1

Introduction

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

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

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

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

https://doi.org/10.1017/9781009377874.003 Published online by Cambridge University Press

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

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

[3] Hudson (1998) 89, 90.

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

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

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

[4] Sassen (2000) 109, 109.

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

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

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

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

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

[7] Emphasis added, from Marx and Engels (2010) at 16.

[8] Teubner and Fischer-Lescano (2004) 999, 1009.

[9] ibid at 1017; quote originally in Luhmann (1981) at 22.

[10] Palan (1998) 625; Helmig and Kessler (2007) 240; Sassen (2013) 21; Mezzadra and Neilson (2013).

[11] Brölmann (2007).

[12] Arcuri and Violi in Kuijer and Werner (2017) at 175–216.

[13] Milano (2013).

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

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

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

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

[14] Pistor (2017) 491.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1 Terminology

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

1.1.1 Territory

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

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

[23] Delaney (2005) at 13.

https://doi.org/10.1017/9781009377874.003 Published online by Cambridge University Press

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

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

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

Finally, the decision to retain the term 'territory' also made sense because it helps differentiate between spaces which are created as a result of the exercise of political and economic control from other kinds of spaces. Not all spaces are territories. A territory in this view of things is 'a bounded social space that inscribes a certain sort of meaning onto . . . the material world.'[24] A space in comparison is a much broader concept. In contrast to earlier 'absolutist' concepts of space, Leibniz transformed the understanding of space and posited it as 'fundamentally relational, that space in and of itself does not really exist at all.'[25] Space is social according to Lefebvre and '(social) space is a (social) product'.[26] A territory is a kind of space *created for and by the exercise of power*. Therefore, I retain the term 'territory' as the name given to this category of spaces, acknowledging at the same time that not all spaces will necessarily be territories.

1.1.2 Sovereignty and Territorial Sovereignty

I wish I could avoid these terms. Unfortunately, the very inquiry of this study requires wrestling with them. If it is not already well established, it will become evident in Chapter 3 that there is a real ambiguity that exists in how these concepts are used in international law discourse. Crawford, for example, observed that there are often two meanings of sovereignty: 'sovereignty may refer to the title to territory or the rights accruing from the exercise of title'.[27] Shaw indicated that 'territorial sovereignty is . . . centered upon the rights and power coincident upon territory in the geographical sense'[28] but also that '[t]he essence of territorial sovereignty is contained in the notion of title. This term relates to both the factual and legal conditions under which territory is deemed to belong to one particular authority or another.'[29] In yet more instances, territorial sovereignty refers to a particular regime: '[s]overeignty in regard to a territory is known as territorial sovereignty.'[30] There seems in much international law discourse to be a blurring of the distinction between these two concepts.

[24] ibid at 14.
[25] Tally (2012) at 28.
[26] Lefebvre (1991) at 26.
[27] Crawford (2012) at 448.
[28] Shaw (1982) 61, 73.
[29] Shaw (2017) at 354.
[30] Güzel (2020) at 143.

As a result of this lack of clarity, in Chapter 5 I outline how I propose such terms could be used going forward to understand the reterritorialisation of competences once associated with (state-)sovereignty. This clarifies both how I think about and use these terms and also serves the purpose of providing a proposed route to the understanding of the reterritorialisation of sovereignty. Going forward, the concept of sovereignty that is applied in the rethink is one developed using a legal realist account of law and legal relations. Sovereignty is understood as divisible bundles of legal relations (rights, duties, privileges, immunities) that may be distributed between different actors (state and non-state alike) who exercise them in relation to their own territories. Indeed, it is through the very exercise of these sovereign bundles that territories of different actors are produced and continually reproduced. And I propose 'burying'[31] the concepts of title and territorial sovereignty entirely. They become superfluous to purpose and their continued usage will only cause confusion.

1.1.3 Globalisation and Global Governance

Globalisation is neither an exact nor precise term. Broadly understood, it is meant to describe all 'social, political and economic activities stretch [ing] across communities, regions and continents'[32] and 'the widening, deepening and speeding up of worldwide interconnectedness',[33] which at times can seem like a rather unhelpful construct considering how many different phenomena are caught under this definition. The concept is overly broad and at times does not help explain any of the specific processes it is meant to cover. It also often contains many ideological undertones and is not, in this sense, at all politically neutral. It does, on a pragmatic view of things, however, help convey the idea of a certain 'stretching of social relations across space and time' and of 'processes which are not hindered or prevented by territorial or jurisdictional boundaries.'[34] In so doing it projects an expressly aterritorial and spatially unspecific picture of the world, which both captures the main challenge perceived by international lawyers to the territorial ordering of legal, cultural, economic, and political relations and helps diagnose the key problems of this perception, namely, that it is abstract and

[31] Gathii (2020).
[32] Held (2004) at 1.
[33] Held and McGrew (2007) at 1.
[34] Newman (2013) at 90.

despatialised at the same time. The same is true of global governance. It is too broad and insufficient. The spatiality of the global is particularly imprecise and unhelpful, but it is the recognised term for both a discipline and ontological reality.

