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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

Eradicating the exceptional: The role of territory in structuring international legal thought

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Abstract

This article examines the idea of the *sui generis* in international law and explores how these exceptions structure international legal thought. Exceptions are useful to international law theorizing because they create easy manageable narratives which explain situations not fitting traditional paradigms, yet as a category in their own right – specifically how they are structured and how they operate – they are often undertheorized. The two examples explored in this article are *sui generis* actors and the concept of extraterritorial jurisdiction. I demonstrate the foundational role played by (state-)territorialized thinking in the creation of oppositional categories: state and non-state, and the non-exceptional and exceptional exercise of jurisdiction. The category of exceptions has significantly expanded from the likes of the Holy See and irregular exercise of extraterritorial jurisdiction to a broad array of actors, such as international organizations and transnational corporations, playing growing and varied roles in contemporary law-making and governance and the regular exercise of extraterritorial jurisdiction by states. Rather than continuing with this overextended category, the article argues it is instead possible, by rethinking international law's spatial imaginary, to first, better understand the spaces of non-state actors and regularized exercise of extraterritorial jurisdiction and second, eradicate the now overstretched legal category of '*sui generis*'.

Keywords: exceptions; jurisdiction; legal geography; *sui generis*; territory

1. Introduction

International lawyers are a little in love with the *sui generis*. With the extraordinary. With the unique and wonderful. With the somewhat geeky anomalies associated with remnants of historical actors and structures. But also, of the new and strange. The novel or special cases. The *sui generis*[1] is at once exciting, sexy, and nerdy for international lawyers. Displaying good knowledge of exceptions is often how one identifies as being internal to the discipline of international law. Exceptional cases unceasingly provide teaching materials and are fruitful areas of research and writing.

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[1]Interestingly, there is no plural for *sui generis*. 'The phrase is singular and doesn't conventionally apply to plural nouns (as only one thing can be unique in a certain way).' See ~grammarist.com/usage/sui-generis/#:~:text = %7C%20Grammarist-,%7C%20Usage,unique%20in%20a%20certain%20way. I had wanted to say the '*sui generi*' or the multiple of *sui generis* situations, but alas.

The term *sui generis* in international law is used to describe all manner of historical anomalies and new or unusual situations. The concept is used to describe, for example, the Sovereign Order of Malta, the Holy See,[2] the European Union (EU),[3] as well as the relations between the EU and states,[4] the League of Nations,[5] the international administration of territories,[6] governments in exile,[7] the International Red Cross,[8] cyberspace,[9] the internal law of international organizations,[10] condominium or co-ownership,[11] the Exclusive Economic Zone,[12] Russia,[13] Taiwan,[14] Kosovo,[15] Antarctica,[16] Lemkin's 'commitment to international law as a means to protect group identity,'[17] the Federal Republic of Yugoslavia's relationship with the United Nations,[18] the 'continuing state of de facto international armed conflict between Israel and Gaza',[19] the status of Danzig,[20] the Bank of International Settlements,[21] the apartheid regime of South Africa,[22] the rights of Indigenous people,[23] legal rules for new

[2]For both entities see P. Gaeta, J. E. Viñuales and S. Zappalà, *Cassese's International Law* (2020), 173–4.

[3]J. Klabbers, 'Sui Generis? The European Union as an International Organization', in D. Patterson and A. Södersten (eds.), *A Companion to European Union Law and International Law* (2016), 1. See also T. Diez, 'Not Quite "Sui Generis" Enough', (2012) 14 *European Societies* 522; J. P. Trachtman, 'International Economic Law in the Cyber Arena', in K. Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace: International Law, International Relations and Diplomacy* (2013), 373, at 376.

[4]N. Walker, *Sovereignty in Transition* (2006), 13.

[5]L. Oppenheim, *International Law* (1921), vol. 1, at 269, as noted in B. Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', (2002) 13 EJIL 401, at 409. See also a discussion on Oppenheim's position in C. Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (2007), 56.

[6]J. Crawford, *Brownlie's Principles of Public International Law* (2019), 194.

[7]See Crawford, ibid., at 115.

[8]See Brölmann, *supra* note 5, at 70. See also a discussion of the International Red Cross as a 'Special Entity' in B. Broms 'Subjects: Entitlement in the International Legal System', in R. St. J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983), 383, at 402–4.

[9]E. Legris and D. Walas, 'Regulation of Cyberspace by International Law: Reflection on Needs and Methods', (2018) 7(1) *ESIL Reflections*; E. Mavropoulou, 'Targeting in the Cyber Domain: Legal Challenges Arising from the Application of the Principle of Distinction to Cyber Attacks', (2015) 4 *Journal of Law & Cyber Warfare* 23.

[10]C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), 274.

[11]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Merits, Judgement of 11 September 1992, [1992] ICJ Rep. 351, para. 412.

[12]M. D. Evans, 'The Law of the Sea', in M. Evans (ed.), *International Law* (2018), 635, at 658.

[13]L. Mälksoo, *Russian Approaches to International Law* (2015), 56.

[14]P. L. Hsieh, 'Rethinking Non-Recognition: The EU's Investment Agreement with Taiwan under the One-China Policy', (2020) 33 LJIL 689, at 697.

[15]J. Ker-Lindsay, 'Not Such a "Sui Generis" Case after All: Assessing the ICJ Opinion on Kosovo', (2011) 39 *Nationalities Papers* 1.

[16]K. Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory', (2014) 27 LJIL 621, at 622.

[17]M. L. Siegelberg, 'Unofficial Men, Efficient Civil Servants: Raphael Lemkin in the History of International Law', (2013) 15 *Journal of Genocide Research* 297, at 299.

[18]*Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 3 February 2003, [2003] ICJ Rep. 7, para. 71.

[19]D. Turns 'The Law of Armed Conflict (International Humanitarian Law)', in Evans, *supra* note 12, at 866.

[20]G. Arangio-Ruiz 'The Plea of Domestic Jurisdiction before the International Court of Justice: Substance or Procedure?', in R. Jennings and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), 440, at 441, 448.

[21]*Horst Reineccius et al. v. Bank for International Settlements*, PCA Case No. 2000-04, Partial Award of 22 November 2002, Section 118.

[22]J. Dugard and J. Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory', (2013) 24 EJIL 867, at 883.

[23]M. Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples', (2009) 58 ICLQ 957, at 957.

technologies,[24] and finally, but certainly not exhaustively, non-governmental organizations (NGOs), and transnational corporations (TNCs).[25]

This is more than just a bit of irreverence. There is surprisingly little written about the concept of the *sui generis* in international law scholarship – or in legal scholarship more generally. While thought has been given to the idea of the 'state of exception' in legal scholarship[26] – and we might think of the *sui generis* and the exceptional as broadly similar in terms of structure (more on this below) – even discourse about the exceptional tends to focus on the circumstances of the exception,[27] rather than the mode of exceptionalist thinking in international law and what structures it.

In this article, I explore the structure of the exception in international law as it relates to two central anchors of international law: actors and jurisdiction. Specifically, it looks at the way the spatiality of international law structures thinking about these two, but it also goes a step further to offer some thoughts on how rethinking our assumptions about the spatial would contribute to many of international law's exceptional and extraordinary situations becoming ordinary and unexceptional. This is not to claim that space structures everything that is *sui generis* and exceptional in international law's disciplinary imaginary. Yet even Lemkin's 'commitment to international law as a means to protect group identity'[28] is spatially underpinned: this position assumes a global space with universalist ideologies and values (of international law) projected into that space, that can 'save' the particular (the group identity, the localized).[29]

Why is this important? Afterall, 'in international law, as in every legal system, rules are invariably subject to exceptions'[30] and this is not new. What I am interested in is what structures these exceptions on a fundamental level. By examining the exceptional, I argue, it is possible to gain a deeper understanding of the less well-known, the uncategorized, the different, and why these exist and what produces difference. However, I also argue that space plays a fundamental and up till now unnoticed role in structuring legal thought; it is the mental picture international lawyers carry around with them that matters. Further, to understand what structures our thinking and test whether anything is really unique can only be a good thing – and it would be possible to stop there. But once we know the mental picture is no longer accurate, that exceptions and anomalies are proliferating, it makes sense to push the theorizing one step further. As such, this rising number of exceptions offers the chance to rethink the concepts of territory and territorial sovereignty in international law, productive of exceptions in the first place. For international law, by and large, operates based on an outdated spatial paradigm – and the rising number of exceptions allows us, is key even in offering, a vantage point to view this outdated paradigm.[31] And as a result, if we rethink the discipline's spatial assumptions, we can also unexceptionalize some of our reasoning. In that sense, this article seeks to understand what structures many norms and

[24]L. Bennett Moses, 'Sui Generis Rules', in G. E. Marchant, B. R. Allenby and J. R. Herkert (eds.), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight* (2011), 77.

