Distinct persons; distinct territories

Rethinking the spaces of international organizations

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Distinct Persons; Distinct Territories: Rethinking the Spaces of International Organizations

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Abstract

Implicit spatial assumptions inform the law of international organisations, including the very concept of an international organization. In this paper, I argue that the reproduction of a physicalized and stato-centric notion of territory informs the idea that international organizations are functional entities without territories because 'territory' – as it has been long been conceptualised – has already been apportioned among states. While other disciplines underwent major epistemic change in their conceptualization of space, law retained reified assumptions of its spaces, especially so of territory. As a result, international lawyers have long assumed only states can be territorial actors. Yet with a reconceptualisation of territory, inspired by thinkers such as Lefebvre, we might instead think of the spaces of international organisations as their territories, constituted through their social practices exercising control. Moreover, this territory is distinct from the territories of member states and is not simply the aggregate of member states' territories.

Keywords

international organizations – territories – legal geography – legal personality – social constructivism

1 Introduction

Like any other discipline, international law incorporates a range of ideas, constructs, and preconceptions borrowed from other disciplinary traditions. Some of these borrowings and linkages most will usually be aware of, others less so.

The linkage with geography until recently has perhaps belonged in the latter category. Geography, briefly outlined, is a body of knowledge that makes it possible to give shape to the spaces humans cannot otherwise know – either because they are 'far away' or because they are 'too big' and 'abstract' to experience physically. Every discipline, from economics[1] to public health,[2] has its own at least implicit geography: its own set of assumptions, in other words, about the various spaces existing in the world 'out there' and the various characteristics these spaces have.

The discipline of international law has its implicit geography and spatial assumptions. International law's geography is one that has long been dominated by one particular type of space – that of state space – to the neglect of the spaces produced by institutions other than the state.[3] The discipline continued with a relatively stable cartographic gaze for most of the 20th century. By this I mean that even if the actual spaces of states changed, the categories of spaces international lawyers looked for and recognized as relevant were relatively static. International legal concepts such as jurisdiction and sovereignty are deeply spatialized theoretical categories – in the sense that they are mediated and informed by a highly specific set of spatial assumptions about territory: that it is physical (sometimes referred to as 'geographic', but this term refers to the physical world directly with little understanding of the social mediation of the physical world, i.e., it refers only to the brute fact) and, relatedly, as something stable,[4] contiguous,[5] often projected as two-dimensional,[6] in other words: 'a portion of the surface of the globe.'[7]

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1 Gordon L Clark and others, *The Oxford Handbook of Economic Geography* (OUP Oxford 2003).

2 Trevor JB Dummer, 'Health Geography: Supporting Public Health Policy and Planning' (2008) 178 *Canadian Medical Association Journal* 1177.

3 Here already it should be obvious that in my analysis I deprioritise the state, as on institution in competition with many others. Indeed, it is due to the dominance of the state that the spaces produced by other institutions are unseen.

4 Johan Galtung, 'Non-Territorial Actors: The Invisible Continent – Towards a Typology of International Organizations' [1977] T*he Concept of International Organisation* 3 <https://www.transcend.org>; See also Malcolm Shaw, *International Law* (8 edition, Cambridge University Press 2017) 362–363; and also Sabine Müller-Mall, *Legal Spaces: Towards a Topological Thinking of Law* (Springer 2013) 78.

5 Jordan Branch, 'How Should States Be Shaped? Contiguity, Compactness, and Territorial Rights' (2016) 8 *International Theory* 1.

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.' see Knop 'Statehood' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 95.

7 *Island of Palmas Case* (*Netherlands, USA*) (1928) Volume II Reports of International Arbitral Awards 829 (Permanent Court of Arbitration) 838.

This implicit geography also informs the law of international organizations, including the very concept of an international organization in international law and what distinguishes organizations from states. Indeed, the idea that the proliferation in international organizations somehow represents a shift from a territoriality model, centered around the concept of *state* territory, to a functionality model, signaling the absence of territory, shows how ingrained the implicit geography of international law is to our theorizing of international organizations. In connection with this, I claim in this paper that it is the reproduction of a highly physicalized notion of territory that informs the idea that international organizations are functional entities because 'territory' – as it has been long been conceptualised – has already been apportioned among states.[8] It is instead understood as a '*fact* that organizations are designed and defined on the basis of function rather than territory.'[9] This is true only because it appears that there is no territorial reality available to international organizations.