Perhaps the person who most helped me understand the spatial assumptions of globalisation discourses is Doreen Massey. She has argued that 'globalisation is not a single all-embracing movement (nor should it be imagined as some outward spread from the West and other centres of economic power across a passive surface of "space"). It is a making of space(s), an active reconfiguration and meeting-up through practices and relations of a multitude of trajectories.'[35] What this conveys is the time–space of globalisation and that all space making is constituted through practices; there is no a priori space that exists outside this social realm. Massey also captured the politics of the time–space of globalisation's spatial imaginaries:

> Clearly, the world is not totally globalised (whatever that might mean); the very fact that some are striving so hard to make it so is evidence of the project's incompletion. But this is more than a question of incompletion – more than a question of waiting for the laggards to catch up. There are multiple trajectories/ temporalities here. Once again, as in the case of modernity, this is a geographical imagination which ignores the structured divides, the necessary ruptures and inequalities, the exclusions, on which the successful prosecution of the project itself depends. A further effect of the temporal convening of spatial difference here again becomes evident. So long as inequality is read in terms of stages of advance and backwardness not only are alternative stories disallowed but also the fact of the production of poverty and polarisation within and through 'globalisation' itself can be erased from view. This is – - again - – a geographical imagination which ignores its own real spatiality.[36]

What is at stake in understanding time–space better, and the territories of all actors associated with globalisation and global law and governance is enormous.

1.1.4 Geographical and Physical Geography

Geography can refer to both the discipline and the brute physical facts. I try to use the term geography to refer to the discipline and the term

[35] Massey (2005) at 83.
[36] ibid at 84.

physical geography to refer to the 'features of the earth and its atmosphere'.[37] Physical geography can be more than just land and can include water. I use the term physical geography to refer to physical facts, given that the concept of territory is often confusingly used to indicate land, sea, and air – the natural or 'brute' reality – and I want to avoid perpetuating this confusion.

1.1.5 Essentialised or Essentialising

Essentialising means the attribution of fixed characteristics or elements, that is, the tendency to present a certain phenomenon as necessarily having those particular features and qualities. A concept becomes essentialised whenever it is assumed that the exact same set of fixed characteristics will be shared by all its referents, no matter what the particular circumstances are, such that the individual characteristics are often overlooked or the idea that these characteristics can be differently configured is neglected. A relationship (between concepts or legal principles) can also be essentialised, for example, by projecting an assumption that there exists an inherent arrangement or function to the relationship.

1.1.6 Naturalising

I adopt the term in the following way: 'naturalisation is a significant mode of the circulation of knowledge during which the relation between knowledge and power becomes fixed in such a way that is appears to be given by nature and thus an unchangeable face and determinant of human actions.'[38] A concept becomes naturalised when its content or meaning is presented as the product of some objective brute fact (e.g., the physical reality), rather than a historically contingent, social construction. It is closely linked to essentialisation but here I want to highlight explicitly the 'naturalness' that is associated with territory – the relationship between the natural world and the political, legal, social world being essentialised.

1.2 Situating the Argument

This thesis contributes to the ongoing discussion about the politics, epistemology, and ontology of territory, sovereignty, globalisation, and

[37] 'Geography, n.' (2020).
[38] Liste (2016) 199.

global governance taking place in and across many different disciplines.[39] As I engage with those who write on this issue from an transdisciplinary perspective, this book may be of interest not only to international lawyers but to anyone seeking to understand current institutional and legal arrangements. In the pages ahead, I argue for a fundamental reconceptualisation of the concepts of territory and sovereignty as they are used in the context of international law. The analysis I propose seeks to remove the narrow confines into which these concepts have been traditionally forced, to problematise and deconstruct their content, and to uncover the implicit assumptions concerning their spatial characteristics.

Many of these assumptions – such as, for example, the idea of territory as a static and container-like space closely associated with statehood or the notion of globalisation as a fluid, spatially imprecise process – exist in many disciplines. The problems I pursue in this book, thus, are not unique to international law, nor is international law, in this sense, cut off from other disciplines or, for that matter, from broader mainstream discourses. The argument I develop in these pages is intended, ideally, to stimulate a wide-ranging reappraisal of international spatial structures that go beyond a specific disciplinary context.