[25]See Gaeta, Viñuales and Zappalà, *supra* note 2, at 175–6.

[26]G. Agamben, *State of Exception* (2005).

[27]L. Bartels and F. Paddeu (eds.), *Exceptions in International Law* (2020).

[28]See Siegelberg, *supra* note 17, at 299. This analysis could be in relation to genocide alone or in general – Doreen Massey pointed out in *For Space* (2005), 18, that there is 'an assumption of isomorphism between space/place on the one hand and society/culture on the other'. See Massey, ibid., at 64.

[29]For more on the spaces of the global/universal and the particular see G. Lythgoe 'The Spaces of the Universal and the Particular in International Law: Questioning Binaries and Uncovering Political Projects', in I. Aral and J. d'Aspremont (eds.), *International Law and Universality* (forthcoming, OUP 2024).

[30]See Bartels and Paddeu, *supra* note 27, at 1.

[31]While other disciplines of social science and humanities, in particular geography, underwent major epistemic change in their conceptualization of space, international law retained a physicalized and reified assumption of its spaces, especially in its conceptualization of the state-centric concept of territory; international lawyers have long assumed only states can be territorial actors in any meaningful sense. For more on this see works by Saskia Sassen, Stuart Elden, Doreen Massey, Henri Lefebvre, Nicholas Blomley, David Delaney, Irus Braverman.

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exceptions (that is: international law's spatial assumptions about territory), but these exceptions also create the conditions for theorists to problematize the limitations of international law's spatial paradigm and, crucially, to rethink it.

To demonstrate how to rethink international law's spatial paradigm and at the same time to unexceptionalize what has until now been firmly settled as *sui generis* – and to understand the link between the two – I first examine a number of exceptions in international law and demonstrate how the orthodox concept of territory, and its mediated concept of territorial sovereignty, produces this exceptionalist thinking. From this analysis, it is possible to see how the imagined spatiality of international law and specifically a particular category of space – that of state territory – structures exceptionalist thinking around (i) actors, and (ii) the operationalization of jurisdiction. The final two sections apply Kuhnian insights concerning paradigm shifts, specifically that too many exceptions undermine the general rule, leading to 'revolution' and paradigm shifts. In this case, the argument, in brief, is as follows: the space of state territory, international law's outdated geography, structures its understanding of what is 'normal' and 'exceptional' for both actorhood and jurisdiction in international law. These two fundamental pillars of international law – actors and jurisdiction – are being stretched beyond recognition by contemporary exceptions.[32] The proliferation of 'exceptions' – extraterritoriality, TNCs, global governors, etc. – creates narratives about the 'end of' geography and/or the territorial state.[33] Yet, rather than concluding the analysis at this point, I question the premises of this spatial imaginary, which is where the potential to eradicate the exception arises.

The concluding section unlocks how to *unexceptionalize* legal thinking. It offers a reconceptualization of space that can help us make sense of 'transnational' or 'global' legal phenomena, rendering them ordinary rather than *extra*-ordinary. It rethinks the spatially mediated binary between the extraordinary and the ordinary underpinning international law's account of actorhood and jurisdiction. This step is crucial: an alternative understanding of territory can help 'future proof' the discipline of international law in light of the rising anomalies confronting it.

2. The role of territory in exceptionalizing international legal thought

There is plenty of scholarship devoted to the *sui generis*. Textbook chapters on 'preliminary' topics such as subjecthood and jurisdiction contain sections that read like cabinets of curiosity, listing and displaying anomalies. Yet, these *Wunderkammer* do not offer much by way of insight into the exceptions and the general rule about entities in international law, instead reporting the historical or contemporary facts underlying the unique situations. Where comparative work is undertaken, it is generally only on the surface. The following analysis shows in more detail how international law's spatiality plays a role in structuring the norm-exception categories for both actors and

[32]A recent debate in EJIL between Krisch and O'Keefe demonstrates this concerning international law's account of jurisdiction. Do we need to theorize the 'far reaching changes' brought about by globalization and global governance, specially how the 'core categories of jurisdiction have been transformed'? Or is existing law sufficient? See N. Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance, European Journal of International Law', (2022) 33 EJIL 481, with R. O'Keefe, 'Cooperative National Regulation to Secure Transnational Public Goods: A Reply to Nico Krisch', (2022) 33 EJIL 515.

[33]We do not have to look far for such narratives: O. Schachter, 'The Decline of the Nation-State and Its Implications for International Law', (1997) 36 *Columbia Journal of Transnational Law* 7, at 7; H. Krieger and G. Nolte, 'The International Rule of Law: Rise or Decline? – Points of Departure', (2016) *KFG Working Paper Series, No. 1*; C. Ryngaert and M. Zoetekouw, 'The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era', (2014) SSRN ; D. Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law', (2014) 25 EJIL 9; D. Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem', (2014) 25 EJIL 25; I. R. Douglas, 'Globalisation and the End of the State?', (1997) 2 *New Political Economy* 165; R. Kwiecień, 'Does the State Still Matter? Sovereignty, Legitimacy and International Law', (2012) *Polish Yearbook of International Law* 45.

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jurisdiction.[34] The norm here is the state with territorial sovereignty 'over' its territory; anything different is the *sui generis* or the exceptional, which actually re-entrenches the norm, proving its existence. As Crawford observes: 'the concept of territorial sovereignty *normally* applies in relation to states'.[35] Exploring each in more detail illustrates the sense of the rule plus exception in operation in international law discourse, and the role particular assumptions about space play in constructing these exceptions in (i) actorhood, and (ii) the operationalization of jurisdiction.

2.1 Actors

Different terms are used in international law discourse to convey the idea of exceptional entities, including explicitly naming an entity as *sui generis* – conveying the entity's uniqueness – but it is also conveyed by the notion that the entity is a historical 'leftover', meaning it dates back to a period before states became the hegemonic actor. In a classic textbook, Shaw indicates that in addition to territorial states, there are '*sui generis* territorial entities' and other special cases, which are understood to be international legal subjects without territories.[36] These two sub-categories distinguish between actors that orthodox theory could consider to have some sense of territory or 'territoriality', even if not the same as state territory,[37] and those supposedly without any territory. The former category according to Shaw includes: mandate and trust territories; condominium; the international administration of territories; Taiwan; The Turkish Republic of North Cyprus; the Saharan Arab Democratic Republic; Kosovo; Palestine; Germany in 1945; 'various secessionist claims'; and 'Associations of States'.[38] The latter category – the non-territorial actors – includes the likes of the Sovereign Order of Malta and the Holy See.

This also shows how important state territory is to informing the exceptions. By examining the spatial characteristics of state territories, *sui generis* territorial entities, and non-territorial entities, we can understand further how the exceptions are constructed by space.

One of the most important elements of any space is its time. Time and space are mutually implicated.[39] As opposed to being opposites – an understanding of time as dynamic and space as

[34]It is not the only contributor to the creation of norm-exceptions in general. In many ways, the primary cause is the dualism common to modernity's conception of law. See R. Gould, 'Laws, Exceptions, Norms: Kierkegaard, Schmitt, and Benjamin on the Exception', (2013) 162 *Telos: A Quarterly Journal of Politics, Philosophy, Critical Theory, Culture, and the Arts* 1; J. Derrida, 'Before the Law', in D. Attridge (ed.), *Acts of Literature* (1992), 180; G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998); G. Agamben, *State of Exception* (2005), which produces binary thinking and creates the possibility for something to inform binaries, exceptions to rules, and norms/exceptions in the first place. What is productive of the norm – exception in these instances is informed by assumptions of space-time.

