

The Changing “Landscape” of Sovereignty Viewed through the Lens of International Tax: Reterritorializing the Offshore

L'évolution du “paysage” de la souveraineté vu à
travers le prisme de la fiscalité internationale:
reterritorialiser l'*offshore*

GAIL LYTHGOE

Abstract

This article reviews the “gaps” that allow for the creation of the “offshore” in international law and argues that these are instead constituted by constraints on our spatial imaginary of law than by any “real” gaps between state jurisdictions. The modern practices of sovereignty by states and non-state actors are at odds with the implicit geography of international law that assumes a static and fixed concept of territory. By rethinking the relevant legal spaces of international law and the sovereign practices that constitute the supposedly deterritorialized offshore, we can see that the offshore is actually onshore somewhere; we can reterritorialize the supposed deterritorialized competences. This article identifies a desynchronization between state territories and the actual

Résumé

Cet article examine les “vides” qui permettent la création de l’*“offshore”* en droit international et soutient qu’ils sont attribuables à des contraintes sur notre imaginaire spatial du droit plutôt qu’à des vides “réels” entre les juridictions étatiques. Les pratiques modernes de la souveraineté par les États et les acteurs non étatiques sont en contradiction avec la géographie implicite du droit international, qui suppose une conception statique et figée du territoire. Repenser les espaces juridiques pertinents du droit international et les pratiques souveraines qui constituent l’*“offshore”* prétendument déterritorialisé nous permet de constater que l’*“offshore”* est en réalité *onshore* quelque part; on peut donc reterritorialiser les compétences supposées déterritorialisées. Cet article identifie

Gail Lythgoe, Co-Director, Manchester International Law Centre and Lecturer in International Law, School of Social Sciences, University of Manchester, United Kingdom (Gail.Lythgoe@Manchester.ac.uk).

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exercise of sovereignty that presents as pseudo deterritorialization. Yet if both the concept of sovereignty and the implicit geography of international law confirm and reinforce one another in international law discourse, international lawyers are blind to the changing “landscape” of sovereignty in international law.

une désynchronisation entre territoire étatique et l'exercice effectif de la souveraineté qui se présente comme une pseudo déterritorialisation. Or, si le concept de la souveraineté et la géographie implicite du droit international se confirment et se renforcent mutuellement dans le discours du droit international, les juristes internationaux se cachent le “paysage” changeant de la souveraineté en droit international.

Keywords: deterritorialization; international legal theory; international taxation; offshore; public international law; sovereignty; territory.

Mots-clés: déterritorialisation; droit international public; fiscalité internationale; *offshore*; souveraineté; territoire; théorie du droit international.

INTRODUCTION

It is long established and recognized by most international lawyers that at the basis of the modern international legal system lies the concept of statehood, that the concept of statehood is based on the idea of sovereignty, and that the idea of sovereignty, in turn, is based upon the fact of territorial control.¹ Much of the traditional understanding of international law — its

¹ Malcolm Shaw, *International Law*, 8th ed (Cambridge: Cambridge University Press, 2017) at 361; JL Briery, *The Law of Nations*, 5th ed (Oxford: Clarendon Press, 1955) at 150–51. See also this traditional international law insight: “Traditionally, international law rested on the principle of territoriality. Every state enjoyed exclusive competence for developments within its territory.” Christian Tomuschat, “Obligations Arising for States without or against Their Will” (1994) 241 *Rec des Cours* 195 at 210. See also a similar idea communicated here: “Sovereignty had become ‘an artificial and abstract idea located in the state’, and doctrinal attention turned to its external implications. Linked to territory, sovereignty became exclusive and absolute, strengthening the tenet of legal equality of states.” Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Portland, OR: Hart Publishing, 2007) at 37. This assumption is also set out by Oscar Schachter: “[T]he decline of the nation-state ... goes to the heart of international law — its character as a system of discrete autonomous entities based on their defined territories, each exercising plenary authority [sovereignty] over persons and things in that territory.” Oscar Schachter, “The Decline of the Nation-State and Its Implications for International Law” (1998) 36 *Colum J Transnat’l L* 7 at 7. (Note that Schachter only uses authority here rather than sovereignty out of “deference” to Louis Henkin, for whom the collection of papers in which Schachter’s article appears was a tribute; Henkin thought “sovereignty” is a “bad word.” *Ibid* at 7, n 1.) James Crawford framed the territorial principle in state jurisdiction as the “application of the essential territoriality of sovereignty.” James Crawford, *Brownlie’s Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 458. The co-occurrence of these three

normative design, institutional structure, spatial imaginary, and procedural setup² — can be traced back to this three-pronged assumption. This process produces various analytical prejudices and, in turn, blind spots given that these continuing assumptions induce the discipline’s common reasoning and narratives, such that both the received traditional international law concept of sovereignty and the implicit geography of international law confirm and reinforce one another. This helps render invisible what I refer to in this article as the changing “landscape” of sovereignty in international law. I argue that when the practices of sovereignty are changing there are also often consequences for the territories of international law, and I use contemporary tax practices to demonstrate this point.

Although the same may be observed in many contemporary legal practices,³ international tax governance helps refract and amplify the complex internal contradictions of the traditional international law concept of sovereignty and the difficult, ambivalent relationship that the contemporary practices of global governance have with the concept of territory. Taxation is plausibly the one function of governance that is assumed to remain wholly within the reserved domain (*domaine réservé*) of the state — that is, to be part of its sovereign prerogatives — and this is what creates even more potential for the creation of an “offshore” space as well as for an interesting study. This article teases open what it perceives as a theoretical constraint and aims to constructively identify, diagnose, and fill the gaps created by new practices of sovereignty (often strategically) misfitting international law’s static geography.⁴ I call them gaps specifically because tax havens and the offshore are often imagined as operating between the cracks of “territorial” jurisdictions.⁵

words — territory, state, sovereignty — in sentences about fundamental propositions of international law would be far too numerous to count and restate here.

² As an example of this influencing the law of state responsibility, see Péter Szigeti, “Territorial Bias in International Law: Attribution in State and Corporate Responsibility” (2009) 19 *J Transnat’l L & Policy* 311.

³ Rebecca Schmidt, *Regulatory Integration across Borders: Public-Private Cooperation in Transnational Regulation* (Cambridge: Cambridge University Press, 2018).

⁴ This article reflects a wider project that more fully deconstructs and reconstructs the concept of territory in international law. See Gail Lythgoe, *The Rebirth of Territory* (Cambridge: Cambridge University Press, forthcoming).

⁵ Ilene Katz Kobert & Jonathan DYellin, “The United States Treaty with the United Kingdom Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters: The End of Another Tax Haven” (1988) 19 *U Miami Inter-Am L Rev* 663 at 692; Gordon L Clark, Karen PY Lai & Dariusz Wójcik, “Editorial Introduction to the Special Section: Deconstructing Offshore Finance: Editorial” (2015) 91 *Economic Geography* 237 at 248; Nicholas Shaxson, *Treasure Islands: Tax Havens and the Men Who Stole the World* (London: Bodley Head, 2011) at 4. This “gap” between jurisdictions is also often diagnosed

By challenging the structuring role that the concept of static state territory plays in the concept of sovereignty in the context of contemporary international tax governance, this contribution aims to bring into sharper relief not only the fluid, constantly shifting realities of state sovereignty today but also the much broader theoretical challenges faced by the traditional international law understanding of sovereignty in the age of post-modern governance. Though this argument focuses primarily on the question of tax havens, it can also be extended to other areas and phenomena of global economic and political governance. One of the reasons why international legal thought has had such a difficult time coming to grips with the phenomenon of offshoring is that, in the eyes of the traditional international law theory, the offshore presents itself as a legal space removed from the reach of traditional sovereign spaces. Other legal spaces thought to share this characteristic are those that were created as such by states through the traditional mechanisms of positive international law, including the high seas and the common heritage of mankind as archetypal examples of *res communis*. Yet these are geographically separate and do not overlap state space; they continue the jigsaw-like⁶ flat imaginary of global space.⁷ The offshore does not fit either of these models: there is no corresponding separate identity or institution to which its spatiality can be moored, and, even under the tacit acquiescence theory of custom, it would be difficult to imagine the offshore as a product of customary lawmaking. Both the nature of its relationship to traditional sovereign spaces and its ambivalent status *vis-à-vis* the sources of international law, thus, give the offshore a certain paradoxical character,

by those working on global value chains. See e.g. IGLP Law and Global Production Working Group, "The Role of Law in Global Value Chains: A Research Manifesto" (2016) 4 *London Rev Intl L* 57 at 71. This is also diagnosed by those working in the geographies of money. See Andrew Leyshon & Nigel Thrift, *Money/Space: Geographies of Monetary Transformation* (Abingdon, UK: Routledge, 2005) at 61–63. This is also a perceived problem generally with transnational law. See Hannah L Buxbaum, "Territory, Territoriality, and the Resolution of Jurisdictional Conflict" (2009) 57 *Am J Comp L* 631 at 631.

