and the modern state' (Brenner and Elden, 2009: 363). This points not only to a perspective enabling us to ask how states *make* territory for particular purposes, but also to the normative conditions of territorial production: 'States make their territory, not under circumstances they have chosen, but under the given and inherited circumstances with which they are confronted' (Brenner and Elden, 2009: 367). States, in other words, are at the same time active and passive in the production of state space; they *make* territory while, at the same time, are *made through* territory.

While the idea of a particular spatial strategy of the territorial state proves to be helpful with regard to understanding territoriality, I suggest decoupling corresponding state strategies from the *state as actor*. In doing so, I aim to expose the idea of the territorial *state as spatial strategy*. Hence, state territoriality can be understood as practice available not only to the state as an actor, but also for a multiplicity of actors and for a number of different political purposes. The configuration of jurisdictional reach can be understood as one such purpose. While state actors may be interested in extending the validity of domestic regulation — and thus the reach of state regulation — beyond state territory (extraterritorial application of domestic law), non-state actors like TNCs may be interested in the opposite, that is, the restrictive interpretation of territorial boundaries with the result that they do not fall under a 'foreign' jurisdiction and thus a regulatory framework that would eventually disadvantage business interests. In practice, the question of regulatory reach depends on the representation of state territoriality, which is then to be understood as a normative concept used for demarcating regulatory practice. Inasmuch as a multiplicity of state and non-state actors tends to struggle for the meaning of territory and the state, this argument points to what may be called a transnational dimension of territory (Banai et al., 2014: 100).

Thus far, critical geography in IR has not made the connection between the elaboration of global territoriality, on the one hand, and transnational public–private governance, on the other. Although several important steps have been made, as in the acknowledgement of a spatial 'everyday practice' (Brenner and Elden, 2009: 366), historical contingency in the making of territory (Shah, 2012) or the differentiation of 'dimensions of state space' (Brenner et al., 2003: 6–11), the transnational moment of geographical knowledge can still be considered a research desideratum. In order to establish a critical perspective on state and non-state territoriality, study needs to account for the social processes during which geography makes a real difference in people's lives, as well as for the multiplicity of actors involved in corresponding spatial struggles (Weizman, 2012). In the subsequent section, I will propose transnational human rights litigation as a site of observation. I assume that the different and opposing legal arguments before the Supreme Court are based upon colliding geographies of knowledge and that the particular spatial strategies are used to put forward legal arguments. The various actors involved in lawsuits like *Kiobel* can thus be expected to contest each other's notions of space and territory. Law is thus not understood as a field separate from politics and as a set of normative scripts that actors may (or may not) comply with. Rather, law is addressed as a practice that *does something to the world*. Understood from this perspective, law is turned into a practice of *world-making* (see Onuf, 1989) — even in a literal sense of proving 'territorial' grounding.

Transnational human rights litigation

As an interesting variant of transnational legal practice, the ATS obviously challenges the established geographical knowledge underlying our system of mutually exclusive nation-state jurisdictions. Already established in 1789 by the First Congress of the US, this statute holds that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. The ATS provides a critical interface of international law and domestic jurisprudence and, in doing so, enables 'aliens' — that is, foreign nationals — to bring lawsuits to the US court system by relying on international law (Knop, 2000). However, for a long time, this transnational script was not widely noticed. Only in the early 1980s, after the ATS had been used in the *Filàrtiga* case,[9] did a global human rights community become aware of the fact that ATS may be established as an instrument in the global struggle for human rights, especially with regard to the phenomenon of human rights violations by TNCs (Karp, 2014; Teubner, 2012).

Kiobel entered the history of modern ATS litigation when a number of Nigerian plaintiffs filed a complaint against Royal Dutch Petroleum Co. and Shell Transport and Trading Company PLC (2002), as well as Shell Petroleum Development Company of Nigeria, Ltd. (2004), to the United States District Court in the Southern District of New York. The companies now consolidated under the parent company Royal Dutch Shell were accused of having aided and abetted in diverse violations of international law, including: extrajudicial killings; crimes against humanity; torture/cruel, inhumane and degrading treatment; arbitrary arrest and detention; rights to life, liberty, security and association; forces exile; and property destruction. While some of the claims were successful in the District Court, they were later rejected in the US Court of Appeals of the 2nd Circuit mainly because private corporations were held not to be liable under international law and the ATS.[10]

However, at the Supreme Court, the case took an unexpected turn. The judges, after having heard oral arguments in February 2012, invited the parties for another round of 'rearguments', now focusing on the territorial question of 'Whether and under what circumstances the Alien Tort Statute … allows courts to recognize a cause of action for violations of the law of nations occurring within the territory other than the United States.'[11] Against this backdrop, a high number of further amicus curiae briefs were issued, now focusing on the question of extraterritoriality.

In the final judgement, this spatial focus took shape in a widely unexpected reliance on the so-called *presumption against extraterritorial application* (Kontorovich, 2014), a legal principle meant to prevent 'unwarranted judicial interference in the conduct of foreign policy'.[12] The question was whether a claim under the ATS 'may reach conduct occurring in the territory of a foreign sovereign'.[13] The answer given was that 'nothing in the statute rebuts that presumption',[14] which led the court majority into a consideration of the relation between corporate conduct and the territory of the US:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.… Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[15]

In the judgement, territory is presented as a given, even though the judges were deeply involved in the production of space. In this respect, *Kiobel* can be read as a contribution to a naturalization of territory, with a veil drawn over the political nature of social space (Liste, 2014). The scalar narrative at work in the *Kiobel* decision reveals the nation-state as a limitation to the validity of norms, while, at the same time, distorting the possibilities of regulating corporate conduct across borders (Santos, 1987: 283–284).