[35]J. Crawford, *Brownlie's Principles of Public International Law* (2012), 206 (emphasis added).

[36]M. Shaw, *International Law* (2014), 162–83.

[37]Yet this 'territory' is under-theorized. For example, despite EU space perhaps being more readily accepted as a territory, is undertheorized in international law discourse. My research suggests no one has explicitly argued EU territory is territory in terms of international law's concept of territory, which nearly always refers to state territory. Yet the term territory is sometimes used to discuss the space of the EU. It must be surmised such instances use the term territory not as a legal term but colloquially or informally – or even metaphorically. This is because, with one potential exception, no international law scholarship in its dealing with territory includes EU territory within the definition of territory for international law purposes. This one exception is Shaw and his category of *sui generis* territorial entities – but even by being described as *sui generis* shows it is not understood as 'the' orthodox concept of territory. Nor does this work interrogate the concept of territory and investigate the implications of these entities as having territory – what is the relationship of such territories to state territory? How is it similar or dissimilar? I submit this under-theorization of EU space as territory arises because, as international legal theory stands, territory is underappreciated as a concept in and of itself. The outcome is pragmatic: EU space is thought of like a territory, and scholars (and even the EU) use the terminology of territory on occasion, but the issue is not addressed systematically. The same is true of 'customs territories' where the term territory is both a subject (territories) and an object (the space of the customs union). This is something I address in in G. Lythgoe, *The Rebirth of Territory* (forthcoming 2024) in further detail and in G. Lythgoe, 'Distinct Persons; Distinct Territories: Rethinking the Spaces of International Organizations', (2022) 19 *International Organizations Law Review* 365.

[38]See Shaw, *supra* note 36, at 175.

[39]See Massey, *supra* note 28, at 18.

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stasis[40] – space is the 'social dimension' and 'time unfolds as change' through those practices of social relations.[41] Such insights allow us the possibility of examining the space and time of *sui generis* entities.

Time could refer to the duration of the space, or the way it is thought to interact with time, as either a permanent social construction, as something triggered by social interactions, or as something assumed to exist with a different marking or passage of time, such as 'nature'.[42] State-territory is often assumed to be permanent or at least durable until such time as it is 'acquired'.[43] And if that is the 'norm', then one of the assumptions around many of the *sui generis* situations that arise is that they are temporary or a situation waiting to be rectified.

That is the case when it comes to the idea of territory placed under international administration. While the facts on the ground may vary and the actors exercising control can also vary widely 'from autonomous areas within states to relatively independent entities',[44] what holds true is that they are assumed to be imperfect on a temporal scale. Such is the case when international organizations, rather than other states, fulfil administrative functions.[45] Cambodia, East Timor, Kosovo and Bosnia and Herzegovina were all previously under international administration. For example, the UN Transitional Authority in Cambodia (UNTAC) had competence in a number of areas such as foreign affairs, finance, defence, human rights, organization of elections, law and order, repatriation and resettlement of the refugees, and displaced persons and rehabilitation of essential infrastructure.[46] Likewise the UN Interim Administration Mission in Kosovo UNMIK had responsibility for banking, education, and telecommunications and after a Special Representative was appointed by UNSCR 1244,[47] all legislative and executive authority in Kosovo was vested in UNMIK and exercised by the Special Representative.[48] Yet both were 'transitional' and 'interim' as their very names and time-limited mandates suggest.

In proving the general rule, Crawford explained that internationally administered territories 'can only be classified as *sui generis* because terms and concepts like "sovereignty" and "title" are historically associated with the patrimony of states'.[49] Given such internationally administered territories are assumed to be temporary and as a situation awaiting rectification – that can only be

[40]D. Massey, 'Politics and Space/Time', (1992) 196 *New Left Review* 67.

[41]See Massey, *supra* note 28, at 61.

[42]There is much research to be done on the temporality of nature and how international legal discourse receives this space. It would for example be possible to look at the issue of accretion of land and the erasure or 'drowning' of land as a result of climate change. See for more instructive thinking about this: Ibid., at 131–7.

[43]That is not to say this assumption is correct. I explore this assumption further in Lythgoe, *The Rebirth of Territory*, *supra* note 37. I specifically refer to the 'adding to territory' question from the law of the sea and international law relating to air travel in Ch. 3. It would be equally possibly to undertake analysis on the moon – an increasingly urgent issue after the US 'Artemis Accords' and recent moon landing by India. I recommend C. Storr, 'Could Corporations Control Territory in Space? Under New US Rules, It Might Be Possible', *The Conversation*, 2 June 2020, available at theconversation.com/could-corporations-control-territory-in-space-under-new-us-rules-it-might-be-possible-138939, as a good place to start.

[44]See Shaw, *supra* note 36, at 166–7.

[45]Using territory to refer to legal subjects is fundamentally a different concept to that of territory as an object. I have argued elsewhere that the term 'territory' has four dominant uses in the discourse; it is used to describe an object, a subject, an organizing logic, and a framework. In and of itself, having different meanings intended by the same word, and slipping between the different uses, is not problematic – especially if those using the terms are familiar enough with the discourse to recognize (even unconsciously) how a term is employed in any particular instance. The reason for this is a common theoretical context is shared; there is a shared background knowledge for those working internally to a discipline. Yet conceptual slippage can cause problems. See Ch. 3 of Lythgoe, *The Rebirth of Territory*, *supra* note 37.

[46]United Nations, 'United Nations Transitional Authority in Cambodia (UNTAC) - Mandate', available at peacekeeping.un.org/mission/past/untacmandate.html.

[47]United Nations Security Council Resolution 1244, UN Doc. S/RES/1244 (1999), on the deployment of international civil and security presences in Kosovo.

[48]Regulation No 1999/1, UN Doc. UNMIK/REG/1999/1 (1999), on the Authority of the Interim Administration in Kosovo.

[49]See Crawford, *supra* note 35, at 206.

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rectified by becoming a state (or being incorporated into an existing state) – the time of space is a vital component to the construction of the exception.

Another way time can interact with our understanding of exceptions is in historical political legacies. The first example is those actors denied the status of statehood, such as Taiwan and Cyprus, and deemed *sui generis* due to historically contingent political facts. Taiwan is often considered a 'non-state territorial entity, which is capable of acting independently'.[50] The Turkish Republic of Northern Cyprus is considered *sui generis*, because the facts on the ground are different to those recognized in law: the Council of Europe (CoE) regards the Republic of Cyprus as the 'sole legitimate government of Cyprus'[51] but this is not reflected 'on the ground' where there are several different actors that exercise control in relation to the physical geography identified (normatively) as the island of Cyprus. The CoE is attempting to establish a normative position with their assertion of 'fact' but in so doing they conflate the island – i.e., the material dimension – with the state and state territory.

Of a far longer duration of historical situations producing *sui generis* actors, are those 'oddities'[52] such as the Holy See and Sovereign Order of Malta, which are only 'considered subjects of international law for historical reasons'.[53] Existing from a time before contemporary states were even imagined, and 'beaten' by those institutional forms in the historical competition for institutional hegemony,[54] they are categorized by some as even more of a 'special case' because they are subjects of international law supposedly without territory.[55] Both entities have UNGA observer status and while sometimes considered to have 'minimal territorial dimensions', are imagined to be universal in their scope.[56] That is not to say there is general agreement on this. Others view the Holy See as the government of the State of the Vatican City, which has an identifiable territory, moving this entity out of this category[57] and into a different one, similar to that of enclaves, which I explore further below.