As such in this paper I suggest there is a path not taken in our understanding of international organizations. Indeed, it was a path international lawyers were precluded entirely from taking. The roadblock was and continues to be an epistemic one: the spatiality of international law, by and large, operates on the basis of an outdated spatial paradigm. For while other disciplines of social science and humanities 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 territory. International lawyers have long assumed only states can be territorial actors in any meaningful sense.

Yet, emerging in the 1970s as a result of the work of Lefebvre and others,[10] territory has come to be understood in other disciplines as *socially produced*

8 One example of this thinking of territory as equating the physical world: in Khan's discussion of 'Spaces Beyond State Territory', a rubric which he constructs as comprising only the High Sea, the Antarctic, and the 'Outer-Space, including the moon and other celestial bodies'. The rest of the globe in this presentation is understood to have been '(re-) distributed … without … leaving any blank spots of stateless domain on the world map.' Daniel-Erasmus Khan, 'Territory and Boundaries', *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 247. Thus, global space is conceived of as a single layer, flattened into the physical world.

9 Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007) 11. (my emphasis).

10 For further discussion see Müller-Mall (n 4) 71. Henri Lefebvre, *The Production of Space* (Donald Nicholson-Smith tr, 1 edition, Wiley-Blackwell 1991), first published in French in 1974; Edward W Soja, 'The Political Organization of Space' [1971] Association of American Geographers, Common on College Geography, Washington D.C. 20036; Edward W Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (Verso 2010).

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.'[11] Social space, of which territory is understood here as a particular category constituted by the exercise of control and demarcation,[12] thus cannot be reduced or equated solely with the physical world. Territory is not a thing. Territory is not physical. Territory is not a container. Instead, territory is a space that is constantly produced and reproduced by social practices.

While it might therefore be expected that legal texts published, and legal theories, legal concepts, and accounts of international law produced before and during the 1970s primarily treat territory as an object, international law as a discipline and practice did not thereafter fundamentally alter its 'spatial awareness'. The discipline continues by and large to reproduce the same understanding of territory.

Retracing that path without the roadblock offers an opportunity to reconsider the territories of international organizations and how these territories relate to the territories of states. Applying Lefebvre's insights and from constructivism generally, I explore this alternative conception of territory and what it means for the law of international organizations. As a result, territory in this paper is 'understood not as a fixed container … but rather as a dynamic and constitutive dimension and space of struggle, one that is currently being reconfigured'.[13] This approach calls for a fundamental reconsideration of the spaces of international organizations.

In the first section, I consider the path-dependent development of international law's account of international organizations, including the resort to functionalism in the law of international organizations. In the second part, I outline in more detail the insights offered by spatial theorists and the alternative conception of territory that might allow the application of this term to the spaces of international organizations in addition to states. I identify the social practices constituting territory by international organizations exercising control through their activities. In the third section, I make a point of clarification regarding the analytical conflation of functions and spaces that have taken place in functionalist accounts of the distribution of powers and legal competences. In the fourth section I apply the (rethought) conceptualisation to two examples. The first is the spatial practice of the EU – a more 'acceptable' example perhaps given it is often recognized as a *sui generis* territorial

11 ibid 73.

12 Christian Fuchs, 'Henri Lefebvre's Theory of the Production of Space and the Critical Theory of Communication' (2019) 29 Communication Theory 129, 135–136.

13 Henri Lefebvre, *State, Space, World: Selected Essays* (Neil Brenner and Stuart Elden eds, Nachdr, Univ of Minnesota Press 2010) 35.

actor – and then to the spatial redistribution of 'data' as a competence. These two examples demonstrate how my argument applies from the *perspective* of the *actor* and of the *function*. In the final section, I argue the separateness of the legal personality and will of international organizations, can be equally applied to understanding the separateness of the relevant territories. In other words, the territory of an international organization is constituted as distinct from the territories of its member states and is not simply the aggregate of member states' territories.