Since the case was finally rejected by the US court system, *Kiobel* is not a success story of spatial resistance. However, this is not a reason to stop spatial analysis at this point. The *Kiobel* proceedings have been the site of an insightful interplay of spatial resistance and counter-resistance, involving an interesting multiplicity of actors in world society. The spatial analysis helps us understand the workings of geography within law. Following Lefebvre's (2009a: 170) argument that 'space has already been occupied and planned, already the focus of past strategies of which we cannot always find traces', the spatial analysis of *Kiobel* allows for the tracing of what can be called an ongoing 'spatial occupation' of law. In this respect, the spatial analysis is not an empirical account of normative *change*, but an attempt to scrutinize the *persistence of order* despite the challenge of geographical knowledge practices that contest the naturalization of territory.

Geographical knowledge at work: Spatial analysis

In March 2012, the Supreme Court invited the parties to the *Kiobel* case to articulate positions on the question of territoriality (see earlier). The court has thus shifted the main legal focus to *territoriality* — and *extraterritoriality*. Up to this point, a remarkable number of third actors had attempted to intervene in the case by means of *amicus curiae briefs*. With respect to the new territorial focus, various new or supplemental briefs were issued so that, in analytical terms, the text corpus generated through these briefs represents a wide range of actors in world society. In order to structure the spatial analysis to be conducted in this section, I concentrate on a number of actors that are grouped along the lines of actor group categories common to the field of IR: state actors, TNCs and non-governmental organizations (NGOs).

State actors

A couple of the amicus curiae briefs related to the *Kiobel* case are authored by state actors. At first hand, these state actors could be grouped into those obviously affected through the *Kiobel* case (like the US, the UK and the Netherlands)[16] and those whose relation to the case is less obvious (like Argentina and Germany). However, while the latter group took distinct positions on either side of the parties — Argentina supporting the petitioners, Germany the respondents — the positions of the former group of state actors appear to be more ambivalent. In a first brief, the governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands acted as 'amici curiae in support of the respondents' (UK et al., 2012); in a second brief focusing on the territorial issues of the case, the same group of states — appearing in reverse order as the governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland — acted as 'amici curiae in support of neither party' (Netherlands et al., 2012). In

its briefs, the US also took an ambivalent position in terms of partisanship by arguing 'as amicus curiae supporting petitioners' in the initial brief (USA, 2011) and 'in partial support of affirmance' in a supplemental brief on the question of territoriality (USA, 2012).

In the first place, the US considered itself as affected since the case would have implications for 'the Nation's foreign and commercial relations and for the enforcement of international law' (USA, 2011: 1). This focus on the nation is even stronger in the supplemental brief on the question of territory. This latter brief holds that the court should not 'resolve across the board the circumstances under which a federal common law cause of action might be created by a court exercising jurisdiction under the ATS for conduct occurring in a foreign country' (USA, 2012: 4). Rather, it would be necessary to weight the particular circumstances of any case with respect to the US foreign relations interests at play. Pointing to the *Filàrtiga* case, the US held that 'the individual torturer was found residing in the United States, circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator' (USA, 2012: 4). What seems to be the primary concern is thus the perception of the US among the members of the international community. From this perspective, the core problematique is not the putative injury of foreign territoriality through US courts' extraterritorial jurisdiction, but the infringements of US foreign relations interests eventually caused by such extraterritorial jurisdictional practice. Extraterritorial jurisdiction, as it were, is not perceived as problematic where this serves the national interest, however constructed.

However, things are different where this is not the case:

> Here, Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing torture, extrajudicial killing, crimes against humanity, and arbitrary arrest and detention in Nigeria. Specially in these circumstances — where the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country — the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could. (USA, 2012: 5)

Although pointing to the 'foreign' character of the circumstances, the brief does not strictly develop the argument along territorial lines. While the locating of the relevant circumstances 'in Nigeria', as well as holding that the involved actors are a 'foreign sovereign' and 'foreign corporations', have a strong territorial connotation, the overall argument points to the nexus, that is, to how the circumstances relate to US foreign relations interests. Strictly speaking, the major rationale of this argument is not primarily territorial — *interest trumps territory*. Interestingly, the US brief here rejects a responsibility 'in the eyes of the international community', while, at the same time, relating such international responsibility with a notion of 'nations directly concerned' (USA, 2012: 5). The crux in the extraterritorial application of law is thus the construction of a *concern*. Territoriality and responsibility do not necessarily coincide. The responsibilities of the US do not necessarily stop at the border, but may transcend territory, that is, in cases where a strictly territorial interpretation of jurisdiction would affect the international reputation of the US as an advocate of human rights (USA, 2012: 19). Thus, the 'United States' is, indeed, located within a certain communal international space whereas international responsibility is constructed in a national rather than a strictly territorial sense.