The classification of these legal subjects as 'special cases' says much about the underlying assumptions about international law's legal subjects, which is that states are distinguishable from other subjects because they 'have' territory. This is the rule *because* anything else – and it is a proliferating list of insurgents and belligerents; national liberation movements; international public companies; and transnational corporations[58] – is exceptional. Yet, I would challenge the very idea that these are territory-less actors. If the actor is exercising control in relation to a space, that space is its territory; this requires us to reimagine the concept of territory as something that is not restricted to the category of states.[59]

One of those categories of actors could be international organizations, although I imagine there would be many who would dispute this – precisely because international lawyers work so hard to maintain assumptions about territory that are disproven over and over by exceptions. Where an 'association of states' is imagined, there may be a willingness on the part of some to accept them as '*sui generis* territorial entities', primarily because the spatial make-up is seemingly thought to be state-space.[60] However, '*sui generis* territorial entities' is an incoherent and unresolved category in international legal doctrine, and how these entities are distinguished from international

[50]See Shaw, *supra* note 36, at 170. I make no judgement on this. The point is to reflect the discourse.

[51]*Cyprus v. Turkey*, Judgment of 10 May 2001, [2001] ECHR, at 61.

[52]J. Klabbers, *International Law* (2017), 21.

[53]Ibid., at 72.

[54]H. Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (1994).

[55]See Shaw, *supra* note 36, at 193.

[56]Ibid., at 194.

[57]J. Crawford, *Creation of States in International Law* (2006), 230.

[58]See Shaw, *supra* note 36.

[59]I explore this idea further in the final section, but also in Lythgoe, *The Rebirth of Territory*, *supra* note 37.

[60]I dispute that elsewhere in Lythgoe, *supra* note 37, where I argue that just like the EU has a distinct legal personality and will, its formation also created a distinct territory.

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organizations is a blurry and ever-shifting line.[61] For example, Shaw's list of associations of states include: the co-operation between the Cook Islands and New Zealand; Associated States of the West Indies; the 'loose association' of the British Commonwealth of Nations; Commonwealth of Independent States (CIS); and the European Union (EU). Others would categorize the EU and CIS as regional and/or international organizations and given there are those who maintain outright that '[i]nternational organisations do not have a territory of their own',[62] there is clearly conceptual inconsistency in international law discourse. But my purpose here is not to 'correct' or even to exhaustively map that indeterminacy. Instead, it is to show that this problem arises precisely because the spatiality structuring these categories is undertheorized. Notably, Shaw while calling these associations '*sui generis* territorial entities', does not explicitly refer to them as having a territory, nor do his descriptions of territory in his textbook and elsewhere allow for these associations to 'have' territories, which is limited to state territory.[63] This is left unresolved and under-theorized.[64] Orthodox international legal theory, unable to offer any explanation, rationalizes the likes of the EU as exceptional or as *sui generis* only.

The EU is perhaps the organization that would be most readily accepted by many to have a territory. Presumably, to be added to the list would be the Organization of American States, African Union, and Association of Southeast Asian Nations, if the EU and CIS are already on the list, given these are 'regional' organizations of a similar type. It remains unclear whether other organizations such as the World Trade Organization (WTO), UN, and the Organisation for Economic Co-operation and Development (OECD) would be included. What therefore is important to highlight is the role that naturalized categories, such as geographical regions or continents, play in determining political entities. As such the role of the physical world in informing the social and therefore also the concept of territory is crucial. According to critical geography, Doreen Massey, who offers tremendous insights into this topic:

> within the history of modernity there was also developed a particular hegemonic understanding of the nature of space itself, and of the relation between space and society. One characteristic of this was an assumption of isomorphism between space/place on the one hand and society/culture on the other. Local communities had their localities, cultures had their regions and, of course, nations had their nation-states. The assumption was firmly established that space and society mapped on to each other and that together they were, in some sense "from the beginning", divided up. "Cultures", "societies" and "nations" were all imagined as having an integral relation to bounded spaces, internally coherent and differentiated from each other by separation.[65]

As such, when the physical, the cultural, and the spatial are effectively flattened and made indistinguishable, it makes it possible to see 'Europe' or 'Africa' as being capable of having territory, while not including other institutions such as the OECD in this category of institutions with territorial elements.

[61]To explore the concept of an international organization further see L. Gasbarri, *The Concept of an International Organization in International Law* (2021).

[62]P. R. Menon, 'The Legal Personality of International Organizations', (1992) 4 *Sri Lankan Journal of International Law* 21, at 88.

[63]There is no account of these territorial entities in Shaw's definition of territory given here: '[a]part from territory actually under the sovereignty of a state, international law also recognises territory over which there is no sovereign. Such territory is known as *terra nullius*. In addition, there is a category of territory called *res communis* which is ... generally not capable of being reduced to sovereign control.' See Shaw, *supra* note 36, at 364.

[64]I try to resolve this and theorize the territories of international organizations in Lythgoe, 'Distinct Persons', *supra* note 37.

[65]See Massey, *supra* note 28, at 64. Massey's work is incredibly instructive for international lawyers to understand spaces better.

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The determinism of the physical world and the collapsing of space-culture-physical world is also present in two further examples: states with disputed status such as Palestine and the 'exception' that is condominium. First, Palestine is recognized by some 138 states as 'having' territorial sovereignty. Like Kosovo, it is often recognized as a de facto state if not de jure.[66] Palestine has non-member observer state status[67] in the UN at which it is afforded rights and privileges. These rights and privileges were expanded when Palestine became the Chair of the G77 and included the right to make statements on behalf of the group, the right to submit and co-sponsor proposals and amendments, the right to raise procedural motions, etc.[68] Present in most of these *Wunderkammer*, Palestine is, regardless of its statehood, understood as a 'territorial entity', because it quite clearly has an assigned 'geography' – it is representable on (some) maps internalized by and at the same time constructed by international law.

Second, condominium is commonly understood as 'a territory over which two or more States jointly exercise governmental authority.'[69] *Notably, it is territory in the singular.* That a situation of condominium has a 'unique status'[70] is clear from international law discourse. For example, Crawford adopts the language of the exceptional to describe condominium, noting that '[e]xceptionally an area of territory may be under the sovereignty of several states (a condominium), though in practice these have always been states with other territory subject to their exclusive sovereignty'.[71] The significance here being that in addition to the anomalous position of condominium these states do conform to 'the norm' in other areas. Huber also noted this exception-status: 'it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others'.[72] Lauterpacht similarly thinks of condominium as exceptional.[73] Again, we see the framing of territorial sovereignty as a norm (states having territory and territorial sovereignty) and an exception (more than one state having territorial sovereignty over the same physical space). It is unclear whether a state could exist if the only territory it had was in a relationship of condominium with another state, i.e., a state with no 'exclusive territory' – it would probably also be an exception.

What condominium shows is that international law's implicit geography assumes a flat jigsaw puzzle-like understanding of territory: in relation to a particular physical geography there is only one territory possible, not two. This also performs a flattening of the social space into the physical. This territory will often be contiguous with the territories of the two (or more) states in the condominium arrangement. In this reading of condominium, there is no overlap between the spaces of the states: there are usually three separate 'territories' – the territory that is shared and the territories of the two states. Again, emphasizing the assumption of the flatness of international legal space.

Running with the characteristic of contiguity, enclaves also tell us something about the 'normal' or ordinary rules for the application of the concepts of territory and territorial sovereignty in international law. Enclaves are often described as 'enigmas'.[74] Judge Wellington Koo for instance

[66]The relationship between *sui generis* and de facto situations is a curious one and a frequently occurring pattern of thought, but there is no scope to explore it, and the spatial assumptions implicit informing these ideas, within this article.

[67]With UNGA Resolution 67/19 on the Status of Palestine in the United Nations, the UNGA accorded non-Member Observer State status to Palestine. See Status of Palestine in the United Nations, UN Doc. A/RES/67/19 (2012).

[68]United Nations General Assembly Resolution 73/295 on the Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (2019), 5.

[69]F. Morrison, 'Condominium and Coimperium', in *Max Planck Encyclopedia of Public International Law* (2006).

[70]See Shaw, *supra* note 36, at 179.

[71]See Crawford, *supra* note 35, at 203.

[72]*Island of Palmas case (Netherlands, USA)*, (1928) II-RIAA 829, 838.