Originally, my project had a slightly different orientation. I had intended to examine the extent to which the process of deterritorialisation had taken place in the arena of international law, to what extent the international legal order, in other words, could be said to have been deterritorialised, and what implications this might have for the relevance of territory to various international law structures and processes. I had already assumed territory was less relevant. Such an examination predictably required an immediate clarification of the concept of 'deterritorialisation'. Acquainting myself with the relevant literature, I found considerable overlap between the deterritorialisation debate and the aforementioned 'shift to functionality' narrative. I also found that this debate often reflected a pervasive anxiety about the changing role of the state, and that many contributors to this debate were unable to approach the subject of globalisation/global governance other than through the prism of this underlying anxiety. In doing so they also unfailingly ended up replicating the traditional positivist bias of normatively prioritising the Westphalian institutional form. In particular, many

[39] Lindahl (2013); Lindahl (2010) 30; Sassen (2008); Massey (2005); Massey (1992); Sokol (2011); Bartelson (2010) 219; Elden (2005); Elden (2006) 47; Held and McGrew (2007); Sloterdijk (2009) 29; Strandsbjerg (2010).

of these contributions continued assuming and applying without question the same underlying conception of territory. Prompted by my reading of this deterritorialisation literature from the discipline of international law, I decided at this point to go 'back to basics' to understand the concept of territory and how tools from different disciplines, such as geography, might differently inform our thinking about spaces and spatial concepts, especially the concept of territory.

Influenced by the suggestions made by scholars in other disciplines that borders were not disappearing but proliferating and becoming more heterogeneous,[40] I asked what if, rather than territory disappearing or becoming less relevant, territories are actually proliferating and doing so as increasingly heterogeneous spaces? If borders can be understood as more complex, could the same be true of territory? Borders, after all, delineate *something* and, more often than not, bound a territory. Did this approach help explain what I thought was missing in accounts of territory, deterritorialisation, and globalisation? Could this help me understand what I thought legal theory is struggling to understand? This approach reflects a similar shift from debates asking, 'is the nation state dead/in decline?' to more fruitful questions of 'how is statehood changing?'[41] The same applies to the idea of territory. Rather than ask whether territory is still relevant, whether it is dead, or whether it is the 'end of geography', we can instead ask how territory can be thought of as changing.

This idea became central to my research. Of course, the number of territories at the international plane proliferated as a result of decolonisation, as well as other secessionist movements. However, this only increased the number of *state* territories in international law. So, while proliferating, territories did not become more heterogeneous – these new territories were constituted and configured in habitually the same way. Territories were increasing in number but not in diversity. What if, instead, territories are being refashioned? If so, we – international lawyers, as I see myself as belonging to this community of international lawyers – need to redefine and re-imagine the concept of territory. Rather than deterritorialisation being a one-way process, implying territory is being replaced by functionality, what if those functions are

[40] Mezzadra and Neilson (2013); Reece Jones and others (2017) 1, 1.

[41] Schachter (1997); Horsman and Marshall (1994); Kwiecień [2012]; MacCormick (1999); Jackson and James (1993); Sørensen (2001); Cutler (2016) 95; Biswas (2002) 175; Sur (1997) 421; Homann in Miller and Bratspies (2008).

reterritorialising into differently configured (non-state) territories? How can these territories become visible? Or rather, what makes these territories invisible? I began to explore and question the underlying assumptions about territory in international law, and why there is a spatial hegemony. Thus, 'territory does not cease to be important, rather it is no longer bound within a single state'[42] or tied to a certain category of actor. As a result, I propose reconceptualising territory, and, as a result, the contingent concept of sovereignty, in a manner that makes the legal spaces of reterritorialised functions and competences visible.

1.2.1 Overview

In the following chapter, I examine how the phenomena associated with globalisation and global governance are understood and trace the reliance on the orthodox spatial imaginary of international law as both positive enactment of law and discourse. Discussing the main theories offered by scholars to make sense of the major societal, political, and legal shifts because of globalisation and global governance, I address what I call the deterritorialisation narrative present in much of these discourses. I identify three main threads to these theories and examine them in turn: first, are those which describe a shift in the organising logic of international law and politics from territoriality to functionality; second, are those theories that relocate power without concretely knowing what to call these spaces of relocation; and third, are theories concerning the porosity of borders. Yet, as I conclude, what is common to all these theories is an incomplete spatial account; they show deterritorialisation without reterritorialisation. I identify several reasons for this, including an analytical conflation between functions and spaces, and that the spaces of reterritorialisation are invisible and unknown. These spaces are made invisible because of the hegemonic concept of territory and analytical prioritisation of (state-)territory. As a result, these theories reproduce the same spatial imaginary of international law, in particular the same assumptions about the concept of territory, which, as a result, forces a non-territorial or aterritorial account.