Regardless of how widely one defines the field of the law of international organization or even the concept of an international organization,[14] this paper speaks to an issue of fundamental concern, which is how international organizations, the exercise of their power, and their relations to states and other institutions are spatially imagined. Given the concept of territory is integral to the law of statehood, the concept of territory should, it is submitted in the following pages, be equally as relevant to the law of international organizations.

2 The Traditional Position: International Organizations as Functional not Territorial Entities

It is, I realise, no small claim to say international organizations have a territory given it is generally agreed amongst scholars that international organizations neither exercise powers over territory nor indeed have territories. In this section, I first corroborate the general understanding and discuss a fundament problem with this position that international organizations unequivocally do not have territory, before demonstrating that international organization scholars reproduce the physicalised and stato-centric concept of territory that belongs to a pre-1970s spatial paradigm, and then arguing that this spatial imaginary may have actually contributed to the production of the functionalist theory of international organizations.

A brief overview of the general agreement that international organizations do not have territory includes the declaration by Schermers and Blokker that 'states, even failed states, have something that international organizations do not have: a territory.'[15] Gazzini relates that international organizations 'do not exercise in a permanent manner governmental powers over a given population

14 Lorenzo Gasbarri, *The Concept of an International Organization in International Law* (Oxford University Press 2021).

15 Henry G Schermers and Niels Blokker, *International Institutional Law: Unity Within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 22.

and territory'[16] and Menon observes that '[i]nternational organizations do not have a territory of their own.'[17] In a similar vein, and laying out the relationship between international organizations and state territory, Jura notes that:

> intergovernmental international organizations do not have their own territory. Therefore, they carry out the activity for the achievements of scopes for which they were incorporated on the territory of member states, to the extent that such states acknowledged in their juridical order the opportunity corresponding to a legal individual of internal law.[18]

And so it continues in this rather unequivocal manner. There are of course a few scholars who are less convinced and leave room for doubt. This includes Brölmann who suggests that it is only 'most organisations [that] do not have territory'.[19]

In its work on treaties concluded between states and international organizations or between two or more international organizations, the ILC adopted the 'brook no exception' approach to international organizations having territory. This appeared in their assessment of whether there could be a parallel provision concerning the territorial scope of treaties between states and international organizations and in relation to Article 62 and its exceptions concerning treaties establishing boundaries. In its Article 29 commentary, the ILC notes that:

> Despite the somewhat loose references which are occasionally made to the "territory" of an international organization, we cannot speak in this case of "territory" in the strict sense of the word.[20]

These loose references include the Constitution of the UPU which speaks of its 'postal territory' in Article 1, to the territory of the European Communities, and

16 Gazzini in Klabbers and Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Elgar 2014) 43.

17 PR Menon, 'The Legal Personality of International Organizations' (1992) 4 *Sri Lankan Journal of International Law* 21, 88.

18 C Jura, 'Legal Personality of Inter-Governmental International Organizations' (2013) 8 EIRP Proceedings, European Integration – Realities and Perspectives 8, 10.

19 Brölmann (above, note 9) 81.

20 United Nations, 'Report of the Commission to the General Assembly on the Work of the Thirty-Fourth Session' (1982) Volume II Yearbook of the International Law Commission 40.

the territories of customs unions. The Commission later notes in its Article 62 commentary that:

> An important preliminary remark is that international organizations do not have "territory" in the proper sense; it is simply analogical and incorrect to say that the Universal Postal Union set up a "postal territory" or that a particular customs union had a "customs territory". Since an international organization has no territory, it has no "boundaries" in the traditional meaning of the word and cannot therefore "establish a boundary" for itself.[21]

There is one main problem with accounts that brook no argument: the clear-cut decree that international organizations do not have territories is irreconcilable with instances where international organizations have exercised something akin to territorial control over a portion of the earth. What I have in mind here is 'international territorial administration'.[22] To cope with this blatant incongruity, international law resorts to the category of *sui generis*.[23] For example: 'it must be remembered throughout that the situation of Kosovo under interim administration by UNMIK is *sui generis*.'[24] The same was said of Namibia and East Timor when the UN acted as administering authority[25] '*in place of* a State'.[26]

Even in accounts that suggest only that *most* organizations do not have territory, and thus implicitly some must have territory, that territory is not clearly outlined, accounted for, nor theorised. These accounts fail to engage head on with the literature which is explicit in rejecting this view and they also do not

21 ibid 61.