[73]L. Oppenheim and H. Lauterpacht, *International Law, a Treatise* (1955), vol. 1, paras. 170–171.

[74]See Portugal in its memorial before the ICJ in *Rights of Passage over Indian Territory* calls the practice of 'having foreign enclaves within … territory' as something that is 'usual'. *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment of 12 April 1960, [1960] ICJ Rep. 6, at 24. But of course, this is to make a legal argument and is not a universally shared view. Plenty of sources do refer to enclaves as *sui generis* entities, including N. Polat, *Boundary Issues in Central Asia* (2002), 56–7; H. W. Jayewardene, *The Regime of Islands in International Law* (2021), 359.

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indicates that 'the situation of an enclave is a special one'.[75] The Holy See as an enclave has likewise been deemed *sui generis*.[76] Enclaves and exclaves have been a subject of fascination for international lawyers – probably *because* they are *sui generis* and disrupt the dominant assumptions about the contiguity of territory.

What enclaves can tell us is that territories are *normally* imagined to be contiguous and continuous. The phenomenon of enclaves and exclaves, given their description as *sui generis*, disrupt this general rule and implicit imaginary. Examples include: Gaza and the West Bank; former East Pakistan and Pakistan; Kaliningrad; Prussian territory enclaved in German territory; the papal territories including Avignon (now part of French territory) and Vatican City; Spanish and French enclaves (Llívia or the oddity that is Pheasant Island which is French for half the year and Spanish for the other half[77]); enclaves in India and Bangladesh (noting their recent territory swap aimed at bringing about more homogeneity and contiguity);[78] or, well-known to international lawyers, the *Right of Passage over Indian Territory Case*[79] concerning Portuguese enclaves in India. Despite its status as special, the space of an enclave is internally homogenous and uniform, i.e., within its boundaries the space is equal and uniform, much like state territory. There is simply a smaller homogenous space within, and sometimes surrounded by, other homogenous other-state space. If it is not its internal composition that is unique, it is the fact that it disrupts a norm of continuity and contiguity. That is not to say that continuity or contiguity is essential for a territory to exist, but that there is something 'unique' in situations where these qualities are missing, contributing to an understanding of what is 'normal'.

Here is a good example of how we can unexceptionalize some of international legal thought: enclaves need not be unique if we question the impulse towards contiguity. Removing the assumption of contiguity opens new ways of understanding legal arrangements and the distribution of power that extends beyond the immediate problematic of enclaves. For example, globalization is often depicted in terms evoking the imagery of homogenous contiguous 'containers' leaking[80] such that different processes and transactions are spilling over.[81] This very framing channels and helps re-entrench an idealized model of territory as parcels of land – of a cartographic synchronization of state, territory, and jurisdiction – that rarely existed in practice, but are part of the imagined geography that structures our thinking about norms and exceptions.

In sum, it is in the exceptions that we can find both how space is structured and therefore also clues us as to how to unexceptionalize legal thought. And by examining these exceptional entities, it is possible to examine the assumptions underlying territorial concepts in international law and

[75] *Right of Passage over Indian Territory*, Judgment of 12 April 1960, [1960] ICJ Rep. 6, at 66 (Judge Wellington Koo, Separate Opinion).

[76] C. Ryngaert, 'The Legal Status of the Holy See', (2011) 3 *Goettingen Journal of International Law* 829, at 830.

[77] 'The Island That Switches Countries Every Six Months', *BBC News*, 28 January 2018, available at www.bbc.com/news/stories-42817859.

[78] W. Van Schendel, 'Stateless in South Asia: The Making of the India-Bangladesh Enclaves', (2002) 61 *Journal of Asian Studies* 115, at 115; 'India and Bangladesh Seal Land Swaps', *BBC News*, 6 June 2015, available at www.bbc.com/news/world-asia-33033342.

[79] *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment of 12 April 1960, [1960] ICJ Rep. 6. Portugal in its memorial before the ICJ calls the practice of 'having foreign enclaves within ... territory' as something that is 'usual'. Ibid., at 24. Notably, Judge Badawi uses the term *sui generis* to describe the legal relations between the UK and Portugal that produced the enclaves in the first place. *Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, [1960] ICJ Rep. 6, at 51 (Judge Badawi, Declaration). Judge Wellington Koo in his Separate Opinion refers to the 'special situation'. See *Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, [1960] ICJ Rep. 6, at 62 (Judge Wellington Koo, Separate Opinion).

[80] J. McCarthy, 'Territoriality', in M. Bevir, *Encyclopedia of Governance* (2007).

[81] I am not saying this is new or that this is the best way to think about this. I propose an alternative in the likes of Lythgoe, *The Rebirth of Territory*, *supra* note 37. Further, cross-border trade, travel, and relations are not new. The proliferation of globalized transactions and processes makes this more noticeable and unavoidable for international lawyers, and indeed is precisely why this rethink is essential.

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potentially reimagine territory without a state-centric perspective, with the by-product of also eradicating the anomalous.

2.2 Extraterritorial jurisdiction

The structure of exceptionalism is not unique to its entities. The same concept of territory also produces the structure of exceptionality in the operationalization of jurisdiction in international law. Specifically, I refer here to the idea of *extra*-territorial jurisdiction, as something *extra*ordinary; the ordinary being territorial jurisdiction.[82] That the ordinary-extraordinary is in the structure of jurisdiction is undoubtable. It can be seen in the European Court of Human Rights reference in *Banković* to 'ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification'.[83]

Given that the structuring role that territory plays is much more well-established in relation to jurisdiction – the concept of extra*territoriality* is widely written about – I only briefly set this out.[84] It could first be noted that 'enforcement jurisdiction is', according to Mills, 'in international law, almost exclusively territorial'[85] and it is primarily in relation to prescriptive jurisdiction, and to some extent adjudicative jurisdiction, that the issue of extraterritoriality arises. Among the different 'heads' of jurisdiction, the most important is territoriality, and is 'unquestionably available to States to exercise any "type" of jurisdiction, i.e., jurisdiction to prescribe, adjudicate and enforce'.[86] This is the traditional concept of jurisdiction in international law. Yet it is also concerning the understanding of jurisdiction that Milanović argues developed primarily within international human rights law – jurisdiction as 'factual power, authority or control that a state has over a territory'[87] – that the same structuring of exceptions based on a sense of territoriality exists. Territory is central to the concept of jurisdiction, regardless of whether jurisdiction refers to the idea of a state as competent to exercise jurisdiction or the idea of a state as factually exercising power.

Further, according to Mills, 'territoriality is supplemented by other bases of jurisdiction'.[88] 'Supplements' indicates these other bases are something extra in addition to territoriality, the core. Ryngaert uses the language of the exceptional to demonstrate how international lawyers understand the other bases too, stating that the '[o]ther grounds of jurisdiction than the territoriality principle ("extraterritorial jurisdiction") are not logically deduced from that principle. Instead,' according to Ryngaert, these other bases 'function as exceptions to the cornerstones of international law—territoriality, sovereign equality, and non-intervention —"based upon ideas of social expediency".'[89] Wallace too adopts the language of exceptionality where she notes 'jurisdiction is primarily exercised on a territorial basis, but there are exceptions . . . there will be occasions when a state may exercise jurisdiction outside its territory'.[90]

Extraterritoriality is not a real-world ontological phenomenon but a narrative to explain the extra-ordinary exercise of law and practices not fitting the ordinary model. The extraordinary – extraterritoriality – explains the manifestation of state power beyond state territory. But, as

[82]According to Milanović, 'Indeed, practically the entirety of the law of (prescriptive) jurisdiction is about the exceptions to territoriality'. M. Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', (2008) 8 *Human Rights Law Review* 411, at 421.

[83]*Banković et al. v. Belgium*, Admissibility, Decision of 12 December 2001, [2001] ECHR, at 61.

[84]There has been a lot of work establishing this basic idea: M. Kamminga, 'Extraterritoriality', in *Max Planck Encyclopedia of Public International Law* (2020). For some of the best insights see C. Ryngaert, *Jurisdiction in International Law* (2015). See also D. S. Margolies et al. (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (2019).