Chapter 3 begins a deep dive into the content of the concept of territory that underpins and informs the deterritorialisation narratives, and the related body of discourse about the end of territory, geography,

[42] Elden (2005) 16.

sovereignty and/or the state, producing this identified aterritorial response. The conceptualisations of territory that are unpicked invariably tend to be reified, physical, 'flat', and statocentric. Much of international law (and its reasoning and operative concepts, such as of sovereignty, territorial sovereignty, and jurisdiction) is built on an implicit geography that uncritically accepts the cartographic imaginary that prioritises state space, while entirely disregarding the space created and inhabited by other categories of actors. As a result, when legal competences move from states to other actors, this way of thinking is inevitably drawn to generating the kind of narratives explored in the previous chapter. The excavation exercise in this chapter looks at the artefacts and features of this traditional concept of territory and problematises many of its outdated spatial assumptions. For it is as a result, that international legal thought finds it impossible to comprehend as territories the spaces of non-state actors, territories which will and do overlap with the territories of states. In other words, there can be no reterritorialisation because the spaces of reterritorialisation are illegible to international lawyers.

In Chapters 4 and 5, I take the spaces of reterritorialisation seriously and propose how international lawyers might rethink the spatiality of international law in order to recognise the territories that are created by non-state actors. I demonstrate that it is possible to account for the 'new' or once-exceptional spaces by questioning and removing the imposed limitations and assumptions about territory. I propose two main phases to reconceptualise territory and consequently sovereignty and jurisdiction, dedicating a chapter to each.

Chapter 4 outlines how territory is being conceptualised differently. This alternative understanding builds on insights drawn from various disciplines, especially critical geography and the work of spatial theorists like Henri Lefebvre and Doreen Massey who would understand territory as socially produced space. The chapter rethinks the basic building blocks of the concept of territory, producing as a result a new appreciation about territory as a space produced by actors exercising control. I discuss how spaces are understood by the likes of Elden, Lefebvre, and Massey who in their own way have revolutionised the understanding of space for many disciplines; from an objectified and container understanding of space to one that is socially constructed, dynamic, multiple, and relational. I then explain the relationship between territory and the material world (or as I call it the physical geography or brute fact): a territory understood within this spatial paradigm becomes understood as 'a bounded social *space that inscribes a certain sort of meaning onto* defined segments of the

material world', that is, the physical geography.[43] It is not physical but is produced and exists in the realm of social relations.[44] I suggest that it might be useful to think of there being a central characteristic to the concept of territory – a characteristic that distinguishes this type of space from other spaces. I propose understanding that defining characteristic in terms of the notion of control. I also suggest re-imagining the concept of territory as consisting of a bundle of different characteristics. In this view of things, that bundle can be differently arranged, some characteristics changed, and others removed but there is still a space recognisable as territory where control and power are exercised. Social practices and relations of control then become the central definition and 'test' of the presence of a territory. I then turn to other considerations, first problematising the 'time of territory', including the assumption that territories are static, and more or less permanent, before thinking about the boundaries of territories and how territories are mappable. Where we end up, if we adopt this concept of territory as constituted through practices of control, is that any space constituted through social practices meeting those criteria is a territory. Therefore, if the spaces of other actors are similarly constituted but configured differently, these too could be considered as their territories. Without this step, we are forced to adopt the aterritorial responses diagnosed in Chapter 2; the spaces of other actors become conflated with unstructured and unfocused global space.

However, what is problematic about redefining territory in this way is that orthodox international legal theories conceptualise territory as an object and the orthodox understanding of sovereignty is something that is exercised 'over' and structured by discrete state territories. Therefore, this new concept needs to be worked out in practice. Following this rethink concerning solely the concept of territory, Chapter 5 returns to the level of broader narratives about the contemporary global legal order. Utilising legal realist and social constructivist lenses, I implement this 'new' geography for international law. Applying the idea of territorial pluralism and departing from a 2-D cartographic imaginary, the chapter proposes how the idea that territories are not diminishing but are instead proliferating might be reinserted into international legal theories. As part of the final steps of rethinking the conceptual and theoretical

[43] Delaney (2005) at 14, emphasis added.