Since Royal Dutch Shell is an Anglo-Dutch company, it could be expected that the briefs by the UK and the Netherlands would emphasize a state–corporation nexus or at least construct the affectedness of the two countries by referring to such a nexus. By contrast, this nexus is foregrounded nowhere in the briefs and is only mentioned in a passage on the two countries' 'jurisdiction-limiting principles' (Netherlands et al., 2012: 18–23). The argument is developed in a rather general — and doctrinal international law — style and focuses less on the *particularity* of the relation than on the *universality* of international law as comprising a legal order among states. Opening with a broad commitment to 'the rule of law, including the promotion of, and protection against violations of, human rights' (Netherlands et al., 2012: 1), the brief extensively relies on the jurisdictional limits under international law:

> Nevertheless, just as international law imposes human rights obligations on States, it imposes restraints on the assertion of jurisdiction by one State over civil actions between persons that primarily concern another State. Jurisdictional restraints are a fundamental underpinning of the international legal order and are essential to maintaining international peace and comity. The Governments are, therefore, opposed to broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States ('U.S.'). Such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict. They may also prevent another State with a greater nexus to such cases from effectively resolving a dispute. (Netherlands et al., 2012: 2)

The quoted passage clearly relies on international law under an interstate paradigm of territorial differentiation. International law thus imposes the limits on jurisdictional practice, and extraterritoriality in particular. The space that is constructed during this argumentation is an international space, characterized by clear-cut territorial demarcations of a political world fragmented into nation-states. Under this spatial rationale, which is a rationale of sustaining peace and security in an international society of states, ATS jurisprudence must appear as an interference. Accordingly, the 'Governments remain deeply concerned about the failure by some U.S. courts to take account of the jurisdictional constraints under international law' (Netherlands et al., 2012: 3).

Similar to the opening statement of the UK and the Netherlands, Germany — explicitly supporting the respondents — starts with an indication of a general commitment to human rights (Federal Republic of Germany, 2012: 1). At the same time, the brief points out clearly that:

> The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil.… The Federal Republic of Germany believes that overbroad exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts with other countries. (Federal Republic of Germany, 2012: 1)

In comparison to the British and Dutch brief, this position about injuries of foreign sovereignty is less concerned about normative space on an international scale. The difference becomes clearer during a passage thus quoted at some length:

> The Federal Republic of Germany is concerned that the failure by some United States courts to take into account limitations on the exercise of their jurisdiction when construing the Alien Tort Statute, 28 U.S.C. | § 1350 ('ATS'), has resulted in the assertion of subject matter jurisdiction over suits by foreign plaintiffs against foreign corporate defendants for conduct that took place entirely within the territory of a foreign sovereign and lack sufficient nexus to the United States. Such assertions of jurisdiction are likely to interfere with foreign sovereign interests in governing their own territories and subjects and in applying their own laws in cases which have a closer nexus to those countries. (Federal Republic of Germany, 2012: 1–2)

As in the British and Dutch brief, territory appears as a strong point of reference, though in another variant. Germany seems not to formalistically oppose extraterritorial jurisdiction as such. The approach is more pragmatic. What is foregrounded is not a breach of international law through extraterritorial judicial practice, but interference in the foreign sovereign interest, the latter consisting in an effective governance of territory and subjects. In a spatial sense, this is not necessarily opposed to the variant of doctrinal international law mentioned before. The implicated mode of spatial production, however, is different. The legitimate interest of a foreign sovereign comes to an end only 'where there is no possibility for the foreign plaintiff to pursue the matter in another jurisdiction with a greater nexus' (Federal Republic of Germany, 2012: 2). The normative space here constructed is actor-centric, with states having a legitimate interest in the governance of territory but also with individuals — foreign plaintiffs — who can legitimately expect that territory is governed properly. In this narrative, state territoriality serves the individual and can, in principle, be suspended where it does not serve the individual. What the German position implicates may thus be called a 'liberal territoriality'.

In contrast, Argentina does not open the brief with a note on a general commitment to human rights, but with a very specific one. The brief — acting as amicus supporting the petitioners — starts with representing Argentina as embedded in a certain spatiotemporal frame, leading to an embracement of universal jurisdiction. As the brief holds:

> Argentina today is a democracy that views the international protection of human rights as integral to the spread of international peace and stability, and that regards domestic as well as international tribunals as central to the advancement of human rights. Those tribunals were important sources of international assistance for victims during the darkest days of Argentina's dictatorship and during its transition to democracy, and continue to be important for oppressed regions of the world today. (Argentine Republic, 2012: 2)

In fact, state territoriality does not play a very decisive role in the Argentinian position. In contrast, the insistence on territory is represented as a risk to the mentioned universal ends. The brief thus establishes a narrative that embeds Argentina within a frame of world space, characterized in a normative sense as a space where states better assist each other with respect to a shared end — the advancement of human rights. Against this spatial background, the ATS hardly appears as a risk to established international normativity, but rather as an 'important contribution by the United States to the cause of international human rights' (Argentine Republic, 2012: 3), whereas the limitation of such a possibility and the ATS's 'loss as a precedent would undermine the international system for the protection of human rights' (Argentine Republic, 2012: 3). Opposed to the positions of the

UK, the Netherlands and Germany, operating jurisdiction under the ATS is not represented as inconsistent with international law, but rather as a consequence of a long-lasting chain of historical achievements in the establishment of international normativity:

> Critics who insist that the Alien Tort Statute was not intended to apply to causes of action arising abroad ignore the importance of Emmerich de Vattel as a scholar whose work informed late 18th century conceptions of the Law of Nations. Vattel insisted on the natural rights of the individual and supported universal jurisdiction against criminals who through heinous acts became enemies of all mankind. Latin America shares the heritage of Vattel with the United States, and while International Law's focus changed over the course of the 19th and early 20th centuries, the individual has returned to the fore since World War II. (Argentine Republic, 2012: 3)

The ATS, in other words, is represented as belonging to an influential tradition of international law. The international tensions that may be caused by the extraterritorial application of domestic law, which have been pointed out in the other state actors' briefs, are disregarded. While the ATS is represented as serving 'mankind' as a whole, the normative mode of territorial differentiation through law appears as a secondary rationale.