⁶ "Paradigmatically, territory, people and government coincide in the state to produce international law's map of the world as a jigsaw puzzle of solid colour pieces fitting neatly together." Karen Knop, "Statehood: Territory, People, Government" in James Crawford & Martti Koskenniemi, eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 95 at 95.

⁷ Nisha Shah, "The Territorial Trap of the Territorial Trap: Global Transformation and the Problem of the State's Two Territories" (2012) 6 *Intl Political Sociology* 57 at 58. Shah was writing in response to John Agnew, "The Territorial Trap: The Geographical Assumptions of International Relations Theory" (1994) 1 *Rev Intl Political Economy* 53. In this excellent article, Shah points out the naturalizing and physicalizing tendencies of Agnew's understanding of territory. See also Lythgoe, *supra* note 4 (diagnosing how international lawyers tend to reproduce old structures of thought about territoriality).

making it difficult for the legal mind that sees static and stato-centric spatiality to process its reality and to make sense of it in disciplinary terms.

The specific theoretical apparatus adopted in this study is built from a combination of insights drawn from the fields of critical legal geography and legal realism. Taking as the main points of departure the legal-realist theory of the bundle of rights that inform sovereignty, as opposed to understanding it as an indivisible concept, as well as the work of critical geography scholars,⁸ I explore the theoretical limitations of our statocentric legal geography and the role that these limitations play in ascribing the legal spatiality of tax havens an allegedly paradoxical character. By way of synopsis, what follows is divided into three sections. The first section sets out the general theoretical background for the argument; the second and third sections develop the argument in its concrete specifics. The first section begins with the idea of implicit geography — in other words, international law’s standard model of geographic imagination. I argue, as have others,⁹ that there exists within international law’s mainstream disciplinary consciousness a certain set of preconceived ideas about territory and territorial space. These are neither “scientifically objective” nor substantively homologous to the equivalent constructs used within specialist geographic discourses. Yet these ideas dominate in such a way that they obscure the legal and political realities of new spaces and different sovereignty practices that have developed in relation to tax havens. The second section addresses the question of alternative theoretical frameworks that might help us make better sense of modern sovereignty practices and the diversely configured spaces that have emerged. I argue that these alternative frameworks make it possible to develop a different account of the spatial logics adopted by the realities of contemporary global governance. Yet to understand these from an international legal point of view, international law must adapt its disciplinary theoretical apparatus when it comes to the conceptualization of territory and legal spatiality more generally.

The first step comes from the classical legal-realist understanding of property as a bundle of rights and the long established parallels between

⁸ Doreen Massey, *For Space* (London: Sage Publications, 2005); Stuart Elden, “Missing the Point: Globalization, Deterritorialization and the Space of the World” (2005) 30 *Transactions Institute British Geographers* 8; Edward W Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 2010).

⁹ Nikolas M Rajkovic, “The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis” (2018) 31 *Leiden J Intl L* 267; Zoe Pearson, “Spaces of International Law” (2008) 17 *Griffith L Rev* 489; Sabine Müller-Mall, *Legal Spaces: Towards a Topological Thinking of Law* (Berlin: Springer, 2013); Cait Storr, “Denaturalising the Concept of Territory in International Law” in Julia Dehm & Usha Natarajan, *Locating Nature: Making and Unmaking International Law* (Cambridge: Cambridge University Press, forthcoming), online: <www.academia.edu/42663319/Denaturalising_the_Concept_of_Territory_in_International_Law>.

the legal meanings of property and sovereignty.¹⁰ To help dissolve the highly essentialized relationship between sovereignty and territory traditionally assumed in international law, and to disaggregate the monolithic conception of legal space thus presumed, I define sovereignty in a legal-realist fashion as a structurally organized bundle. Thus, sovereignty is a bundle of structured elements. So too in many ways is territory a bundle of ideas,¹¹ but not of legal rights. Neither of these concepts needs to assume a certain predetermined form. Each may be “reset,” splintered, reconfigured, combined, and recombined in an infinite number of ways and an infinite number of times. The second step stems from the work of critical geography theorists, from whom we have learned to think of geography as a system of power relations rather than as an “objective fact,”¹² and from an insight from the early twentieth-century French international lawyer Albert de Lapradelle: “[T]erritory [in international law] is neither an object nor a substance; it is a framework ... within which the public power [that] is described as the sovereign power [is exercised].”¹³

Putting this concept of territory and the legal-realist understanding of sovereignty together, what emerges is something more or less as follows. Sovereignty is not a single, internally indistinguishable monolithic idea of “supreme power” belonging (only) to a state: it is a bundle of structurally distinct rights, privileges, and immunities, each of which can be and is exercised by different actors, under different conditions, within differently constituted territorial frameworks. Territory, in this understanding, is not the physical land, water, and air that a state “owns”: it is a framework for the spatial organization of sovereignty that has been constituted by institutions exercising control, and, in connection with this article, it is the exercise of powers in relation to the function of taxation. The brute fact of physical

¹⁰ Morris R Cohen, “Property and Sovereignty” (1927) 13 Cornell LQ 8.

¹¹ By this I mean that territory might be imagined as contiguous or disconnected, smooth or striated, bordered in hard lines or bordered through diverse practices, temporally stable or changing, cartographically defined or cartographically represented, state-centric or also associated with non-state actors. These ideas may be recombined in different ways and still produce a recognizable territory. On this, see, in particular, Stuart Elden, *The Birth of Territory* (Chicago: University of Chicago Press, 2013); Jordan Branch, “Mapping the Sovereign State: Technology, Authority, and Systemic Change” (2011) 65 Intl Org 1; Jordan Branch, “How Should States Be Shaped? Contiguity, Compactness, and Territorial Rights” (2016) 8 Intl Theory 1; F Lysen & P Pisters, “Introduction: The Smooth and the Striated” (2012) 6 Deleuze Studies 1; Johan Galtung, “Non-Territorial Actors: The Invisible Continent — Towards a Typology of International Organizations” [1977] Concept Intl Organisation 78, online: <www.transcend.org/galtung/papers/Non-Territorial%20Actors%20-%20The%20Invisible%20Continent%20-%20Towards%20a%20Typology%20of%20International%20Organizations.pdf>.

¹² Shah, *supra* note 7 at 8–9.

¹³ Oral pleadings in *Nationality Decrees* (1923), PCIJ (Ser C) No 2 at 106.

geography does not predetermine the structure of the legal. Legal space is a social reality created at the intersection between sovereignty and territory: it is not just the projection of physical facts into legal givens. Since sovereignty is not monolithic, and territory is not physically determined, the legal-spatial map of the world is neither flat nor “tidy” or homogenous: it is fragmented, multidimensional, full of overlays, disjunctions, and desynchronicities.

As a result, the sovereignty bundle and content of the concept of territory can be configured and reconfigured in any number of conceivable ways. There exists no single, objectively correct way to assemble them. There exists also no reason to assume that either of them has to be synchronized with the other in any particular mode. We can never assume that just because one given element of the sovereignty bundle is exercisable within one particular territorial framework and thus creates one particular structure of legal space, all other elements belonging to this sovereignty bundle are exercised within the exact same territorial framework and presume the exact same configuration of the legal space. The United Kingdom’s taxational sovereignty not only operates within a very different territorial framework from its public health or criminal justice sovereignties, but it also creates a very differently structured legal space, not least in terms of which physical and juridical persons it covers and captures. It is to the description and analysis of this legal space that the third section of this article turns its attention.

This last section, applying that which is covered in the second section, reveals two insights regarding tax havens. Each also sheds important light on what might have gone wrong in international law’s engagement with the ideas of sovereignty and territory — that is, what the discipline’s standard model of geographic imagination and its commitment to liberal positivist legal theory have obscured it from recognizing about the practical realities of contemporary global governance. The first insight focuses on what I call the thesis of territorial desynchronization and explores the way in which the discipline needs to rethink its basic understanding of the relationship between sovereignty, space, and spatial representation. The claim, in brief, is that the formal cartographic representations of a state’s territory not only do not necessarily serve as a reliable guide to understanding the actual spatial organization of that state’s sovereignty but also that the spatial configuration of its sovereign territory in one field of economic or political governance does not necessarily have to coincide with the spatial configuration of its sovereign territory in another area of economic or political governance. That is to say, the standard assumption implicitly adopted across most mainstream international law discussions that the legal sovereign space remains uniform across different aspects of sovereign governance and that it is, furthermore, closely synchronized with the standard cartographic representations of that state’s territory has to be set aside as fundamentally incorrect and outdated.