[44] Massey argued that space is relational in its construction, its production is realised 'through practices of material engagement. If time unfolds as change then space unfolds as interaction. In that sense space is the social dimension.' Massey (2005) at 61.

frameworks, aided by insights developed by legal realists, I argue that the concept of sovereignty can be understood as bundles of legal relations. This insight helps explain the continual redistribution of the bundle of sovereign powers, competences, rights, and duties to different actors with their own spaces. In this chapter, I also argue that title is not a useful operative legal concept any longer. This is because conceptualising territory as an object or possession of the state is integral to the concept of title *and given territory is a space, not an object*, the discipline of international law can do away entirely with the concept of title. This chapter also deals with the notion of exclusivity. A legal realist approach, combined with the insights from earlier chapters, helps show that what exclusivity describes is actually a relationship between actors, not the relationship between the state/sovereign rights holder and territory. Finally, a social constructivist perspective helps free the sovereignty bundle from the state, by removing the normative positivist 'view from nowhere' that states are the only actors capable of exercising power, rights, duties, etc. in relation to their territories. This is a vital chapter in the story re-imagining territory because it explains the legal relationship between actors who exercise powers in relation to their own territories, and who indeed actually constitute their own territories by exercising different parts of the legal bundle of sovereignty. Taking the idea of reterritorialising seriously, I propose a legal account of the relationship between actors and their spaces and think through the implications of this argument for the spatially mediated legal concepts of sovereignty and jurisdiction. In short, I propose a 'rebirth' of the concept of territory for international law.

1.3 Methodology

Methods are central to this project. Here I broadly sketch out the approaches and insights I have found most useful in developing my ideas. The very first consideration is that this is a transdisciplinary project. Individuals may disagree generally with trans- or interdisciplinary approaches, but the nature of the issues addressed – geography, the spatial, legal rights, 'global society', global governance, global law, globalisation, etc. – prompts a transdisciplinary response. Originally the discipline of international law adopted ideas about territory from geography,[45] therefore, it is important to understand how this discipline

[45] Jennings (1963) at 74.

and its discourse developed. It is entirely commonplace for disciplines to create their own meaning for words. Territory is a prime example of a concept borrowed from the discipline of geography, but debate and discourse have moved on in that discipline and the two disciplines have not been in discourse with each other. Such developments are to be expected. Often the purpose of inter- or trans-disciplinary research is to understand how far apart the conceptualisations have become. Further, although I study the structure and operation of a legal system, globalisation as a subject, and its ontology, are challenging, and being challenged in, many disciplines besides international law, making it sensible to explore how they have framed their debates and responses to it. Further still, law is a social practice that exists in and creates legal spaces, making a study of how other social sciences relate to the spatial and its productive effects necessary.

Second, I adopt a 'legal geography' approach which seeks to understand 'the where of law' as practised, as opposed to relying on legal positivist accounts of where territories ought to be. Legal geography is not a subdiscipline of human geography, or of law, but a specialised area of scholarship where 'space is foreground and serves as an organising principle'.[46] This approach offers a way to understand the 'unacknowledged assumptions about the space[s] that work to stabilise . . . the very meaning of "law"'.[47] Legal geography helps us comprehend the diversity of spaces of law, how these spaces are configured, and how this affects the operationalisation of the legal system itself. By reading legal geography's insights, we gain more clarity regarding the false binary that exists in the functionality versus territoriality discourse outlined in Chapter 2, showing that instead what has taken place is a shift from the organisation of competences in the territory of one actor to a redistribution of these competences to the territories of other actors. More than this, there is a critical sensibility, in the sense of critical (legal) geography, and there is a huge debt to Doreen Massey's and Stuart Elden's work for my thinking about space and in understanding many of the philosophical and political theory debates concerning concepts such as space, time, deterritorialisation, globalisation, place, local, and global.

As such, it is also a critical methodology – not critical in the sense of disapproving or fault finding – but in the sense of interpreting, commenting on, and analysing how international lawyers think about

[46] Braverman and others (2015) at 2.
[47] Blomley, Delaney, and Ford (2001) at xv.

territory and its role in mediating other concepts. I feel I must acknowledge this because 'critical' work is often off-putting to those who approach law through more doctrinal or positivist sensibilities, and I would like these ideas to be read, used, discussed, critiqued, worked on further, by both 'camps'. There is always a fundamental and ongoing role for questioning accepted meanings and the assumptions creating them. The ultimate aim of Chapter 3 is deconstructing how the concept of territory[48] is understood and applied in practice from someone who also 'gets' international law from an internal perspective. The aim of such deconstruction exercises can be to question the hegemony of thought and 'does not reject the need for law and institutions, but rather seeks to work within those structures to reveal new possibilities.'[49] Being critically aware is an emancipatory process.[50] More focused and sharper thinking can result from continually questioning whether blindspots exist in orthodox theories. Critical methods create opportunities to better understand the structure and ideology of the legal system and offer a different intellectual framework for understanding of the likes of the concept of territory. Deconstruction as a tool can offer insights that may produce conceptual clarity in a discourse that has become burdened with exceptions and conceptual slippages. This book is an invitation to engage in the possibilities rather than to command or find fault or create strawmen to knock down.[51] It aims to find the 'enrichment of a multi-dimensional understanding of, on the one hand, drivers, backgrounds, influences, power relations and, on the other hand, consequences, effects and feedback loops of legal endeavors in social contexts (reality and realities) [which] offers a much wider horizon of intellectual and scholarly mutual enrichment.'[52] The book in many ways is broadly written in an arc that deconstructs and then reconstructs the concept of territory and the legal categories such as sovereignty mediated by it. The reconstruction I offer in Chapters 4 and 5 is not the objective truth or 'correct' understanding of territory.[53] It is an alternative that allows us to entertain a different