TNCs

Corporations that have intervened by means of amicus briefs were themselves respondents in other ATS cases. In this regard, their interest in the matter is rather obvious and it does not come as a surprise that briefs were written to argue for a stringent curtailing of future transnational litigation under the ATS. Consequently, a number of the private corporations' briefs argued for a strict separation of jurisdictional spaces, which eventually stands against the common sense of internationally operating private corporations as transcending (or even undermining) interstate normativity (Strange, 1996).

Corporate amicus briefs often start with a — mostly rather brief — note on the commitment to human rights (BP America et al., 2012; Chevron et al., 2012; KBR, Inc., 2012) before pointing to the damage caused to business through ATS litigation. 'Those suits', as the BP brief puts it, 'impose severe litigation and reputational costs on corporations that operate in developing countries and chill further investment' (BP America et al., 2012: 1). In another brief, the ATS is addressed as a 'burden' (Chevron et al., 2012: 2). In this respect, the corporations' stakes are high and the rationale straightforward:

> [T]he judgment below [the decision by the Court of Appeals of the 2nd Circuit] should be affirmed because the ATS: (1) does not apply to extraterritorial conduct that occurred entirely in a foreign country; and (2) does not create a course of action for civil aiding and abetting liability.… If corporate executives can still be sued for extraterritorial conduct … a narrow ruling on corporate liability will not suffice to deter diplomatically problematic and investment-chilling lawsuits. (BP America et al., 2012: 2)

Relying more on questions of international law, Chevron et al. (2012: 3) held that 'ATS human rights litigation is contrary to international law', and that:

> Under international law, a nation's sovereignty over activities within its territory is presumptively absolute, subject to exceptions by national consent. Nations have consented to a foreign

> prosecution for certain 'universal jurisdiction' crimes committed in their territories even though the foreign nation lacks any connection to the underlying behavior. They have not, however, consented to allow a foreign court to entertain civil causes of action on the basis of universal jurisdiction, as is done in ATS cases. Universal civil jurisdiction is a different and greater intrusion on territorial sovereignty than universal criminal jurisdiction, for it is broadly enforceable by individuals rather than by the government alone, which exercises political discretion in enforcement. (Chevron et al., 2012: 3–4)

Here, international law is represented as a normative order demarcated into clear-cut territorial jurisdictions. Those moments of international law that tend to transcend that traditional spatial narrative are somehow degraded and limited to a particular field of (international) law — in fact, a field where legal persons cannot be charged.[17] However, the concern about the development of international law also relates to the more practical question of interstate relations:

> Extraterritorial application of the ATS not only offends basic precepts of our own law, it also violates international law. Territorial jurisdiction is one of the basic building blocks of international law. It serves to avoid confrontations between nations generated by conflicting and overlapping claims to jurisdiction. International law regards as illegitimate the assertion of jurisdiction over disputes that have no relation to the nation in which those disputes are adjudicated. (BP America et al., 2012: 3)

Chevron and BP America both reproduce a highly territorialized knowledge of state jurisdiction and mutual non-intervention. International law is represented as mainly serving that end of preventing interstate confrontation. The normative order coming to the fore is even sharper than the one drawn by the state government briefs. Perhaps the most sophisticated argument in the field of corporate actors is put forward in the brief by Coca Cola, pointing to the possible consequences of granting a certain international legal status to private corporations:

> Such a proposed elevation of the corporation's role has the potential to infringe on the territorial and political sovereignty of the host nation. Many nations — especially smaller and politically weaker nations — are wary of any change in law that would deputize multinational corporations with the obligation, and hence, implicitly, the authority, to police compliance with supposed international law obligations within the host nations in which they operate. A related concern is that elevating multinational corporations to the status of international 'persons' or 'subjects' might imply certain political rights, including the right to participate in the process of making international law — a role that is viewed as undermining the sovereign prerogative of nations. (Coca Cola and Archer Daniels Midland Company, 2012: 2)

Here, the Coca Cola brief accurately demonstrates what is at stake in regulatory terms. Holding corporations responsible for international law is represented as a step of normative 'elevation' that, in turn, may lead to a state of normativity in which corporations gain 'authority' over certain territories and possess rights of participation in the process of the further normative development of a then no doubt 'transnational' law.[18]

In sum, the corporations read international law in a particularly narrow way. In this reading, international law strictly follows an interstate paradigm. Progressive normative developments in international law are neglected or even explicitly rejected. Moreover,

the commitments to human rights that are included in many of the corporate briefs remain rather vague and point to self-commitment and soft law regulation rather than the embrace of binding regulatory frameworks:

> Amici strongly condemn human rights violations, and each company abides by its detailed corporate social responsibility policy. Yet many amici have been and may continue to be defendants in suits predicated on various expansive theories of liability under the Alien Tort Statute. (BP America et al., 2012: 1)

Where international law safeguards jurisdictional boundaries and limits the governments' or domestic courts' power to regulate, that is, to enforce international human rights domestically, this is rejected as 'expansive'. Instead, human rights are 'embraced' only in terms of non-binding approaches, as Cutler (2013) has criticized. A similar argument can be found in the brief by Coca Cola:

> It also is critical to note that, although corporations are not 'subjects' of international law, they still play an important role in improving global human rights conditions. Multinational corporations have become increasingly engaged in productive collective activities with nations, non-governmental organizations and other constituencies to shape and advance international law to improve global social and environmental conditions. That effort will continue even if corporations are not deemed 'subjects' of international law. (Coca Cola and Archer Daniels Midland Company, 2012: 3)

Taken together, while international law is characterized in a highly 'territorialized' way, an 'effective' protection of human rights is here proposed to operate in a different mode of public–private partnerships. What comes to the fore are two different, if not opposed, narratives of an international legal order: a 'territorialized' international legal order with strict limits on any transcendence of state jurisdiction, on the one hand; and a more dynamic public–private shaping of international law for the sake of humanity, on the other. This juxtaposition comes close to a paradoxical condition of two separate normative spaces: one *space of interstate politics*, where business can only be regulated within territorial containers of the nation-state; another *space of global self-regulation*, where different actors, public and private, interact on a par with each other, and where effective protection of human rights is achieved beyond the confines of binding (inter)state regulation.

Human rights NGOs and associations

The group of NGOs, think tanks and associations is very heterogeneous. For example, it comprises actors as different as associations including various private enterprises themselves respondents in ATS transnational human rights litigation cases, on the one hand, and human rights organizations specialized in the representation of victims of putative human rights violations before courts, on the other. Since those associations or think tanks whose mission is to represent the interests of business (Cato Institute, 2012; Chamber of Commerce of the United States, 2012) widely argue along the same lines as the discussed corporate briefs, I concentrate in this section on human rights organizations and associations mainly arguing for the protection of human rights. It does not come as

a surprise that the narrative frame chosen by human rights protagonists is wide in scope and tends to transcend the normative confines of the nation-state and international order fragmented along territorial lines. In this respect, the corresponding briefs emphasize the role that the ATS plays in a globally scaled struggle for justice:

> The history surrounding the ATS indicates it was meant to authorize federal courts to consider courses of action for a limited number of international law violations even when such actions occurred in the territory of a foreign sovereign. The ATS serves a vital role, allowing foreign nationals to bring claims for torture and extrajudicial killing as well as other serious violations of international law such as slavery, genocide, crimes against humanity, and war crimes regardless of where such acts were committed. (Human Rights First et al., 2012: 3)

What comes to the fore in the quote from the Human Rights First brief is a narrative that the briefs by human rights organizations widely share. The mentioned violations of international law are entirely pointing to a boundary-transcending aspect of international law, not to the normative aspirations of international relations as relations among state governments. The represented meaning of international law is not territorial demarcation, but globality. In a similar vein, the American Bar Association hails the ATS as having 'provided victims with access to justice that is often unavailable in their own lands, making it a valuable enforcement mechanism in upholding the law of nations' (American Bar Association, 2012: 5). Where justice is at stake, territorial borders do not count; nation-state territoriality is subordinated to an aspiration for global space. This moment is brought out strongly in the Earth Rights International brief, which holds that such a global reading of international law builds upon a wide historical precedent:

> From before the Founding, the common law has recognized that torts are transitory. The tortfeasor can be sued wherever found. Thus, courts then and today adjudicate transitory tort actions involving foreign defendants, foreign conduct, and foreign plaintiffs. The forum has always been thought to have a sufficient nexus to adjudicate precisely because the defendant has brought the dispute to our shores. (Earth Rights International, 2012: 2)

The aspect of 'nexus' that is often held problematic in the state and corporate actors' positions discussed earlier is here constructed as a criterion easily met. Relatedly, 'nations' are constructed as not a hindrance to the relationality of events taking place in different locales:

> [I]nternational human rights law reflects a universal consensus that all nations owe an obligation to all other nations to adhere to certain minimum standards in their treatment of their own citizens.… In short, international law encourages, if not requires, external scrutiny of human rights violations. (Earth Rights International, 2012: 4)

Taken together, international law is read as a manifestation of a global space within which humanity is the core rationale. Hence, it makes no sense that humans, though here understood as 'citizens' of 'nations', face in their search for justice the normative boundaries of territoriality. In this eventually cosmopolitan variant, territoriality is represented as being a dinosaur concept of international law.

Conclusion

Territoriality is a powerful regime of knowledge, and obviously even a number of non-state actors are interested in its perpetuation. Transnational human rights litigation practice and the related claim that abusive corporate conduct by a TNC can be brought to court in the US challenge this regime. As a regime of geographical knowledge, territoriality is highly contested. The article attempted to establish a spatial gaze on *transnational relations at work*. In the US Supreme Court, human rights violations by private corporations were rendered 'irrelevant' in a jurisdictional sense. This was only possible against the background of a certain configuration of space. Shell won the case since the corporation's lawyers succeeded in sustaining a highly 'territorialized' geographical knowledge. State territoriality served as a technique to rule out the application of transnational law. What is important is that this technique has particularly been used by a number of non-state actors.