The second insight explores what I call the thesis of false or pseudo deterritorialization. The concept of deterritorialization is a common theme in much of modern-day international law scholarship.¹⁴ The actual realities that this term is supposed to describe vary rather widely from case to case.¹⁵ But often what stands behind this concept is simply the idea that certain economic and political phenomena, such as offshoring, have come to evolve in such a way that they can now be said to have “lost” any territorial grounding. The only “territorially relevant” aspect about them is that the extremely *sui generis* legal space in which they supposedly take place now lies completely outside the plane of legal spaces constituted by territorially bounded sovereign states. And yet these transactions and practices continue to take place *in situ*. They are not devoid of place. This is something the deterritorialized “offshore” intends to obscure — hence, the pseudo deterritorialization.

Each of these theses helps counteract a different limitation of international law’s implicit geography — that is to say, the standard beliefs, common preconceptions, and default assumptions adopted in the modern international law discourse about the basic way in which political, economic, and legal processes tend to unfold across the global physical space — or, as the *Island of Palmas* case would have put it, the way sovereignty is exercised across “the surface of the globe.”¹⁶ Each of them also helps focus the conversation about the possible ways forward: the theoretical reimagining that can be introduced into the discipline’s intellectual framework.

Last but not least, three preliminary comments about some of the methodological assumptions driving this argument. First, the theory of bundles and the idea of territory as a framework that is suggested in this article are heuristic devices. Neither is meant to be understood as an ontological truth claim. I draw on them in this article because of their explanatory power and find them useful only inasmuch as they give us the opportunity to articulate better an alternative approach to thinking through the realities of contemporary global governance — a chance to make visible that which has heretofore remained invisible. Second, in developing this opportunity, I have identified as a case study the field of international tax regulation. In making this selection, I do not intend to suggest that it offers the only plausible starting point, that international tax regulation is the most

¹⁴ Catherine Brölmann, “Deterritorialization in International Law: Moving Away from the Divide between National and International Law” in Janne E Nijman & André Nollkaemper, eds, *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007) 84; Enrico Milano, “The Deterritorialization of International Law” (2013) 2 *European Society Intl L (ESIL) Reflections* 6; Virgil Ciomos, “The Deterritorialization of Human Rights” (2010) 9 *J Study Religions & Ideologies* 17.

¹⁵ See Lythgoe, *supra* note 4, ch 2.

¹⁶ *Island of Palmas Case (Netherlands v United States)*, reprinted in (1928) 2 UNRIAA 829 at 838 [*Island of Palmas*]. But note the usual two-dimensional associations of this and its implications.

important field of contemporary global governance, or that the discourse on tax regulation is the most privileged site for critical exploration. The broader claim made is that there is something important we can learn about international law — both as a discipline and as a political project — if we start paying more attention to the way in which the realities of international tax governance is fitted within the broader universe of international legal events, regimes, and processes.

Finally, as any scholar of tax law will warn you, analytically, the concept of tax havens presents a certain challenge since what it purports to describe in practice is actually a rather wide range of relatively distinct phenomena that involve noticeably different institutional and regulatory mechanisms and that presume somewhat dissimilar political and economic preconditions. In this article, I limit the focus of this inquiry to the discussion of only two elements of the traditional problematic of tax havens: the concept of the offshore and the idea of its territorially paradoxical character.

INTERNATIONAL LAW’S IMPLICIT GEOGRAPHY

At some level, the idea that international law, as a discipline and as a normative order, projects its own implicit geography is relatively self-explanatory. Every governance system, every political discourse, every model of governmentality presumes a certain theory of space: a set of ideas, beliefs, and preconceptions about how political, economic, cultural, and other processes work in relation to the practicalities of physical space, the material terrain, and so on.¹⁷ International law is certainly not an exception in this regard. A large number of international legal concepts, doctrines, and tropes reference the idea of territorial organization and follow explicitly spatialized normative logics. Consider, for instance, the way in which international organizations like the United Nations and its organs such as the International Court of Justice organize their institutional frameworks around a series of regional groupings.¹⁸ Or take the standard language that international law uses to distinguish between different scales of customary law-making: quite tellingly, the main alternative to “general” customary law is called in the traditional vocabulary “regional” or “local” custom, as

¹⁷ This might be the geography of domestic public health policy, it could be the geography of economic systems, or it could be the geography of indigenous communities. See Trevor JB Dummer, “Health Geography: Supporting Public Health Policy and Planning” (2008) 178 *Can Medical Assoc J* 1177; Gordon L Clark et al, *The Oxford Handbook of Economic Geography* (Oxford: Oxford University Press, 2003); Brian Murton, “Being in the Place World: Toward a Māori ‘Geographical Self’” (2012) 29 *J Cultural Geography* 87; Soren C Larsen & Jay T Johnson, “In between Worlds: Place, Experience, and Research in Indigenous Geography” (2012) 29 *J Cultural Geography* 1.

¹⁸ United Nations, *Regional Groups of Member States*, online: <www.un.org/dgacm/en/content/regional-groups>.

opposed to, say, “particular” or “exceptional,” even though the actual physical space in which these lower-order customary regimes are supposed to be legally operative often may extend over extremely broad and physically non-contiguous areas.¹⁹ What holds true on the law of the “dry land” also holds true in the law of water. Some of the oldest concepts and doctrines in the international legal regime of the sea evidence a clearly spatialized outlook. The way in which the four or five basic regimes that make up the modern law of the sea — territorial waters, the continental shelf, the exclusive economic zone, the high seas, the deep seabed — are defined and conceptualized obviously exhibits a deeply territorialized legal imagination.²⁰

The idea that, at its very root, the concept of statehood in international law is territorially grounded forms a staple of both modern and classical international legal discourse. One sees its reflections in the traditional criteria of statehood enumerated in the 1933 *Montevideo Convention*²¹ as well as in the way in which the 1978 *Vienna Convention on State Succession*, for example, seeks to define the phenomenon of state succession and how it purports to distinguish between different types of successor states.²² But let us go slightly further than that. Consider, for instance, what the following statement from the *Island of Palmas* decision says about the relationship between the legal content of statehood and its territorial expression:

It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. ...

... Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own

¹⁹ This is especially true of “Western European and other States,” which includes Australia, Canada, New Zealand, and the United States. See *ibid.*

²⁰ See research by Henry Jones and Surabhi Ranganathan on this. Henry Jones, “Lines in the Ocean: Thinking with the Sea about Territory and International Law” (2016) 4 *London Rev Intl L* 307; Surabhi Ranganathan, “Decolonization and International Law: Putting the Ocean on the Map” (2020) 23 *J History Intl L* 161; Surabhi Ranganathan, “Ocean Floor Grab: International Law and the Making of an Extractive Imaginary” (2019) 30 *Eur J Intl L* 573.

²¹ *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 *LNTS* 19 (entered into force 26 December 1934).

²² See e.g. *Vienna Convention on Succession of States in Respect of Treaties*, 23 August 1978, 1946 *UNTS* 3 (entered into force 6 November 1996), arts 2, 8–9, 12 and Parts II–III.

territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others.²³

Note the essential logic of the argument and the suggestive phrases accompanying it: state territory is sovereign territory; sovereignty is a “legal condition” that implies the existence of a “right” to exercise within the two-dimensional understanding of “a portion of a globe” the functions of a state to the exclusion of all others; territorial sovereignty, by default, always belongs to one state; only in exceptional circumstances can it be exercised by several states; and this fact forms the “point of departure” for “settling most questions that concern international relations.”

Or consider, alternatively, the underlying logic of the following argument that comes from the notorious *Customs Union* opinion:

It can scarcely be denied that the establishment of [an Austro-German customs union] does not in itself constitute an act alienating Austria’s independence, for Austria does not thereby cease, within her own frontiers, to be a separate State, with its own government and administration; and, in view ... at all events of the possibility of denouncing the treaty [which Austria concluded with Germany], it may be said that legally Austria retains the possibility of exercising her independence.²⁴

Note what this reasoning implies about the core content behind the idea of sovereignty: Austria continues to remain an independent state because it has not ceased to have its own government and administration “within her own frontiers” and, at all events, retains the possibility of autonomously terminating its international legal obligations. Note also how little specificity is given both in this passage and in the passage quoted above to the idea of “government and administrative functions.” Which particular functions are we meant to be looking at in order to confirm the continued presence of territorial sovereignty? The only detail we are given points towards the existence of some single monolithic block called “government and administration” or “the functions of a State.”