[85]A. Mills, 'Rethinking Jurisdiction in International Law', (2014) 84 *British Yearbook of International Law* 187, at 195.

[86]A. S. Galand, 'Conceptions of Courts and Their Jurisdiction', in A. Galand, *UN Security Council Referrals to the International Criminal Court* (2019), 12, at 14.

[87]See Milanović, *supra* note 82, at 428.

[88]See Mills, *supra* note 85, at 197 (emphasis added).

[89]See Ryngaert, *supra* note 84, at 37.

[90]R. Wallace, *International Law* (1986), 101.

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Ryngaert has pointed out, the term is confusing, suggesting extraterritorial jurisdiction 'ought to imply that a state exercises its jurisdiction without any territorial link ("extra-[of]-territorial"), although the expression is typically used in a context of States asserting jurisdiction based on some admittedly non-exclusive, territorial link'.[91] This narrative is created because territory (and crucially this territory is equated with the physical geography) is assumed to be a stable, static 'starting point' or container of *exclusive* state activities. Nothing actually *is* extraterritorial; extraterritoriality is a narrative explaining where states are exercising power. It acts as a justification for why and how a state exercises power in a physical geography beyond where it is 'supposed' to.

Whether the exception is at all exceptional anymore is of course an important question. The exceptionalist narrative has been undermined much more evidently in relation to jurisdiction – *precisely because of the number of exceptions*. To some extent at least, extraterritorial jurisdiction has become a blackbox concept, such that its 'internal complexity' has been 'made invisible by its own success'.[92] This nuances a point O'Keefe makes in a recent article. In this he argues, in response to Krisch's argument that there is an urgent need to rethink jurisdiction acknowledging the move away from a once-vital territorial jurisdiction,[93] that international law has long provided for extraterritorial heads of jurisdiction – and there are over sixty years of practice evidencing this.[94] While international law 'always has' provided an exceptional basis for jurisdiction, the point is precisely that this reasoning was structured territorially; it is just this has for a long time no longer really been exceptional despite the designation as extra-ordinary. The 'remains' of the exceptionalizing structure of legal thought, informed by a particular concept of territory, is still traceable. And not only is it traceable, but it is also remarkable that international law continues using (and potentially overstretching) concepts. Territory continues, fundamentally, even according to O'Keefe, to be 'the analytical starting point'.[95] International law has, in other words, 'retained an essentially "territorial orientation"'.[96] Why? It seems as a discipline and as a practice, international law is not at all ready to let go of its (state-)territorializing impulses – an impulse that still guides thinking about rule and exception.

This ordinary/extraordinary distinction has underlying it an assumption that territory is the bounded and internally homogenous physical geography where exclusive state powers (territorial sovereignty) are exercised. This is the 'rule'. Anything outside this parcel of land is the extraordinary; the container has 'leaks'. We see again the same qualities appear as explored above. The same imaginary of the world as primarily made up of non-overlapping jigsaw-like pieces dominates. The difference between the rule/exception for jurisdiction, unlike actors, is the state is the subject that that has been breaking this rule/exception and repeatedly. Being a state-centric discipline, international law and its lawyers have had to recognize that where state powers are exercised is not, in reality, limited to a uniform and permanent parcel of land. The extraordinary has become stretched beyond recognition as being in any way exceptional. This has made the concept of territory appear less and less important to the operationalization of jurisdiction in international law, other than at its root, as the primary head, as its orientation or analytical starting point.

This structure of exceptionalism exists in constructing ideas about jurisdiction and actorhood. What this brief exploration shows is there is an over-essentialization and over-determination of the state and territory in international law – as well as that territory is conceptualized as permanent, ideally contiguous, and collapsed into the physical/cultural. *The general rule is* that

[91]See Ryngaert, *supra* note 84, at 7.
[92]B. Latour, *Pandora's Hope: Essays on the Reality of Science Studies* (1999), 304.
[93]See Krisch, *supra* note 32.
[94]See O'Keefe, *supra* note 32, at 520.
[95]Ibid.
[96]Ibid., at 517 (citing Krisch, *supra* note 32).

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states exercise sovereignty and jurisdiction territorially and are the only actors to 'have' a territory, synchronizing the exercise of sovereignty and jurisdiction concerning that territory.

Exceptions are key to international legal theory because they produce the only possible narrative explaining situations not fitting the traditional paradigm. Yet this structure of thinking – of a rule and its exceptions – potentially poses a problem for the theory of international law because of the increasing number of exceptions. The broad category of *sui generis* entities has expanded from the Holy See and condominium to insurgents and belligerents, international administration of territory, national international public companies, and TNCs. Such entities are playing a larger and more varied role in governance and law-making today. Businesses are increasingly expected to comply with, protect, and promote human rights, an area traditionally associated with public law,[97] often creating their own private transnational regulatory mechanisms. Yet the spaces of these corporations and of private normative authorities are unidentified and obscured. Similarly, there are many obvious exercises of extraterritorial power, perhaps many more of such practices given how well-established extraterritorial jurisdiction is in the doctrine. As Milanović already conveyed in 2008 'the extraterritorial exercise of prescriptive jurisdiction can these days hardly be said to be exceptional'.[98] Yet, concerning jurisdiction, it may now also be the time to 'move beyond the duality of territorial and extraterritorial law and instead focus our attention upon what might be required to construct relational laws that acknowledge the reality of state and non-state interdependence'.[99]

3. Problematizing exceptions and the growth of anomalies

Exceptions tell a series of stories. They can tell a story about what a general rule is by working out where the boundary lies between rule and exception. Especially where that general rule is unwritten or assumed and can only be (re)constructed by examining assumptions that lie far beneath the surface of disciplinary discourse. Naturally, the relevance of this insight is not limited to international law. Carlo Ginzburg, the pioneer of micro-historical research, has long advocated the view that 'the exception is ... always epistemologically richer than the norm':[100] 'anyone who studies [the norm] ... remains on the surface of things' while 'the in-depth analysis of an anomalous case is much more fruitful'.[101] Thus, understanding exceptions allows us to appreciate the default assumptions of the discipline.[102] I argue this is so when it comes to the structuring role played by (state-)territoriality in international law's approach to entities in international law. In comparison, the role of (state-)territory in structuring the operation of jurisdiction in international law is a more familiar tale. By pushing this critique further and connecting it to contemporary trends in transnational and global law and governance, exceptions can also tell a story about how and why the disciplinary imaginary is limited by the prevailing epistemology concerning space; for these exceptions can help diagnose what is problematic about orthodox theory, being symptomatic of the general rule and exception. The spatial imaginary of

[97]The Ten Principles of the United Nations Global Compact (Final Report) (24 June 2004). See analysis in M. F. Penedo, OXIO 286, Oxford International Organizations, February 2018; also M. F. Penedo, OXIO 361, Oxford International Organizations, April 2018.

[98]See Milanović, *supra* note 82, at 421.

[99]S. L. Seck, 'Moving beyond the EWord in the Anthropocene', in Margolies et al. (eds.), *supra* note 84, at 49.

[100]P. Anderson, 'The Force of the Anomaly', (2012) 34(8) *London Review of Books*.

[101]The entire passage reads 'The violation of the norm contains even the norm itself, inasmuch as it is presupposed; the opposite is not true. Anyone who studies the functioning of a society beginning from the entirety of its norms, or from statistical fictions as the average man or the average woman, inevitably remains on the surface of things. I think that the in-depth analysis of an anomalous case is much more fruitful, though the contemplation of an isolated oddity does not usually interest me.' C. Ginzburg, *Threads and Trace: True False Fictive* (2012), 222.

[102]This is well known to those working in artificial intelligence. L. van der Torre and Y. H. Tang, 'Reasoning about Exceptions', (2005) 1303 *KI-97: Advances in Artificial Intelligence* 405.