The assumption of this article has been that spatial knowledges operate in the background and provide the normative basis upon which discursive interventions like the legal arguments put forward in the numerous amicus curiae briefs to the *Kiobel* case are built. In this respect, the briefs have been analysed as documents of spatial resistance and counter-resistance. They represent a broad spectrum of geographical knowledges, though different groups of actors are not strictly separated along the lines of the scalar techniques used. Widely congruent with the expectations, human rights organizations tend to embed the state within a global normative context and call upon humanity as the relevant scale of state practice. More predictable perhaps are the positions of state actors, though some deviations become visible. Territorial differentiation does not appear in a pure form. State actors point to their position within an international community of states in which the concept of *concern* may transcend territoriality, even though this is represented as exceptional. Most interestingly, corporate legal practice is highly ambivalent in spatial terms. On the one hand, corporate actors perform a highly 'territorialized' geographical knowledge. Put frankly, TNCs seem to hide their business interests behind territorial state borders. Here, geographical knowledge practice arguably comes with an amount of hypocrisy. On the other hand, corporate briefs implicate a state of global normativity within which human rights are effectively promoted beyond nation-state borders through self-regulated corporate conduct (corporate social responsibility) and public–private partnerships (see Cutler, 2013; Ruggie, 2014). At the same time, modernist scripts of binding public regulation through nation-states are rejected, at least for certain economic societal segments. For the latter mode of regulation, state borders do not play an important role. The geographical knowledge at work in self-regulation arguments is much less 'territorialized'. *The corporate production of space consists in a private use of territoriality to resist state regulation.* Paradoxically, this 'private' use of territoriality transcends the 'public' nation-state. As a legal technique of private actors, territoriality strikes as 'transnational territoriality'.

From a normative perspective, transnational human rights litigation is no doubt an ambivalent phenomenon. While it can well be argued that transnational scripts like the ATS provide a welcome tool for justice in places where the rule of law is hardly available, the extraterritorial application of Western law to places in the Global South comes

with a hint of neo-colonial paternalism. On the one hand, by holding that Royal Dutch Shell cannot be held responsible in a US court, the *Kiobel* judgement contributes to the creation of a 'regulation-free zone' of corporate conduct (in Nigeria). On the other hand, this latter appraisal is already problematic since it implies that the absence of a Western rule of law automatically leads to 'non-regulation'. However, what is at stake in *Kiobel* is not only the territorial or extraterritorial reach of jurisdiction, but also the strategic amalgamation of territoriality and private interest. In this respect, state territoriality — as represented in the analysed amicus briefs — is turned into a *technique of demarcating the validity of norms* regulating corporate conduct. With respect to human rights, the 'worldness' (Lefebvre, 2009c: 278) of TNCs is limited. Rather, corporate actors — though operating 'transnationally' — are deeply involved in the preservation and eventual elevation of a 'state-like' geographical knowledge. Inasmuch as *Kiobel* is a conservative manifestation of international space and the territorial integrity of state jurisdiction, the implicated geographical knowledge of territoriality is 'transnational'. The *Kiobel* episode can thus be understood as a public–private partnership in its own (human) right — giving rise to a form of 'transnational hyper-territoriality'.

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Notes

1. *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, slip op. (US Supreme Court, 17 April 2013) (hereinafter: *Kiobel*).
2. In the literature, the ATS is also referred to as the Alien Tort Claims Act (or ACTA).
3. 28 U.S.C. § 1350.
4. The previous decision of the Court of Appeals is *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (U.S. Court of App., 2nd Cir., 17 September 2010).
5. *Kiobel*, p. 14 (emphasis added).
6. *Filàrtiga v. Pena-Irala*, 630 F.2d 876 (U.S. Court of App., 2nd Cir., 30 June 1980).
7. For an overview, see Teitel (2005). For human rights advocacy in IR, see Risse and Ropp (2013). Transnational litigation lawsuits have also been brought in other areas (like in competition law; see Buxbaum, 2009) and jurisdictions (for a collection of European cases, see European Court of Human Rights, 2014).
8. Even after *Kiobel*, courts are divided as to how to deal with the Supreme Court decision (see Bellinger, 2014).
9. *Filàrtiga v. Pena-Irala*, 630 F.2d 876 (U.S. Court of App., 2nd Cir., 30 June 1980).
10. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (U.S. Court of App., 2nd Cir., 17 September 2010), p. 43. (In particular, the argument now was that under ATS, claims could not be brought against private corporations since 'imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se. Because corporate liability is not recognized as a "specific, universal, and obligatory" norm … it is not a rule of customary international law that we may apply under the ATS. Accordingly … claims must be dismissed for lack of subject matter jurisdiction.')
11. U.S. Supreme Court, Order List: 565 U.S., 5 March 2012.
12. *Kiobel*, p. 5.
13. *Kiobel*, p. 4.
14. *Kiobel*, p. 13.
15. *Kiobel*, p. 14.
16. The US because the plaintiffs have chosen the US court system; the UK and the Netherlands because the respondents, *inter alia*, are Dutch and British companies.
17. As regards international criminal law, proposals to include corporate issues in the International Criminal Court were not included in the Rome Statute.
18. In fact, what is presented as an infringement of territorial sovereignty does already take place and points to the emergence of 'private authority' that I have mentioned before (Cutler, 2013; Cutler et al., 1999; Hall and Biersteker, 2002).

References

Abbott KW and Snidal D (2013) Law, legalization, and politics: An agenda for the next generation of IL/IR scholars. In: Dunoff JL and Pollack MA (eds) *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art*. Cambridge: Cambridge University Press, pp. 33–56.

Agnew J (1994) The territorial trap. The geographical assumption of International Relations theory. *Review of International Political Economy* 1(1): 53–80.

Agnew J (2007) Know-where. Geographies of knowledge of world politics. *International Political Sociology* 1(2): 138–148.

American Bar Association (2012) Brief of the American Bar Association as amicus curiae in support of petitioners. Submitted to the US Supreme Court, 13 June (on file with the author).

Argentine Republic (2012) Brief for the government of the Argentine Republic as amicus curiae in support of the petitioner. Submitted to the US Supreme Court, 13 June (on file with the author).