Fast forward several decades. How is the concept of territorial sovereignty defined in the eyes of international law today? When a state needs to

²³ *Island of Palmas*, *supra* note 16 at 838.

²⁴ *Customs Regime between Germany and Austria* (1931), PCIJ (Ser A/B) No 41 at 52.

demonstrate that its occupation of a given piece of territory has been exercised “à titre de souverain,” explains the *Kasikili/Sedudu Island* case, the main condition that it has to satisfy is to show that it carried out within that territory the “functions of state authority” to the exclusion of all other states.²⁵ When does a state lose its status as a sovereign entity in the eyes of international law? Whatever may be the *de facto* position on the ground, writes Ian Brownlie, the central factors that determine whether a state has retained its sovereignty for international legal purposes are the continued persistence of a separate “legal personality” in its international transactions and the continued “attribution of [its] territory to that legal person.”²⁶

The list of illustrations can be continued. The same pattern of uncritically fusing the subjects of statehood, sovereignty/independence, and territorial control can be uncovered in most international law textbooks, the jurisprudence of international tribunals, and the statements and reports of authoritative international bodies. One sees its traces in the contemporary discussions of the responsibility to protect,²⁷ in the traditional definitions of extraterritorial jurisdiction,²⁸ in the way in which the debates about the universality of international human rights standards get routinely side-tracked into discussions of “regional” human rights systems, and in the way in which international treaty-making practice routinely highlights the importance of specifying the scope of its purported territorial applicability, while also assuming that, where no such specifications have been made, it will be the entirety of the given state’s national territory to which the treaty obligations in question will apply.²⁹

Though the equation of sovereign statehood with territorial exclusivity is made repeatedly and virtually automatically, little thought, if any, appears to be given to how exactly this assumption can be squared with the colossal increase in the functional authority of various international organizations to

²⁵ *Kasikili/Sedudu Island (Botswana v Namibia)*, [1999] ICJ Rep 1045 at 1103–05. See a critique of this judgment by James Thuo Gathii, “Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning *Kasikili/Sedudu Island* (Botswana/Namibia)” (2002) 15 *Leiden J Intl L* 581 (Gathii argues that the International Court of Justice “places more probative value on physical, geographic, scientific and economic evidence at the expense of evidence of the use and occupation of the disputed island by the Masubia” at 582).

²⁶ Ian Brownlie, *Principles of Public International Law*, 5th ed (Oxford: Oxford University Press, 1998) at 107.

²⁷ Anne Orford, “Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect” (2008) 30 *Mich J Intl L* 981.

²⁸ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011).

²⁹ Marko Milanovic, “The Spatial Dimension: Treaties and Territory” in Christian J Tams, Antonios Tzanakopoulos & Andreas Zimmermann, eds, *Research Handbook on the Law of Treaties* (Cheltenham, UK: Edward Elgar, 2014) 186.

regulate the exercise of domestic government functions and dictate the actual content of corresponding economic and social policies, often with the effect of practically excluding the possibility of any genuine regulatory autonomy at the national level. Underlying the entire idea of territorial exclusivity and sovereignty is this implicit geography. Traditionally, international law is understood as not addressing areas of law assumed to be within the exclusive competence of the state. These exclusive competences have a “usual” spatial reach, which is assumed to be state territory. Thus, each function or competence within the exclusive competence of the state obeys the spatial logic of the state. Anything that is no longer within the exclusive jurisdiction of the state is thought to have “spilled out” of the container or leaked — to international organizations or other sites.

International law has an implicit geography that shapes an understanding of what is “for” international lawyers to address and what is “for” state actors to address. It may be plausibly argued that tax is one competence (indeed, *the* one competence) understood to still “belong” to the state. Tax arrangements and regimes are extremely spatially ordered in a way that both limits the reach of international law as well as of each state *vis-à-vis* another state (that is, the underlying assumed geography of international law). Indeed, this is the very idea that constitutes the idea of gaps between jurisdictions. Moreover, there is an assumption that international law does not address the issue of tax regulation, particularly not its content or normativity, other than through (usually bilateral) treaties dealing with information sharing or double taxation.³⁰ The European Union (EU) unusually has a number of directives and recommendations (the Anti Tax Avoidance Package)³¹ addressing tax that can be seen as a multilateral approach, but it is a highly nuanced approach. This implicit geography, I contend, is engrained in how international lawyers think about international law and engrained in the operationalization of the referent legal system as well as playing a role in disciplining how the discourse thinks about issues spatially.

The dominance of state territory as the default model of legal spatiality recognized by international law has led to overly essentialized thinking about the relationship between statehood and the practice of governance,

³⁰ Yitzhak (Isaac) Hadari, “Tax Treaties and Their Role in the Financial Planning of the Multinational Enterprise” (1972) 20 Am J Comp L 111.

³¹ “Anti Tax Avoidance Package,” online: *European Commission* <ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en>; Council Directive (EU) 2016/1164 on Laying Down Rules against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market, [2016] OJ L 1164; “Commission Notice: Measures Considered Equally Effective to Article 4 of the Anti-Tax Avoidance Directive,” online: *European Commission* <[eur-lex.europa.eu/legal-content/EN/TXT/?qid=1560946385939&uri=CELEX:52018XC1207\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1560946385939&uri=CELEX:52018XC1207(01))>.

mediated through the vocabulary of sovereignty and jurisdiction. The third section of this article will examine what might happen if we de-essentialize this relationship and disaggregate or break down the concepts of sovereignty and territory into bundles containing different elements. Before we go there, however, I first explore some tools that allow us to better understand modern sovereignty and spatial practices related to tax havens and the offshore.

A NEW “LANDSCAPE” FOR SOVEREIGNTY

The purpose of this section is to outline a different way of thinking about the operation of legal space in international law that better reflects modern sovereignty practices. Given that it involves certain tools to “see past” certain engrained blind spots, I address in this section those particular ideas that I think can inform a different conceptualization. There are two key elements to this way of thinking. The first is to understand sovereignty as a bundle of legal rights and, with it, the general insight of legal realists that sovereignty means “title” to exercising rights, not “title” to the object of territory; the second is to understand territory as a framework and not as an object in which the state has legal rights. This conceptualization instead envisages territories to be more variable and heterogeneous than often understood. The following two sections outline and explore further what I mean by this idea.

UNBUNDLING THE RELATIONSHIP BETWEEN SOVEREIGNTY AND TERRITORY

American legal realists developed an understanding, for example, of ownership of property as a bundle of different legal relations.³² This is instructive for how we think about the concept of sovereignty in international law in two ways: first is the idea of the bundle and second is the concept of relations. Turning first to the bundle element, the right to property “consists of a number of disparate rights, a ‘bundle’ of them: the right to possess, the right to use, the right to exclude, the right to transfer.”³³ Sovereignty can be similarly understood, not as a monolithic and indivisible legal right but, instead, as a complex arrangement of very distinct legal relations. David Kennedy adopts this way of thinking about sovereignty as a legal concept: “[J]uridically sovereignty ... [is at once] a unified idea, and at the same time,

³² Joseph William Singer, “The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld” [1982] *Wisconsin L Rev* 975 at 986; Arthur L Corbin, “Rights and Duties” (1924) 33 *Yale LJ* 502 at 429.

³³ Jesse Dukeminier, James E Krier & Gregory S Alexander, *Property*, 6th ed (New York: Aspen, 2006) at 81.

a bundle of rights to be parcelled out in a whole bunch of different directions.”³⁴

There exists no “natural” or “correct” way to assemble any given bundle. Every bundle of legal relations can be arranged in many different ways. Applied to the concept of property, “the concept of the bundle of sticks, with different ‘owners’ holding different sticks, meant that property ownership was a very flexible concept.”³⁵ Ownership can thus appear in “an almost infinite variety of ways.”³⁶ We might think of sovereignty the same way. “Sovereignty” is not the same for every state: each state has different rights, duties, powers or competences, and immunities. This is obvious if we consider that states are, for example, members of different international and regional organizations or, as another example, have signed different bilateral investment treaties (BITs). To think otherwise, and, indeed, to think of sovereignty as indivisible,³⁷ would be to assume there is an “objectively correct” way to configure the bundle. This is, in many ways, the same thing as believing in natural law — that there is a proper order of things. How the bundle of sovereignty is put together is a question of policy — that is, choice rather than “logic” or “truth.”³⁸

The second relevant contribution of legal realism to legal thinking was to understand that the relationship of an individual is not to their property but, rather, between the right holder and all others — that is, those against whom the rights can be enforced, to whom the holders have a duty, and so on. The legal bundle, and, therefore, the property itself, consist of legal relationships between different actors rather than “ownership of things or relationships between owners and things.”³⁹ This insight is useful in understanding the relationship between the state, or whatever institution is exercising sovereign competences, and territory in international law, as it is for

³⁴ See James Der Derian et al, “How Should Sovereignty Be Defended?” in Christopher Bickerton, Philip Cunliffe & Alexander Gourevitch, eds, *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: University College London Press, 2007) 187 at 187.