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international law, structured by (state-)territory is 'the prism through which the subject is examined' and 'determines in no small measure the picture which emerges. The geology of international law is, thus, both the window and the bars on the window, which frame and shape our vision'.[103]

Exceptions to general rules in and of themselves are unproblematic; they are common. However, the relevance of territoriality, of statehood, of sovereignty[104] to international law is coming under pressure from an increasing number of exceptions. There conceivably comes a point where a high number of exceptions 'break' the rule; they are no longer exceptional, and they can fundamentally transform the existing paradigm.[105] The problem is determining when this point is met: how many exceptions are too many that they disrupt the general rule? Many of these exceptions have been around for a long time and are the 'leftovers' of historical structures. Yet there are many more 'newer' prevalent examples such as state-managed companies, international organizations, private standards authorities, and transnational corporations, playing a more sophisticated and varied role in law-making and governance today.

To help think through this issue, I draw not only on Ginzburg, who would anyway say that the oddity is a more fruitful study of norms,[106] but also on insights on anomalies from Thomas Kuhn, who studied the role of anomalies in producing 'revolutions' within paradigms of knowledge: when knowledge paradigms no longer fit or match up to perceived realities, anomalies eventually arise between what a paradigm predicts and what is observed empirically. If the anomalies persist, a crisis generally ensues – leading to the second movement – and the community enters a state of extraordinary science in the hope of resolving it.[107] The value of this observation by Kuhn is as a heuristic device as it offers a plausible explanation of the potential for anomalies to undermine a hegemonic understanding of how the world works – the hegemonic episteme. It is possible for theories about the dominant spatial ordering of international law to become 'untrue' or disproven when they are no longer thought to accurately describe legal or political reality – and it is this particular element that I find productive.

When the exceptions were discrete, such as the Holy See or Sovereign Order of Malta, or temporally limited, as is the expectation regarding internationally administrated territory, legal theory can continue to operate by adding to the category of *sui generis*. After all 'paradigms are not challenged by discrete anomalies'.[108] It could be said, however, that it is the recognition of the increasing numbers and types of anomalies penetrating international law and global governance,

[103]J. H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 547, at 551.

[104]A very small yet reflective sample of these narratives: see Bethlehem, *supra* note 33; Douglas, *supra* note 33; Koller, *supra* note 33; Ryngaert and Zoetekouw, *supra* note 33; A. J. Obermaier, *The End of Territoriality?* (2009); S. Biswas, 'W(h)Ither the Nation-State? National and State Identity in the Face of Fragmentation and Globalisation', (2002) 16 *Global Society* 175; Schachter, *supra* note 33.

[105]I too find claims of 'paradigmatic change' to be over used. Cf. J. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law', (2015) 26 EJIL 9, at 10. Yet it is entirely appropriate here. I really am talking about an entire paradigm of international law being shaped by its implicit legal geography.

[106]See Ginzburg, *supra* note 101, at 222.

[107]J. Marcum, 'The Revolutionary Idea of Thomas Kuhn', *Times Literary Supplement*, 17 January 2018, available at www.the-tls.co.uk/articles/private/scientific-revolutions-thomas-kuhn/. There is debate as to whether Kuhn's work, whose research focused on anomalies in paradigms of knowledge about nature, is applicable to social sciences (See N. Guilhot, 'The Kuhning of Reason: Realism, Rationalism, and Political Decision in IR Theory after Thomas Kuhn', (2016) 42 *Review of International Studies* 3, at 5–7). There is also debate about whether social sciences can have paradigms at all (G. Gutting, 'Paradigms, Revolutions, and Technology', in R. Laudan (ed.), *The Nature of Technological Knowledge. Are Models of Scientific Change Relevant?* (1984), 47, at 47–9) – and they do not if the term is used in the narrow sense Kuhn intended. However, the term 'paradigm shift' has been elevated to 'household phrases and the stuff of advertising slogans, corporate boardrooms, and Washington bureaucratese' (T. Nickles (ed.), *Thomas Kuhn* (2003), 1.) There is general agreement today, I think, especially if we look at how often this term is utilized in academic discourse, that there are paradigms in social sciences, for example, it would be possible to think of dominant paradigms of thought and knowledge.

[108]See Guilhot, ibid., at 21.

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that has caused the upsurge in interest in the geography and spaces of international law in the last decade.[109] It is often related, for example, that '[g]lobalisation, signifying an increase in the importance, volume, speed and scope of cross-border flows of ideas, money, commodities and people, challenges the exclusive territorial authority of sovereign states'[110] or similar sentiments.

This discourse might be broadly framed as international law and related discourses going through, echoing Kuhn, a state of 'extraordinary science' in the hopes of rationalizing and 'resolving' the challenge to the territorial ordering of international law and our traditional theories of this. One such example of scholars rethinking this problematic is Pearson, who observes that '[globalization] discourses challenge and complicate dominant hierarchies of scale and space that are considered to be the traditional, state-centric regulatory spaces of international law'.[111] Among these anomalies might be added cyberspace which is said to 'challenge[] the law's traditional reliance territorial borders'.[112] The idea that anomalies are becoming greater and more central to the discipline can be found in Johns observation that although '[t]erritoriality remains a powerful—probably still the predominant—architecture' and while '[territoriality] has always interacted with other global legal architectures ... which it has often been in tension' there is, alongside 'the architecture of national and regional currencies [and] international human rights regimes', 'shifts and challenges that may be identified with the [significant] deployment of technologies of automated data collection, representation and analysis in international law and policy'.[113]

There are important questions prompted by this broad framework of 'paradigm-anomalies-scientific revolution sequence'.[114] When these anomalies reach a critical mass, what happens to the concept of territory and the territorial ordering of international law? And what would that critical mass of anomalies look like? Does the permanency and proliferation of those anomalies associated with globalization, such as cyberspace, the structure of global governance with TNCs, banks, and international organizations, and the increasing role played by private individuals and experts in international relations and law-making mean that critical point is reached? It seems impossible to plug the leaks in the container of the state caused by globalization; international law-making and governance have fundamentally changed as a result.

However, I think it is unnecessary to establish the exact critical mass of anomalies because it is possible to offer a different theory of territory, and how it structures the entities and jurisdiction in international law, *capable of accounting for and explaining* a (new) norm; that which is currently deemed exceptional *and* many of the competing differently spatialized actors associated with globalization. This is the model to which I now turn.

4. Eradicating the exceptional and '*sui generis*'

In this section I reconceptualize territory. If Kuhn is right regarding anomalies, and if the number and quality of anomalies in international law – anomalous actors exercising control in relation to a defined space – is increasing, the risk is it 'breaks' the general rule, making international law frankly irrelevant to understand contemporary international dynamics. One response is to find

[109]To cite a few: Z. Pearson, 'Spaces of International Law', (2008) 17 *Griffith Law Review* 489; 'Spaces beyond Sovereignty: International Law Outside of Territorial Jurisdiction', (2019) *28th Annual SLS/BIICL Workshop on Theory in International Law*, available at https://www.biicl.org/events/11298/28th-annual-slsbiicl-workshop-on-theory-in-international-law; see Koller, *supra* note 33; K. Raustiala, 'The Geography of Justice', (2004) 73 *Fordham Law Review* 2501; K. Aoki, 'Space Invaders: Critical Geography, the Third World in International Law and Critical Race Theory', (2000) 45 *Villanova Law Review* 913.

[110]A. Hudson, 'Beyond the Borders: Globalisation, Sovereignty and Extra-territoriality', (1998) 3 *Geopolitics* 89, at 89.

[111]See Pearson, *supra* note 109, at 490.

[112]D. R. Johnson and D. Post, 'Law and Borders: The Rise of Law in Cyberspace', (1996) *Stanford Law Review* 1367, at 1368.

[113]F. Johns, 'Data Territories: Changing Architectures of Association in International Law', in M. Kuijer and W. Werner (eds.), *Netherlands Yearbook of International Law 2016 - The Changing Nature of Territoriality in International Law* (2017), Vol. 47, 107, at 108.

[114]See Guilhot, *supra* note 107, at 9.