Banai A, Moore M, Miller D et al. (2014) Symposium 'theories of territory beyond Westphalia'. *International Theory* 6(1): 98–104.

Bartelson J (1995) *A Genealogy of Sovereignty*. Cambridge: Cambridge University Press.

Bellinger J (2014) In spate of new ATS decisions, courts are divided about meaning of Kiobel's 'touch and concern' standard. Available at: http://www.lawfareblog.com/2014/09/in-spate-of-new-ats-decisions-courts-are-divided-about-meaning-of-kiobels-touch-and-concern-standard/

BP America, Caterpillar, Conoco Phillips et al. (2012) Brief of amici curiae BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell, and International Business Machines in support of respondents. Submitted to the US Supreme Court, 3 February (on file with the author).

Brenner N and Elden S (2009) Henri Lefebvre on state, space, territory. *International Political Sociology* 3(4): 353–377.

Brenner N, Jessop B, Jones M et al. (2003) Introduction. State space in question. In: Brenner N, Jessop B, Jones M et al (eds) *State/Space. A Reader*. Malden, MA: Blackwell Pub.

Bull H (1995) *The Anarchical Society. A Study of Order in World Politics*. New York, NY: Columbia University Press.
Büthe T and Mattli W (2011) *The New Global Rulers. The Privatization of Regulation in the World Economy*. Princeton, NJ: Princeton University Press.
Buxbaum HL (2009) Territory, territoriality, and the resolution of jurisdictional conflict. *American Journal of Comparative Law* 57: 631–675.
Cato Institute (2012) Supplemental brief of amicus curiae the Cato Institute in support of respondents. Submitted to the US Supreme Court, 8 August (on file with the author).
Chamber of Commerce of the United States (2012) Supplemental brief of the Chamber of Commerce of the United States as amicus curiae in support of respondents. Submitted to the US Supreme Court, 8 August (on file with the author).
Chevron Corporation, Dole Food Company, Dow Chemical Company et al. (2012) Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, Glaxosmithkline PLC, and the Procter & Gamble Company as amici curiae in support of respondents. Submitted to the US Supreme Court, 3 February (on file with the author).
Coca Cola and Archer Daniels Midland Company (2012) Brief of the Coca Cola Company and Archer Daniels Midland Company as amici curiae in support of respondents. Submitted to the US Supreme Court (on file with the author).
Colangelo AJ (2014) What is extraterritorial jurisdiction? SMU Dedman School of Law Legal Studies Research Paper No. 131 (forthcoming in *Cornell Law Review*). Available at: http://ssrn.com/abstract=2363695
Coyle L (forthcoming) Tender is the mine: Law, shadow rule, and the public gaze in Ghana. In: Walker-Said C and Kelly J (eds) *Corporate Social Responsibility? Human Rights in the New Global Economy*. Chicago, IL: University of Chicago Press.
Cutler AC (2013) Legal pluralism as the 'common sense' of transnational capitalism. *Oñati Socio-legal Series* 3(4): 719–740.
Cutler AC, Haufler V and Porter T (1999) Private authority in international affairs. In: Cutler AC, Haufler V and Porter T (eds) *Private Authority and International Affairs*. Albany, NY: State University of New York Press.
Earth Rights International (2012) Supplemental brief of Earth Rights International as amicus curiae in support of petitioners. Submitted to the US Supreme Court, 13 June (on file with the author).
European Court of Human Rights (2014) Fact sheet: Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights. Available at: http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf
Federal Republic of Germany (2012) Brief of the Federal Republic of Germany as amicus curiae in support of respondents. Submitted to the US Supreme Court, 2 February (on file with the author).
Finnemore M and Sikkink K (1998) International norm dynamics and political change. *International Organization* 52(4): 887–917.
Ford RT (1999) Law's territory (a history of jurisdiction). *Michigan Law Review* 97: 843–930.
Gregory D (2007) Vanishing points. In: Gregory D and Pred A (eds) *Violent Geographies. Fear, Terror, and Political Violence*. New York, NY: Routledge.
Hall RB and Biersteker TJ (2002) The emergence of private authority in the international system. In: Hall RB and Biersteker TJ (eds) *The Emergence of Private Authority in Global Governance*. Cambridge: Cambridge University Press.
Human Rights First, the Anti-Defamation League and the Leadership Conference on Civil and Human Rights (2012) Brief of Human Rights First, the Anti-Defamation League, and the Leadership Conference on Civil and Human Rights as amici curiae in support of petitioners on reargument. Submitted to the US Supreme Court, 12 June (on file with the author).