³⁵ Denise R Johnson, “Reflections on the Bundle of Rights” (2007) 32 Vermont L Rev 247 at 254.

³⁶ *Ibid.*

³⁷ Alain Pellet, “The Proper Use of Sovereignty,” *ESIL Newsletter* (Autumn 2021), online: <esil-sedi.eu/esil-newsletter-autumn2021/>. I agree here with Jens Bartelson who has said that “although indivisibility has long been regarded a necessary attribute of sovereignty, scholars have equally long argued that this requirement does not correspond to empirical facts and, therefore, ought to be abandoned in favor of conceptions that are more closely aligned to political reality.” Jens Bartelson, “On the Indivisibility of Sovereignty” (2011) 2 Republics Letters 85.

³⁸ Pierre Schlag, “How to Do Things with Hohfeld” (2015) 78 Law & Contemp Probs 185 at 190.

³⁹ Johnson, *supra* note 35 at 249.

conceptualizing property. Gone is the link between the sovereign state and territory in an “ownership” sense. Instead, the legal relations associated with the bundle of powers called sovereignty are legal relations between different actors, enforceable against and exclusive *vis-à-vis* other actors.

These legal realist insights are useful to reflect on because, by and large, most classical international law scholars compare territorial sovereignty to, or think of it as, title to territory. According to Malcolm Shaw, “the 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.”⁴⁰ Yet, in this understanding, territory is an object rather than a framework — as something capable of being owned — as something to which critical geographers would object. I explore this further in the second step, but it is also crucial to mention here since rethinking the spaces of international law as frameworks rather than objects is linked to this “step.” Thus, legal realists have developed a model for understanding legal powers that can be used to understand rights related to the dephysicalized territory as a framework that is outlined below. Their insights give shape to the argument that sovereignty can be understood as a bundle of rights and duties that can be divided between different actors — both state and non-state alike — in relation to their spaces constituted by these very activities.

This approach to sovereignty also helps to better explain the increasing role played by non-state actors in international law-making and global governance. Competences and powers that are traditionally assumed to be state-territorially delimited and organized have been “increasingly emancipated ... and create their own reality.”⁴¹ In simple terms, we might think of non-state actors as exercising elements of the sovereignty bundle of legal relations that at one point were deemed to lie wholly with the state. When seen in this context, the monolithic content of the concept of territory is replaced with the idea of multiple legal spatialities, each of which is tied to a particular governance process or function and the spatial framework of relevant actors. Instead of one simple global legal space, with its presumed structure of spatial divisions corresponding to the traditional cartographic representations of nation states, one now has a whole series of overlapping, often non-synchronized, mutually incommensurate spaces or global legal maps. Some of these spaces, unlike the spaces of states, will have a different degree of permanence compared to the spaces of other actors. These territories, of different temporalities, should be understood as existing alongside one another and overlapping the same physical space.

⁴⁰ Shaw, *supra* note 1 at 354.

⁴¹ Jan Helmig & Oliver Kessler, “Space, Boundaries, and the Problem of Order: A View from Systems Theory” (2007) 1 *Intl Political Sociology* 240 at 241.

TERRITORY AS A FRAMEWORK

The idea of territory as an object of the state and of the analogy between territory and sovereignty as being akin to man and property has deep roots in international law.⁴² Yet the objectification of territory leads to the physicalization and naturalization of territory.⁴³ Critical geographers are at pains to highlight that territory is a socially constructed concept, not a brute fact. Emerging since the 1970s as a result of the work of Henri Lefebvre and others,⁴⁴ territory has come to be understood as socially produced space; it is neither physical geography nor object. This rethink saw space “as something we produce by way of our social lives, and not social life as something we do *in* space.”⁴⁵

Territory, I argue, can be understood as one type of spatial⁴⁶ or “geographical framework.”⁴⁷ It is a consistently socially imagined arrangement that structures the exercise of power by states (and other actors). Territory as a framework is a structure in relation to which actors exercise power in relation to land, air, and water, controlling the activities, resources, people, businesses, and so on of social life. In other words, territory is a spatial structure constituted in fact by this exercise of power. Like grammar structures speech, territory structures this exercise of power and is at the same time constituted by this practice. But note that I use “actors” in the general sense, for I do not limit the ability to constitute territory through the exercise of control to states.⁴⁸

The idea of territory as framework is not alien to international law discourse, but it has not been fully embraced, I would suggest. It can be most

⁴² RY Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 4–6.

⁴³ In this regard, see also Storr, *supra* note 9.

⁴⁴ For further discussion, see Müller-Mall, *supra* note 9 at 71; Henri Lefebvre, *The Production of Space*, translated by Donald Nicholson-Smith (Oxford: Wiley-Blackwell, 1991; first published in French in 1974) [Lefebvre, *Production of Space*]; Edward W Soja, *The Political Organization of Space* (Washington, DC: Association of American Geographers, Common on College Geography, 1971); Soja, *supra* note 8.

⁴⁵ Müller-Mall, *supra* note 9 at 73 [emphasis in original].

⁴⁶ Lefebvre, *Production of Space*, *supra* note 44 at 281.

⁴⁷ Henri Lefebvre, *State, Space, World: Selected Essays*, edited by Neil Brenner and Stuart Elden (Minneapolis: University of Minnesota Press, 2010) at 35.

⁴⁸ Legal realism and social constructivism would not presume the normative source of authority that international legal positivism does. If we ask ourselves: “are states no longer able to freely determine everything in relation to the physical geography they associate as their territory? Do other actors have the ability to discipline activities over that same physical geography?” and the answers to these questions are “yes,” then from the point of view advocated in this article, the exercise of sovereign powers and the constitution of territory through the exercise of these powers may be conducted by actors other than states.

clearly seen in Albert Geouffre de Lapradelle's oral pleadings before the Permanent Court of International Justice: "In works with which the Court is cognisant, and which have modified the conception of territory in international law, one reads that territory is neither an object nor a substance; it is a framework. What sort of framework? The framework within which the public power is exercised."⁴⁹ De Lapradelle explained that

[t]here exists, side by side with the Tunisian territory of Tunis, a French Tunisian territory, because, under the regime of composite sovereignty constituted by a protectorate in international law, there is in a sense, from a juridical standpoint, a territory which is the territory of the protected State, and another territory which is the territory of the protecting State. It may be said that the same geographical area, without losing its physical form, assumes from the legal standpoint either the form of a possession of the protected State or of the protecting State according to circumstances.⁵⁰

This French Tunisian territory is "an extension of French territory,"⁵¹ and France endows this territory "with the same legal characteristics as French territory *in so far as* nationality questions are concerned."⁵² This formulation of territory — territory as framework — is the best way to make sense of it being possible for two different actors to have power over the same space (that is, it "detotalizes the space" that would otherwise happen in approaches that understand territory as an object). Surprisingly little is written (nothing if I am correct) in English about this important doctrinal statement about how territory functions. And, yet, as de Lapradelle says, such an understanding "modifie[s] the conception of territory in international law," and it does so in a huge way.

Returning to the main thread of the argument, putting the concept of territory as a framework and the realist idea of bundles together, what I hope has emerged is something more or less as follows: sovereignty is a bundle of rights, privileges, and powers, each of which can be exercised by different international actors, under different conditions, in relation to their own territorial frameworks. Territory is a framework constituted by and for the exercise of sovereignty. There exists no reason to assume that

⁴⁹ *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921 (Great Britain v France)*, [1923] PCIJ (Ser C) No 2, Part II, Speeches Made and Documents Read before the Court, "Speech by M. A. de Lapradelle," Annex 4, Morning Sitting, 11 January 1923, 93 at 106.

⁵⁰ *Ibid* at 97–98.

⁵¹ *Ibid*.