[48] A very difficult task, because there is no single understanding of territory in international law discourse, but instead a lot of conceptual ambiguity and imprecision, but with certain identifiable key or commonly occurring characteristics.

[49] Turner (2016).

[50] Korhonen (2017) 625, 632.

[51] ibid at 633.

[52] ibid at 637.

[53] Litowitz (2000) 41, 57. I am also quite aware that I knock down one totalising way of thinking and could be critiqued as proposing another. Such totalising moves can often be

understanding of contemporary legal orders; 'territorialising' that which has been deterritorialised by our dominant way of thinking. By examining insights from different disciplines, as I do in these two chapters, we may receive new ways of thinking and new skills that can lead to disciplinary change. Lawyers cannot remain frozen[54] in our understanding of territory because legal realities are changing; while traditionally understood as a stable base associated with one actor, territories too are dynamic. That essentialism can be unlearned.[55]

1.3.1 *International Lawyers and the Enchanted Heartland Concept of Territory*

The task confronting this research project is so much greater and all the more challenging because territory is a central concept of international law. This book contributes to rethinking some foundational concepts of law that are often treated and used self-evidently and uncritically, with assumptions about the concepts being uncritically reproduced. Therefore, I have found it useful to understand these as *heartland* concepts which have *enchanted* international lawyers. Given I have just introduced two new concepts – enchantment and heartland – developed by different scholars, I feel I must first explain what I mean by these terms and describe their use.

unpopular in critical scholarship. I could have written this book in a way that only deconstructed how international law discourse misdiagnoses issues by excavating its conceptualisations of territory. This would have in many ways have been easier and kept my powder dry, so to speak. I decided to take the step of suggesting an alternative way of thinking. On totality, I have found Milton Santos instructive, especially since he writes about the timidity of geography 'in its approach to totality', Santos (2021) at 69. I entirely appreciate critiques of world systems theory or Hegelian Marxist accounts of capitalism, for example, for their totalising moves. What I offer in these pages is not a theory of how power or international law works, or ought to work. I have found that concentrating on the 'control' element of territory as a concept has been a very useful diagnostic tool. This will make more sense in Chapter 4 where I explain it in more detail. Throughout, I emphasise that I think concepts are only in use for as long as they are useful, and that I think the concept of territory's meaning can and will change. In this book I am trying to dissect this control element, as it is an especially useful way of understanding territory, at this precise moment in time and in how I understand the constitution of its space. In 500 or 1,000 years, if the planet survives that long, the concept may have shifted in terms of content considerably or fallen into disuse entirely.

[54] Schlag (1986) 917, 917.

[55] Koskenniemi (2004) 229, 240.

I use the idea of enchanted concepts to describe concepts that are used and invoked by international lawyers so frequently such that they are treated uncritically; these concepts are credited with functions and explanatory power that logic and critical reasoning suggest should not be ascribed to them. This understanding of enchantment is reflected in, for example, the following passage from Koskenniemi's interview with Schult: 'lawyers are enchanted by the law that is familiar to them and the institutions and practices they are involved with; that makes them often unable to find a good solution to the problem they are faced with. International lawyers are enchanted by international law.'[56] Notice the emphasis on the disabling impact that enchantment has on reasoning faculties: being enchanted by familiar law and institutions, Koskenniemi argues, or at least in how I have interpreted him, makes lawyers often unable to resolve problems confronting them effectively and with clarity. This characterisation also holds true regarding how international lawyers think of, and apply, many key concepts. The concept of enchantment can also be understood in relation to its opposite, the concept of disenchantment. Here is how, for example, Kennedy, drawing on Weber, defines the latter: '[d]isenchantment is an existential or phenomenological category. It means loss of belief that ... events are part of a system of [pre-established, self-evident] meaning,'[57] that is miraculously immune to any logical contradictions and, often, rational explanations. It is 'the attempt to find a rational answer [that] sets us down a path of "disenchantment"'.[58]