Jessup PC (1956) *Transnational Law*. New Haven, CT: Yale University Press.
Johns F (2005) Guantanamo Bay and the annihilation of the exception. *European Journal of International Law* 16(4): 613–635.
Kaleck W (2009) From Pinochet to Rumsfeld. Universal jurisdiction in Europe 1998–2008. *Michigan Journal of International Law* 30(3): 927–980.
Karp DJ (2014) *Responsibility for Human Rights. Transnational Corporations in Imperfect States*. Cambridge: Cambridge University Press.
KBR, Inc. (2012) Supplemental brief of KBR, Inc., as amicus curiae in support of respondents. Submitted to the US Supreme Court, August (on file with the author).
Knop K (2000) Here and there. International law in domestic courts. *International Law and Politics* 32: 501–535.
Knop K (2012) Statehood. Territory, people, government. In: Crawford J and Koskenniemi M (eds) *The Cambridge Companion to International Law*. Cambridge: Cambridge University Press.
Kontorovich E (2014) Kiobel surprise: Unexpected by scholars but consistent with international trends. *Notre Dame Law Review* 89(4): 1671–1694.
Kratochwil F (2014) *The Status of Law in Global Society*. Cambridge: Cambridge University Press.
Lefebvre H (2009a) Reflections on the politics of space (1970). In: Brenner N and Elden S (eds) *State, Space, World*. Minneapolis, MN: University of Minnesota Press.
Lefebvre H (2009b) Space and the state (1978). In: Brenner N and Elden S (eds) *State, Space, World*. Minneapolis, MN: University of Minnesota Press.
Lefebvre H (2009c) The worldwide and the planetary (1973). In: Brenner N and Elden S (eds) *State, Space, World*. Minneapolis, MN: University of Minnesota Press.
Liste P (2014) Transnational human rights litigation and territorialized knowledge. Kiobel and the 'politics of space'. *Transnational Legal Theory* 5(1): 1–19.
Marston SA, Jones JP III and Woodward K (2005) Human geography without scale. *Transactions of the Institute of British Geographers* 30(4): 416–436.
Mitchell A (2011) Quality/control: International peace interventions and 'the everyday'. *Review of International Studies* 37(4): 1623–1645.
Netherlands, UK and Northern Ireland (2012) Brief of the governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as amici curiae in support of neither party. Submitted to the US Supreme Court, 13 June (on file with the author).
Nye JS and Keohane RO (1971) Transnational relations and world politics. An introduction. *International Organization* 25(3): 329–349.
Onuf N (1989) *World of Our Making. Rules and Rule in Social Theory and International Relations*. Columbia, SC: University of South Carolina Press.
Peterson VS (2000) Rereading public and private: The dichotomy that is not one. *SAIS Review* 20(2): 11–29.
Riles A (2008) The anti-network: Private global governance, legal knowledge, and the legitimacy of the state. *American Journal of Comparative Law* 56: 605–630.
Riles A (2011) *Collateral Knowledge. Legal Reasoning in the Global Financial Markets*. Chicago, IL: University of Chicago Press.
Risse T and Ropp SC (2013) Introduction and overview. In: Risse T, Ropp SC and Sikkink K (eds) *The Persistent Power of Human Rights*. Cambridge: Cambridge University Press.
Risse T and Sikkink K (1999) The socialization of international human rights norms into domestic practices. Introduction. In: Risse T, Ropp SC and Sikkink K (eds) *The Persistent Power of Human Rights*. Cambridge: Cambridge University Press.
Risse-Kappen T (1995) Bringing transnational relations back in. Introduction. In: Risse-Kappen T (ed.) *Bringing Transnational Relations Back In*. Cambridge: Cambridge University Press.

Robinson WI (2001) Social theory and globalization: The rise of a transnational state. *Theory and Society* 30(2): 157–200.
Rosenau JN (1992) Governance, order, and change in world politics. In: Rosenau JN and Czempiel E-O (eds) *Governance Without Government: Order and Change in World Politics*. Cambridge: Cambridge University Press.
Ruggie JG (1993) Territoriality and beyond. Problematizing modernity in International Relations. *International Organization* 47(1): 139–174.
Ruggie JG (2014) Global governance and 'new governance theory': Lessons from business and human rights. *Global Governance* 20(1): 5–17.
Santos B dS (1987) Law. A map of misreading. Toward a postmodern conception of law. *Journal of Law and Society* 14(3): 279–302.
Sassen S (2006) *Territory, Authority, Rights. From Medieval to Global Assemblages*. Princeton, NJ: Princeton University Press.
Shah N (2012) The territorial trap of the territorial trap. Global transformation and the problem of the state's two territories. *International Political Sociology* 6(1): 57–76.
Sharma A and Gupta A (2006) Introduction. Rethinking theories of the state in an age of globalization. In: Sharma A and Gupta A (eds) *The Anthropology of the State: A Reader*. Malden, MA: Blackwell.
Slaughter A (2004) *A New World Order*. Princeton, NJ: Princeton University Press.
Soja EW (1989) *Postmodern Geographies. The Reassertion of Space in Critical Social Theory*. London: Verso.
Strange S (1996) *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge: Cambridge University Press.
Teitel R (2005) The Alien Tort and the global rule of law. *International Social Science Journal* 185: 551–560.
Teubner G (2012) *Constitutional Fragments. Societal Constitutionalism and Globalization*. Oxford: Oxford University Press.
UK, Northern Ireland and the Netherlands (2012) Brief of the governments of the United Kingdom and Northern Ireland and the Kingdom of the Netherlands in support of the respondents. Submitted to the US Supreme Court, 3 February (on file with the author).
USA (2011) Brief for the United States as amicus curiae supporting petitioners. Submitted to the US Supreme Court, December (on file with the author).
USA (2012) Supplemental brief for the United States as amicus curiae in partial support of affirmance. Submitted to the US Supreme Court, June (on file with the author).
Walker RBJ (1993) *Inside/Outside International Relations*. Cambridge: Cambridge University Press.
Walker RBJ (2010) *After the Globe, Before the World*. London and New York, NY: Routledge.
Weizman E (2012) *Hollow Land. Israel's Architecture of Occupation*. London: Verso.
Wiener A (2008) *The Invisible Constitution of Politics. Contested Norms and International Encounters*. Cambridge: Cambridge University Press.
Zumbansen P (2012) Comparative, global and transnational constitutionalism. The emergence of a transnational legal-pluralist order. *Global Constitutionalism* 1(1): 16–52.

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