⁵² *Ibid* at 100 [emphasis added].

one element of the sovereignty bundle is exercised in relation to exactly the same legal space as every other element. One can never assume that, just because a given element of the sovereignty bundle appears to be exercisable in relation to one particular territorial framework, the same will also hold true for all the other elements of the sovereignty bundle that may instead be exercised differently in relation to their own space.

As such, neither territory nor sovereignty as concepts traditionally associated with states have “declined”; they are as important as ever.⁵³ The concepts may instead be refashioned in both how social reality exists and how we think about them. Much of our ability to account for these developments has been blinded by overly essentialized configurations of these two concepts, and, therefore, I hope to have been able to offer an alternative way of thinking about them. What is taking place is simply another “passage within the notion[s] of sovereignty” and of territory.⁵⁴

TAX, SOVEREIGNTY, AND INTERNATIONAL LAW: RETERRITORIALIZING THE OFFSHORE

With this different appreciation of the spaces of international law, I suggest international lawyers can better understand, track, and rethink what is taking place when it comes to tax havens and secrecy jurisdictions. These are critical to make sense of because of what is at stake. Over half of the world’s trade “passes at least on paper, through tax havens,” and 85 percent of international banking and the issuing of bonds takes place in the Euromarket, which is “a stateless offshore zone.”⁵⁵ The most recent cache of papers — the Pandora papers — implicated more than three hundred public officials in more than ninety states, including thirty-five world leaders.⁵⁶ This is currently floating free of the attention of international law.

In many ways, what I seek to do is “reterritorialize” these processes and phenomena in the following discussion.⁵⁷ International lawyers can only address to a limited extent such matters because of the deterministic

⁵³ Schachter, *supra* note 1; Milano, *supra* note 14.

⁵⁴ Stuart Elden, “The State of Territory under Globalization: Empire and the Politics of Reterritorialization” (2006) 12 *Thamyris/Intersecting: Place, Sex and Race* 47.

⁵⁵ Shaxson, *supra* note 5 at 8.

⁵⁶ *Guardian* Investigations Team et al, “Pandora Papers: Biggest Ever Leak of Offshore Data Exposes Financial Secrets of Rich and Powerful,” *The Guardian* (3 October 2021), online: <www.theguardian.com/news/2021/oct/03/pandora-papers-biggest-ever-leak-of-offshore-data-exposes-financial-secrets-of-rich-and-powerful>.

⁵⁷ Shah warns that, in the process of reterritorialization, there is a danger of continuing to reify state territory, and, in that sense, I hope to fundamentally question many of the assumptions that tie territories only to the identification of state space. See Shah, *supra* note 7 at 13.

influence of international law's implicit geography.⁵⁸ The orthodox understanding of territory is at spatial odds with the logic of tax havens, secrecy jurisdictions, and the offshore and does not allow for the proper examination of these entities. Instead, to understand the legal realities of tax havens and the offshore, a reimagining of territory and sovereignty is required. Having spent time outlining and developing an alternative geography for sovereignty, I highlight in this final section two problems that I see international law discourse having as it seeks to confront tax havens — namely, the territorial desynchronization of state sovereignty and, second, the issue of “pseudo deterritorialization” (a false deterritorialization).

THE PROBLEM OF THE TERRITORIAL DESYNCHRONIZATION OF SOVEREIGNTY: THE UNITED KINGDOM

There is virtually no commentary about why particular terms are employed at any given moment in the discourse on secrecy jurisdictions. And, yet, in relation to tax, the term “jurisdiction” is favoured and is more accurate, while the term “territory” falls to the background of the discourse. This observation is important to my thesis that the territoriality of sovereignty is desynchronized: actors and states (“jurisdictions”) independently and autonomously have sovereignty over their own tax regimes. The territory of the United Kingdom in relation to tax is fundamentally different from the territory of the United Kingdom for the purposes of self defence. And, yet, orthodox understandings of territory and state sovereignty understand the space of sovereignty as uniform and synchronized. Tax is assumed to be a

⁵⁸ To read more about this influence, see Rajkovic, *supra* note 9. International lawyers tend to only be able to approach the general topic of tax havens through two approaches: “public order” or “sources.” The “public order” approach refers to the opportunity many international lawyers have found to address the issues via, and in light of, terrorism financing, drug trafficking, and “sanctions busting” or embargo busting. See Mary Footer, “The Panama Papers, Corporate Transnationalism and the Public International Order” (2017) 6:1 ESIL Reflections, online: <esil-sedi.eu/esil-reflection-the-panama-papers-corporate-transnationalism-and-the-public-international-order-2/#_ftnref16>; Richard K Gordon, “On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers” (2010) 88 North Carolina L Rev 95. The “sources” approach refers to scholarship on the nature of the activities of international organizations — in particular, the Organisation for Economic Co-operation and Development (OECD), in combating tax havens, the bindingness of their measures, and whether such measures should be classed as soft law or hard law. See William Gilmore, “The OECD, Harmful Tax Competition and Tax Havens: Towards an Understanding of the International Legal Context” (2001) 27 Commonwealth L Bull 548; James E Salzman, “The Organization for Economic Cooperation and Development’s Role in International Law” (2012) 43 Geo Wash Intl L Rev 101; John McLaren, “The OECD’s Harmful Tax Competition Project: Is It International Tax Law?” (2009) 24 Australian Tax Forum 421; Allison Christians, “Hard Law, Soft Law, and International Taxation” (2007) 25 Wisconsin Intl LJ 325.

state activity and therefore assumed to map over the entire territory in a unitary and uniform manner.

Instead, different actors — sub state and supra state — are differently active in relation to tax law and tax governance — hence, the territorial desynchronization of sovereignty; each “jurisdiction” exercises control over its own territory regarding tax as well as for purposes of non-tax sovereign powers. Yet these territories will overlap over the same physical geography. The United Kingdom provides an interesting illustration of these different overlapping spaces. For all intents and purposes, for example, when the United Kingdom signs an international treaty, it is expected to apply to the territories of Jersey and Guernsey. Yet this is not so for tax purposes. The territory of the United Kingdom desynchronizes for these purposes. Jersey, for example, is often called a separate tax jurisdiction, and it is capable of entering into agreements with states to exchange information on tax-related matters.⁵⁹ For some international law purposes, Jersey is seen by some as a *sui generis* actor, but it is not a fully or formally independent state.

There is an interesting instance of this problem in the membership categories of the Organisation for Economic Co-operation and Development (OECD). The United Kingdom is a member state of the OECD, joining on 2 May 1961, and, for the purposes of this membership, it includes Guernsey and Jersey. The OECD officially considers the situation to be as follows: “The OECD Convention was extended to Guernsey and Jersey in 1990 and they are part of the UK for the purposes of its membership of the OECD. OECD Decisions and Recommendations apply to Guernsey and Jersey to the same extent as they do to the UK.”⁶⁰ And, yet, Jersey and Guernsey (and the Isle of Man) are all highlighted as separate countries on the OECD’s website — literally, both appear under a dropdown menu named “Countries.” This listing is for the purposes of the Base Erosion and Profit Shifting (BEPS) Framework. This framework includes not only states but also jurisdictions, recognizing that Jersey and Guernsey and other self-governing British territories are separate tax jurisdictions that map differently. This BEPS Framework demonstrates the disaggregation between public sovereignty, or treaty-making capacity sovereignty, and taxational sovereignty and the fluidity of how these different sovereignties can be viewed. Currently, sovereignty is understood to still formally reside in the United Kingdom because international law only recognizes sovereignty as a uniform bundle, yet, if these rights were to be split up and disaggregated, it is possible for different actors to hold different rights in different territories.

⁵⁹ See e.g. *Agreement between Jersey and New Zealand for the Exchange of Information Relating to Tax Matters*, 19 May 2009, online: <www.oecd.org/countries/jersey/43408818.pdf>.

⁶⁰ “Crown Dependencies and Overseas Territories of the United Kingdom,” *OECD*, online: <www.oecd.org/legal/ukdependenciesterritories.htm>.

The appreciation of territory outlined above, rather than seeing a flat model of homogenous, contiguous and uniform space, with a monolithic “sovereign,” allows for international law to “see” Jersey and Guernsey. Jersey and Guernsey are self-governing territories that exercise sovereign powers, most especially in relation to tax. They are no longer in this *sui generis* category and, along with the many other subjects put in this category, are not exceptional, but entirely normal, familiar, and standard if we adopt the alternative landscape of sovereignty outlined in the second section of this article. By recognizing the different spatial logics of public law and taxational sovereignties, we can better grasp the strategic dimension and malleability of tax haven space and the practices and actors that constitute it. There is a great deal of room for different agents involved in the system to play with territorial logics — that is, for the United Kingdom to exercise an element of control in a number of ways but with sufficient distance for it “to say ‘There is nothing we can do’ when it suits.”⁶¹ As a result, I would go so far as to argue that the dominant understanding of state power and its exclusive relationship to territory is not sustainable; by leaving unobserved these underlying spatial modifications, this dominant understanding becomes an obstacle and a blind spot in our thinking about tax havens.