The idea of heartland concepts as I use it comes from Jenkins, for whom: '[t]hese are concepts such as time, evidence, empathy, cause and effect, continuity and change'.[59] In his discussion of the general conceptual framework of modern history, Jenkins explains that certain concepts, such as time and space, tend to be used by historians in a fundamentally 'unproblematic' manner[60] – because 'the impression is strongly given' within the discipline that their meaning is somehow 'obvious and timeless'.[61] The discipline of international law shares many of the same heartland concepts, such as time and space. In addition, it also has

[56] Koskenniemi and Schult (2018).
[57] Kennedy (2004) 1031, 1057.
[58] ibid.
[59] Jenkins (2003) at 19.
[60] ibid at 61.
[61] ibid at 19.

numerous heartland concepts of its own. Those of territory, sovereignty, territorial sovereignty, and jurisdiction could be included among them.

Concepts like territory and sovereignty, in this sense, can be understood as the essential 'building blocks' of international lawyers' understanding of the legal system they work with and study. Yet, these are historically and socially produced constructs and their use should not forever be continued unproblematically. Their content is not static. It is, therefore, important to study them historically and critically, to understand their potential application, and justify their content and application when faced with new legal and political challenges.

The idea that sovereignty and territory are core concepts in international legal thought, of course, is not novel. Thus, for example, Shaw observes that 'international law is based on the concept of the state. The state in turn lies upon the foundation of sovereignty [which is] founded upon the fact of territory. Without territory a legal person cannot be a state. It is undoubtedly the basic characteristic of a state.' He continues: 'fundamental legal concepts such as sovereignty and jurisdiction can only be comprehended in relation to territory.'[62] This means, he concludes, that, inevitably, 'territory becomes a vital part in any study of international law.'[63] In a similar vein, Simpson describes sovereignty and territory as 'the classic legal principles'[64] 'that structure international politics';[65] Tomuschat remarks that '[t]raditionally, international law rested on the principle of territoriality';[66] Bilkovà observes that 'States possess[ing] and control[ling] territory is [] one of the most important assumptions that international law stems from';[67] and Brierly comments that '[a]t the basis of [all] international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises . . . jurisdiction over persons and things to the exclusion of the jurisdiction of other states.'[68] According to O'Connell, the fact that 'the exercise of sovereignty is predicated upon territory' is why territory 'is perhaps the fundamental concept of international law.'[69] The ICJ in the *Corfu Channel* case indicated that 'respect for territorial

[62] Shaw (2017) at 361.
[63] ibid.
[64] Simpson in Crawford and Koskenniemi (2012) at 40.
[65] Simpson in ibid at 45.
[66] Tomuschat (1993) 195, 210.
[67] Bílková in Kuijer and Werner (2017) at 43.
[68] Brierly (1949) at 142.
[69] O'Connell (1971) at 181.

sovereignty is an essential foundation of international relations,'[70] and in his lectures, Jennings, who later would become ICJ President, declared '[t]he whole course of modern history testifies to the central place of State territory in international relations'.[71] In short, 'territory [has become] "perhaps the fundamental concept of international law"'.[72]

The enchantment referred to by Koskenniemi is, I contend, more likely to arise with heartland concepts. The reproduction of assumptions is more likely to arise with concepts that are core to a discipline. Concepts, such as territory, are used and invoked by international lawyers so commonly and frequently, they are treated as self-evident and, as a result, may become essentialised and naturalised. As Elden argues:

> However central the notion of territory is to definitions of the state, it generally tends to be assumed as unproblematic. Theorists have largely neglected to define the term, taking it as obvious and not worthy of further investigation ... it is unhistorically accepted, conceptually assumed and philosophically unexamined. Its meaning is taken to be obvious and self-evident and can therefore be assumed in political analysis.[73]

And yet, as we will see, there are deep inconsistencies which go unnoticed. Territory is sometimes an area, sometimes a space, sometimes a portion of the surface of the earth, sometimes airspace, sometimes primarily land and sometimes it is air, land, and water equally. Each of these descriptions is a result of different assumptions about the reality of territory that create different legal and political orders as a result. The same applies with territorial sovereignty and the understanding of territory underlying the particular theory adopted (if one is indeed explicitly adopted).

Further, when enchanted by a concept, or so the argument goes, those applying it are also unable to see past it or be prepared to adopt different understandings of it. Added to this, international law as a discipline, indeed most legal disciplines, are in their nature doctrinal, tending to stick with the known doctrine. But such doctrinal approaches may mean, recalling Koskenniemi, that many international lawyers are unable 'to

[70] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) Judgment* [1949] ICJ Reports 1949 4 (International Court of Justice) 35.
[71] Jennings (1963) at 1.
[72] Shaw (2017) at 361.
[73] Elden (2005) 10.

find a good solution to the problem they are faced with'.[74] One such important and pressing problem is the changing legal and political realties wrought by globalisation. What is common to many international law accounts of globalisation is they reproduce this heartland concept of territory. And given their enchantment, the concept is thought to have relatively *static content*.[75] The key element that is common to most international law conceptions of territory is that territory 'belongs' only to states (something that itself is unquestioned).