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there has been deterritorialization without reterritorialization; to turn to functionalism as a theory to understand transnational phenomena, but this is an intensely aspatial theory and is unhelpful I think.[115]

We could in the alternative understand territory as the space where any state (or any other actor) is exercising a particular function or power. *Territory is a framework* for the exercise of power and constituted by that exercise of power on an ongoing basis, rather than territory as a physical, flat, temporally static, container-like object. This conceptualization produces an entirely different narrative that does not adopt normative ordinary or extraordinary assumptions – there are no 'oughts', exceptions, 'supposeds' or ordinary starting references. Territory as a spatial-framework accounts for the spaces concerning which states and other actors exercise particular powers at any one point in time, wherever that may be. In that sense then, I am suggesting that the *extra*-ordinary element can be eliminated given that the 'ordinary' has the capacity to explain the spatial strategy for the exercise of power regardless of where it is.

Let us take the example of EU measures (including the Fuel Quality Directive, the Timber Regulation, and the Maritime Emissions Regulation)[116] aimed at reducing the carbon footprint of imports of goods and services consumed by EU citizens that recently featured in extraterritoriality discourses. These measures have been framed by many as an extraterritorial exercise of power 'circumventing the territorial system'.[117] It is framed thus due to the underlying spatial assumptions about how territory ought to work, creating extraterritoriality. (Here we assume lawyers accept the EU has a territory, which is not uncontroversial, and which was explored further above and elsewhere[118]). This concept of territory explains that for the duration of these directives, the EU's territory, for the purpose of these powers, is more than the homogenous unit of EU geographical space. We can see this territorial extension as a *strategy*: as 'using [the EU's] market power to extend the geographical reach of its [greenhouse gas] mitigation efforts'.[119]

This concept of territory also offers an alternative narrative to interpret *Al-Skeini*[120] and *Jaloud*[121] where the ECtHR found *extra*territorial jurisdictional justifications to ensure accountability for human rights abuses. The Court appeared to find personal jurisdiction too weak a ground to wholly rely on, preferring territorial jurisdiction and as a result created a 'back up',[122] namely the exercise of extraterritorial powers in Iraq due to the control exercised at the likes of a checkpoint to find that the UK and Netherlands failed in their duties to promote and uphold human rights beyond the ordinary – 'their territory'. According to Ryngaert's *Al-Skeini* and *Jaloud* demonstrate the 'non-exclusive, territorial link'[123] basis for jurisdiction, but according to the proposed approach, the jurisdiction is also territorial. The extraterritorial narrative does not need to be constructed, because it can account for *wherever* the UK and Netherlands exercise control at a particular point in time and view it as part of their territory for that particular purpose or function. It is thus under their jurisdiction for the purposes of Article 1 of the ECHR and these states can be held accountable. Exclusivity in the sense Ryngaert uses it, is a myth because no actor exercises control exclusively in relation to physical geography anymore, if they ever did. This situation can be distinguished from instances of 'kidnapping' suspects and exercising power,

[115]For more on this see Ch. 2 of Lythgoe, *The Rebirth of Territory*, *supra* note 37.

[116]EU Directive 98/70/EC (October 1998); EU Reg. 995/2010 (October 2010); EU Reg. 2015/757 (April 2015).

[117]N. Dobson, 'The EU's Conditioning of the "Extraterritorial" Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse', (2018) 27 *Review of European, Comparative & International Environmental Law* 75, at 75.

[118]See Lythgoe, 'Distinct Persons', *supra* note 37; Lythgoe, *The Rebirth of Territory*, *supra* note 37.

[119]J. Scott, 'The Geographical Scope of the EU's Climate Responsibilities', (2015) 17 *Cambridge Yearbook of European Legal Studies* 92, at 93.

[120]*Al-Skeini v. United Kingdom*, Judgment of 7 July 2011, [2011] ECHR.

[121]*Jaloud v. Netherlands*, Judgment of 20 November 2014, [2014] ECHR.

[122]B. Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons', (2012) 33 *Michigan Journal of International Law* 693, at 738.

[123]See Ryngaert, *supra* note 84, at 7.

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not over cities or checkpoints, but over individuals only (as in *Eichmann*) which is wholly personal jurisdiction (and extra-territorial jurisdiction 'without any territorial link' in the sense in which Ryngaert advocates).[124]

This conceptualization of territory means lawyers and scholars can instead challenge situations by asking *why* a state is exercising powers in any particular place, because the strategic use of territory to exercise control is now grasped. Territory is not natural, but continually produced through practices. It also helps get rid of the problem Milanović identified in his early work on jurisdiction in international human rights law which recognized the actual exercise of jurisdiction. The orthodox and 'general' rule of jurisdiction, identified by the ECtHR and Milanović, otherwise operates with a territorialized ideal of exclusive territorial competence.

By thinking of territory as a space in such a way, the assumption that territories never overlap – the classic Huberian 'portions of the globe' understanding of territory where '[t]he whole surface of the earth is ... divided up in political territorially delimited units'[125] – can be revisited. Viewing territory as a non-physical space allows for the overlaying and coexisting of different territories over the same physical geography.[126] There is only one physical geography, but if territory is the socially constituted framework by which power is exercised, there can be more than one of these in relation to the same physical space. It does not displace state territory but recognizes the territory of other actors; this 'new strata which do not replace earlier ones, but simply layer themselves alongside'.[127] As Müller-Mall observes: 'Law is not place, it is not a systematic order that makes it possible to define distinctly any place contained in it. Instead, law is space, it is constituted through practices, and these practices might be simultaneous and overlapping.'[128]

Adopting this framework reimagines the relationships between state and non-state actors, including Special Economic Zones (SEZs) and international organizations (their headquarters and spaces of activity like refugee camps or the seabed). Ferguson and Gupta argued that actors or organizations (international organizations, NGOs, etc.) '[do] not replace the older system of nation-states ... but overlays and coexists with it. In this optic, it might make sense to think of the new organizations ... not as challengers ... but as horizontal contemporaries ... operating on the same level, and in the same global space'.[129] And from the global space to the local, these actors may at any one time operate over the same physical geography. Each has its own territory in relation to which they influence and discipline activities.

5. Conclusion

This rethinking of territory not only offers a guide to unexceptionalizing legal thought but also could preserve the relevance of international law for years to come given it can make sense of the spaces of all actors, whether that be the spaces of non-state actors, or the spaces of states exercising power anywhere in the world. This study of the exceptionalizing structure of international law's understanding of actorhood and jurisdiction demonstrates that there is in the first place a general rule – and it is the norm, the general rule, that is being confronted by and undermined by the increasing anomalies and challenges to orthodox legal theory. These are linked. Increasingly, 'it is necessary to treat state and nonstate governmentality within a common framework, without making unwarranted assumptions about their spatial reach, vertical height, or relation to the local'.[130] It is

[124]Ibid., at 7.

[125]See Kuijer and Werner, *supra* note 113, at 4.

[126]We could also look to fictive examples of this, as in C. Miéville, *The City & The City* (2011). Where I might differ from China's example though, is that I see the spatial relations as much more entangled even than in this book.

[127]See Weiler, *supra* note 103, at 551.

[128]S. Müller-Mall, *Legal Spaces: Towards a Topological Thinking of Law* (2013), 90.

[129]J. Ferguson and A. Gupta, 'Spatializing States: Toward an Ethnography of Neoliberal Governmentality', (2002) 29 *American Ethnologist* 981, at 994.

[130]Ibid.

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what I have set out to do in this article. Rather than assigning or consigning the concept of territory only to a state, which obscures the spatiality non-state actors, it allows scrutiny of the territorializing practices adopted by these.

What we are left with is a simple test: if *any* actor is exercising control of something territorially, it has a territory for those purposes. Powers and competences are being reterritorialized but *where* they are being reterritorialized is not just misunderstood but their possibility entirely excluded, with the result that there is no accountability for activities happening within those spheres. By interrogating the exceptionalized thinking in international law, we have not only understood how space structures that thinking but also that these very exceptions are linked to the undermining of the relevance of the discipline of international law and its ability in practice to make sense of contemporary legal and governance challenges.

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