By desynchronizing sovereignty, territory, and physical geography, we can also “see” the City of London and not just by piercing the sovereignty veil but also by understanding its strategic links with very separate physical spaces.⁶² In doing so, this deconstruction process also allows us to “see” other influences on the creation of tax havens and the offshore and better understand the power dynamic in these territories — perhaps calling it colonialism by other means⁶³ — operating currently by unclear overlapping jurisdictions, regimes, and arrangements that do not “map” onto the orthodox understanding of the synchronicity of territory and sovereignty. By understanding the plurality of actors and spaces, it allows us as international lawyers to understand the potential number of spaces that could be created.

Thus, tax havens provide an excellent opportunity through which to study and understand differential and multiple spaces. Behind the traditional understanding of the relationship of political sovereignty to space is the assumed equation of, for the sake of argument, the spatiality of taxation and the spatiality of public law sovereignty. What informs this is an assumption that all aspects of legal political governance by the state are exercised in a

⁶¹ Nicholas Shaxson, “The Tax Haven in the Heart of Britain,” *New Statesman* (24 February 2011), online: <www.newstatesman.com/economy/2011/02/london-corporation-city>.

⁶² For a thorough understanding of this, see Vanessa Ogle, “Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s” (2017) 122 *American Historical Rev* 1431.

⁶³ *Ibid* at 1439.

territorially uniform fashion — in particular, that the circuits of public law sovereignty map seamlessly onto those of taxational sovereignty. The reality, however, suggests that this is often not the case. What is more, this discrepancy between the spatialities of these two governance powers is not only very real, but it is also, in fact, an integral part of what enables the existence of many tax havens in the first place. We cannot equate the same territorial or spatial logic with public power sovereignty and taxational sovereignty. These two have different territorial logics that we would miss by looking at the world only through the lens of the territorial state configuration of authority and space.

Accordingly, the traditional assumption of synchronicity in international law not only does not give a terribly insightful analysis or solution, but it also misses entirely what is going on by misdiagnosing and mischaracterizing the operations, events, and processes that contribute to the overall problem of harmful taxation practices. It suffers from the consequences of labouring behind a blind spot and reproduces the structure of fetishist assumptions about the uniformity of sovereignty and territory. If our knowledge is limited to thinking within these uniform spaces, then the rules, regulations, doctrines, and discourse that is produced as a result of this knowledge are also equally limited.

THE PROBLEM OF THE PSEUDO DETERRITORIALIZATION OF OFFSHORING

The second thesis is that offshoring is actually an example of pseudo deterritorialization. By pseudo deterritorialization, I refer to the process whereby it appears like activities, processes, transactions, and so on have been “offshored” when they are not in fact offshore — indeed, there is no longer an offshore.⁶⁴ They are instead conducted onshore in another territory sharing the same physical geography as state territory. It is a pseudo phenomenon because the processes and legal spaces have been created in such a way that they are not supposed to be subject to any state’s regulations — in other words, they are strategically made to look like they have been deterritorialized. This process of pseudo deterritorialization has been essential to the success of the practice of “offshoring” and indispensable to the success of the *modus operandi* of this industry.

The specific processes of tax havens that I focus on as an example in this section are transactions that take place onshore physically — say, an office in London — but, for all intents and purposes, these transactions take place

⁶⁴ See Susan Roberts, “Fictitious Capital, Fictitious Spaces: the Geography of Offshore Financial Flows” in Stuart Corbridge, Ron Martin & Nigel Thrift, eds, *Money, Power and Space* (Oxford: Blackwell, 1994) 91 (in this, Roberts highlights that the “the term ‘offshore’ is a relative one” yet still seems to accept that offshore is not onshore somewhere although does note that “the distinction between onshore and offshore has become fuzzier” at 93).

offshore. It is not something new, yet old spatial paradigms of sovereignty continue to cause problems today. Already in 1957, after a fight between the then UK government and the Bank of England, the Eurodollar market was created as London merchant banks started trading in dollars, and the Bank of England did not regulate this trade. The transactions were deemed by the Bank of England “not to take place in the UK for regulatory purposes ... and since this trading did in reality happen inside British sovereign space, no other authority from elsewhere was allowed to regulate it either.”⁶⁵ The unregulated dollar market in London was created. It meant that banks would maintain two sets of books — one for onshore operations and another for offshore operations. These second books recorded the activities of a market that in effect was offshore and not regulated by UK laws, despite in reality taking place in London. This term “offshore” is important because it has morphed since these humbler beginnings. In 1963, this offshore market developed with the “birth of Eurobonds,” and so it has grown.⁶⁶

The orthodox spatiality recognized by international law allows these transactions and such activities to look “stateless,” “deterritorial,” or “nonterritorializable.” But this is pseudo deterritorialization, caused by using the label of offshore, which may also be thought of as the pseudo non-territorialization of the offshore. This implies that these transactions suddenly float free from regulation of state, jurisdiction, and sovereignty. But I maintain that this is an unsatisfactory explanation and that we can reterritorialize these transactions. It is a pseudo deterritorialization for a number of reasons. First, any account that does not factor in the fact that it was an “onshore” decision to allow for an “offshore” in the first place, and that agents of states benefit (personally and politically) from these offshore sites — an idea that Ronan Palan encapsulates well in the idea of “having their cake and eating it”⁶⁷ — misses a vital element of the legal competences and issues of jurisdiction surrounding the offshore. Second, it is pseudo in the sense that it is an incomplete description of the movement of powers and competences as most accounts miss the reterritorialization that has simultaneously taken place.⁶⁸ But we would need to rely on the alternative theoretical framework to understand to where these competences have

⁶⁵ Shaxson, *supra* note 5 at 87.

⁶⁶ *Ibid* at 91.

⁶⁷ Ronen Palan, “Trying to Have Your Cake and Eating It: How and Why the State System Has Created Offshore” (1998) 42 *Intl Studies Q* 625.

⁶⁸ Elden, *supra* note 54 at 50, citing Gilles Deleuze & Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, translated by Brian Massumi (London: Athlone, 1988). Deleuze and Guattari’s deterritorialization does not describe the end, decline, or failure of a system or structure but, instead, signifies a story of continuity and open-endedness. See Eugene W Holland, “Deterritorializing ‘Deterritorialization’: From the ‘Anti-Oedipus’ to ‘A Thousand Plateaus’” (1991) 20 *SubStance* 55 at 55.

reterritorialized because international law on the whole fails to recognize anything other than state territory; there is no space for reterritorialization. Third, it is because of this preoccupation with state territory that this (pseudo) deterritorialization has been allowed to occur in the first place; by playing on the essentialized understanding of territory as an object and a single layer over the earth’s surface, actors involved in offshore financial markets have relied on the appearance of a regulatory gap between states that “floats free” of state regulation so as to continue their own secretive activities.

Tax havens and offshoring are phenomena that are often portrayed under the rubric of deterritorialization — namely, that the jurisdiction or power over taxation is deterritorialized or removed from the territory of the state. However, without rethinking the stability and fixity of territories, this can end up being an unhelpful and quite probably also deeply incorrect characterization of what has taken place. Rather unhelpfully, discourse about de-, re-, and extra territorialization project an assumption that the concept of territory has a stable and fixed content, which is that of the territorially bounded sovereign state. That is not the concept of territory proposed here,⁶⁹ although it is possible to fit deterritorialization and reterritorialization into this model so long as we do not fetishize one particular configuration of territory.

Therefore, first, we must grasp that territories are not static⁷⁰ but that they are temporally contingent — that is, they may be temporally limited.⁷¹ It could be thought of like this: rather than there being one space and offshore transactions “floating free” of this space, there are actually two spaces: one territory or space may only even exist for the length of time of the

⁶⁹ I explore this reconceptualization of territory in full in Lythgoe, *supra* note 4, especially chs 4–6.

⁷⁰ Shah, *supra* note 7 at 4.