There is a broader pattern whereby lawyers tend to treat their basic tools as objects; this includes territory. Schlag identified this pattern, calling it an instance of the *objectivist aesthetic*: '[l]egal actors and thinkers come to believe that when they talk about rules, principles, doctrines and the like – they are talking about things that are incontestable ... [they] treat rules, principles, doctrines and the like as if they were physical objects.'[76] This creates a stable identity for these rules, principles, concepts, doctrines, etc. – if these objects are incontestably real they are increasingly unproblematically used and essentialised. Bring into the picture territory, a concept that is associated with the 'real world', 'tangible'[77] and material physical geography, the likelihood of this transformation into the physical object is greater. Almost then as a direct result of enchantment, territory has been reified in discourse – reification describing the process of making an abstract space more concrete and real.[78] In other words, the enchantment has influenced international lawyers' ontological understanding of this concept.

Territory is a deeply rooted concept – both in the sense that it is core to the understanding of international law and that is has been an important concept for a long period of time. The meaning of territory however has changed over time and yet it is common to unconsciously overlay historical thinking with the meaning held by scholars today or allow the assumptions of the historical text to slip into today's application. When reading a historical text or legal provision, scholars may

[74] Koskenniemi and Schult (2018). And here I am, someone who thinks of herself as also belonging to this community, telling international lawyers 'what to think', but I hope that this is not taken as an insult. We can sometimes stand too close to the object of study, and I was fortunate to have the time and space for several years to ponder this question.

[75] I discuss this further in Chapter 3 in which I deconstruct the content of the concept of territory.

[76] Schlag (1998) at 98.

[77] Wallace (1986) at 81.

[78] Also, objectification has taken place. See Chapter 3, Section 3.4 for an explanation on this.

(unconsciously) attach to the concepts of territory and territorial sovereignty a contemporary understanding, and vice versa. It is not possible to assume the term has been used uniformly.

These are all issues affecting the use of heartland concepts, contributing to the reification and essentialisation of territory in discourse. These considerations are all important to bear in mind when using the concepts of territory and sovereignty in modern practice, as well as justification for the proposed rethinking.

—

This contribution is intended to be an intervention in, and a continuation of, an important debate concerning territory to further thinking on the issue. It is not the final answer, nor does it claim to be the 'right' answer – if we can believe there is such a thing. Although prompted by the need to respond to debates about sovereignty, globalisation, or global governance, and of moves away from territoriality toward functionality, what emerges is a project offering a fundamental rethink of territory and touching on the way this will affect the operationalisation and structure of other international law concepts. I therefore hope it is of use to the wider discipline, as well as to those in international relations and politics who also use the concepts of territory and state as building blocks to their analysis. It explores my original hypothesis that territory is proliferating and that where deterritorialisation occurs, so too does reterritorialisation. But *where* powers and competences have been reterritorialised to must be identified because these territories are not visible to legal theory. The book is an effort to outline my thinking on the spaces and territories of international law. The task ahead is best captured in the following terms:

> Perhaps one of the most difficult lessons for anyone to learn is the way in which their own worlds are geographically coded; to understand the relationship between the visible and the invisible, the proximate and the distant, and to recognize the complex folds of past and present that constitute place and experience as we know it. The modern world-view has been so lodged upon naturalist notions of experience that people are very reluctant to question their belief in the stability and reality of their visual world. How could it be otherwise? Isn't the world clearly apparent to us? Isn't sight the purest of all our senses, the one least affected by social values and cultural practices? Well, it turns out that it isn't so clear or so stable.[79]

[79] Pickles (2004) at 81.

Reconceptualising territory in the way I propose, impacts many topics of international law from drone warfare to international organisations, from refugee journeys and camps to the law of treaties. With further development and wider input, it could have, I appreciate, widespread consequences for how international law is operationalised, its spatial logic, and how legal relations and regimes are structured. But 'the world is changing. Our conventional legal picture of the patterns of power is no longer adequate. We need new thinking' while remembering at the same time that international law is also a 'project[] of reinvention', requiring 're-imagining' and remaking.[80] It is possible to uncover and recreate, through different narratives, the legal order itself and by reinterpreting legal spaces, perhaps a different spatial constitution of the world emerges.

[80] Kennedy (2008) 827, 835.