⁷¹ The static temporality associated with territory in international law discourse is also assumed in much of the globalization and global governance discourse. Edward Soja illustrates and then questions this underlying assumption: “There seems little doubt that global economic integration has been increasing, but this world of intensified economic flows [appears to be] constrained by more static political boundaries, older forms of political territorialisation and regulation that were constructed, for the most part, to meet very different demands.” Soja then argues that there has been a “rebounding” and “restructuring” of spaces such that we should rethink the supposed temporal dichotomies between traditional state territory and other spaces. Edward Soja, “Borders Unbound: Globalization, Regionalism and the Postmetropolitan Transition” in Henk van Houtum, Olivier Kramsch & Wolfgang Zierhofer, eds, *B/Ordering Space* (Aldershot; UK: Routledge, 2004) 33 at 37. Elden in a similar vein argues that “the continual remaking and reshaping of spatial relations may take on, indeed must take on, different forms in different times and places” because our vision should not be limited to that “of a static world of fixed territories suddenly thrown into flux, as it is in much of the literature on deterritorialisation.” Elden, *supra* note 54 at 51.

transaction in question. It is a territory that constantly reappears though — it is the same space or spaces that replace the space of the state each time the same types of transactions take place. The authority in such spaces is much more diffuse than the centralized authority of the state, but there are still governance structures influencing, regulating, and creating rules in these spaces.

Second, we need to get our heads around the idea that multiple territories with multiple state and non-state actors can exist in any one physical geography at any one time. It is commonly accepted that this is possible at a substate level — that is, the local government or authority has a boundary and has jurisdiction over particular matters in that area. It is also recognized (exceptionally) by many that it is possible at a supra-state level — that is, the EU could be said to have a territory. The main difference with what I am arguing is that the governance model and the splintering of sovereign powers over these “second” or “third” spaces work a little differently and have new non-state, often private, actors involved compared to the more familiar local government official or the state officials that operate at the EU level. In this regard, I apply Sabine Müller-Mall’s observation that “[l]aw 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.”⁷²

However, because these other spaces are currently invisible to the eyes of international law, we do not understand the different actors circulating within and constituting them. Once visible, we can associate them with actors working within the governance regimes of these overlapping spaces, which may be joined — non-contiguously, of course — with spaces in other cities or state territories around the world. We can thus create recognition for a new framework for governance that has its own spatial logics that could be described as *aterritoriality*.

Returning to the most well-known example of the offshore — the Euro-market — it is an obvious candidate for fitting into this description of supposed or false deterritorialization. The Euromarket, “which is a market unregulated by states”⁷³ and is thought of as “a stateless offshore zone,”⁷⁴ has been explored by many working in international politics and economics, but less so by international lawyers. This is surprising as it is a creation of law generally, and its effects on international law are important; moreover, its existence is thought to have emerged in 1958 as a consequence of a well-known international law event: the Suez Canal crisis. In response to

⁷² Müller-Mall, *supra* note 9 at 90.

⁷³ Palan, *supra* note 67 at 632.

⁷⁴ Shaxson, *supra* note 5 at 8.

the Suez Canal crisis and the ensuing run on the Sterling, the British government imposed restraints on Sterling credits to countries engaging in third-party transactions within the Sterling area and, in addition, raised the Bank rate to 7 percent. In response, British banks began actively to solicit dollar deposits to use in trade credits. ... These transactions in dollars were then considered to be taking place not under the exchange rate regulation, reserve regulation, or any other regulations of the British state, but de facto under no regulation.⁷⁵

The creation of this space is therefore intertwined with significant international law events such as the Suez Canal crisis, the end of the Korean war,⁷⁶ decolonization,⁷⁷ and many others beside. Given the significance and relevance of these events, that this space is largely unexplored and invisible in international legal discourse is surprising. And yet this lack of exploration by international lawyers is, at the same time, not surprising because this space is assumed to be outside the spatial ambit of international law. International law cannot make sense of the spaces that the offshore operates in because they do not fit international law’s implicit geography.

States allowed, enabled, and participated in the creation of the offshore; the offshore was created through sovereign acts. Yet the “offshore” is not simply an empty ungoverned political space, it is a highly legalized space, both in how it was constituted (through the actions and decisions of sovereign states and a lot of help and pressure from private individuals and companies) and in its continual, day-to-day activities. Not all activities in the offshore are the same, and, yet, when everything has gone “offshore,” we are unable to understand it, which leads to an overly reductionist understanding of tax havens and the offshore. This process of pseudo deterritorialization has allowed for the invisibilizing of activities that do actually take place onshore; the agents involved in creating and recreating spaces with every new activity and transaction “offshore” are located in a physical geography. But they have also created a new territory, even if just for the exercise of these powers in order to control and discipline activities and people deemed to also be within that territory and with effects on other territories and actors. Law created the space in the first place and, in some form,

⁷⁵ Palan, *supra* note 67 at 632 [citations omitted]. See also R Palan, “Symbiotic Sovereignities: The Untold Story of the British Overseas Territories” in R Adler-Nissen & UP Gad, eds, *European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories* (London: Routledge, 2013) 102 at 104.

⁷⁶ For further details, see S Picciotto, “Offshore: The State as Legal Fiction” in Jason P Abbott & Mark P Hampton, eds, *Offshore Finance Centres and Tax Havens: The Rise of Global Capital* (London: Palgrave Macmillan, 1999) 43 at 54–55.

⁷⁷ For more details, see Ogle, *supra* note 62 at 1439.

continues to determine the acts that take place in this yet unfamiliar and unknowable offshore space.

CONCLUSION

The issues addressed in this article reflect a broader concern about how (post-)modern times supposedly violate the state-territory-unit order that has been deemed to be how the legal system, and the world in general, works. It is that same concern that exercised Karl Marx and Frederick Engels⁷⁸ and that echoes through much of contemporary scholarship: “[E]verything solid seems ... to be melting into thin air, because of globalisation.”⁷⁹ This implicit legal geography framing creates the implication that tax transactions or economic and social relations have floated free from the state, from its jurisdiction, and from its sovereignty. I find this to be an unsatisfactory explanation. The framework proposed here seeks, in some ways, to territorialize these — it seeks to find the places and spaces that have been reconstituted. This could be understood as a project of emphasizing the reterritorialization of these issues and, for the purposes of this article, of competence over tax (designing tax law, administration of tax collection, and so on), company law, shipping registration (flags of convenience mimic the behaviour of tax havens), and the many other activities that are understood as existing in the offshore or in tax havens.

The implicit geography of international law, as it currently stands, cannot easily make sense of the realities of international tax practices — the practices and processes associated with tax havens, the offshore, and secrecy jurisdictions. By splintering or disaggregating sovereignty and rethinking the concept of territory, these operations and transactions — these tax havens or separate accounting books — do not “float free” or stand at odds with the orthodox understanding of territorial sovereignty but, rather, fit within a re-thought spatial framework of international law. Offshore spaces can be made visible and reterritorialized, and I have demonstrated how in this article. The strength of this approach lies in its ability to be applied to other examples. It can be applied to better understand cities and infrastructure spaces — both currently invisible to the gaze of international law but key to understanding tax practices as well as other issues. The offshore can be “joined by a plethora of export processing zones (EPZs), the Chinese special economic zones and the free zones in the USA, over 800 in total, providing

⁷⁸ Karl Marx & Frederick Engels, *Manifesto of the Communist Party* (Moscow: Progress Publishers, 1848; reprinted 1969, 1987, 2000, 2010) at 16.

⁷⁹ J Der Derian, MW Doyle & JL Snyder, “How Should Sovereignty Be Defended?” in Bickerton, Cunliffe & Gourevitch, *supra* note 34, 187 at 197.

employment directly to over two and a half million workers worldwide.”⁸⁰ These EPZs are structured like enclaves with different actors and applicable laws “within *detached* area[s].”⁸¹ There are the many “development” projects “devised by dominant actors such as metropolitan states, multilateral institutions, and political and economic elites to order the world,” for which we lack the relevant tools to understand the corresponding legal spaces.⁸²

To conclude, tax havens and the offshore — and their associated processes and activities and the legal realities creating them — are made more visible by exposing the implicit geography of international law that creates a blind spot in how we spatially conceive of these practices. By rethinking the spaces that are relevant for international law, desynchronizing territories and the exercise of sovereignty, and exposing the pseudo nature of deterritorialization, we can adopt a fresh approach by using international tax practices to understand the modern practices of sovereignty and their relationship to territory.

⁸⁰ Abbott & Hampton, *supra* note 76 at 18.

⁸¹ Helena Johansson, “The Economics of Export Processing Zones Revisited” (1994) 12 *Development Policy Rev* 387 at 389 [emphasis added].

⁸² Philip McMichael, *Development and Social Change: A Global Perspective*, 6th ed (Los Angeles: Sage Publications, 2016) at xiv.