22 Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2010) 15; James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press 2012) 206.

23 This *sui generis* category is always an easy fall back when a given situation transcends the accepted rules and is perhaps used too liberally, allowing international lawyers to avoid examining whether their background assumptions about the unexceptional continue to hold true.

24 'Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999' (United Nations 2006) UN Doc. CCPR/C/UNK/1 28 para 124.

25 Stahn Carsten, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis' (2001) 5 M*ax Planck Yearbook of United Nations Law* 105, 121.

26 Eric de Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Brill 2009) 101.

offer a theory of the territory of international organizations, especially how these territories relate to state territory, how their territory is conceptualised vis-a-vis traditional international law conceptions of (state-)territory, and the implications, including for the law of treaties, of international organizations having their own territory. Moreover, the 'territory' in question is usually only a territory that would otherwise be a state's i.e., administering authority '*in place of* a State'[27] which tells us nothing about the space of the organization otherwise.

2.1 *The Physical Stato-centric Conception of Territory and the Resort to Functionalism*

What then is '"territory" in the proper sense' and '"territory" in the strict sense of the word' that the ILC has in mind when it employs the term in this way. This is nowhere to be found in the ILC's reports, making it impossible to say exactly. The only recourse is to reconstruct their understanding from the work of scholars of international law and international organizations who presumably share the same background assumptions about 'territory proper'.

There are two important things to note from the usual discourse about 'territory proper' and these are that the concept is generally physical or reified and it is also stato-centric. The most common usages of the concept of 'territory' are to represent the material reality of physical geography (i.e., an object). That this is the intended meaning must be deduced from the discourse, how territory is described and then how it is applied. 'Territory' in international law refers to a particular parcel or portion of land, water ('territorial sea'), etc. that is capable of being owned, acquired, transferred, possessed, ceded, occupied and so on.[28] What defines this way of thinking about territory is the tendency to construct the referent behind the concept of territory as an *inanimate entity* to which *an action can be directed*: e.g. territory as an object of violation, an object of acquisition, an object of contestation and so forth.

Typical illustrations of this way of using the concept include depicting territory as 'tangible',[29] 'material',[30] a 'physical base',[31] or a 'physical foundation',[32]

27 ibid.

28 It is remarkable just how similar the discourse of modes of acquisition of territory, etc are to the modes of acquiring property in Roman law, where property law is *the law of things*. See eg: Nicholas, *An Introduction to Roman Law* (Clarendon 1962) 115–116.

29 Rebecca Wallace, *International Law* (Sweet & Maxwell 1986) 81.(above, n 69) 81.

30 Jean Gottmann, 'The Evolution of the Concept of Territory' (1975) 14 Social Science Information 29, 29.

31 Crawford (above, n 22) 204.

32 Manfred Lachs, 'The Development and General Trends of International Law in Our Time', *Collected Courses of the Hague Academy of International Law*, vol 169 (Martinus Nijhoff Publishers 1984) 36.

as well as the idea of territory as essentially equivalent with various features of physical geography, such as land or maritime waters, a rock, a seabed, soil, etc. Statements such as the following: 'territory consist[s] of land or waters',[33] '[i]nside a state's territory, naturally, are its internal waters: its rivers, lakes and canals',[34] or '[f]or the purposes of this Convention the territory of a State shall be deemed to ***be*** the land areas and territorial waters,'[35] capture this approach well.

In relation to international organizations – for scholars addressing these organizations do not noticeably differ in their concept of territory to 'generalists'[36] – Summers suggests they 'lack the national territorial base enjoyed by states.'[37] A base here has connotations of something that acts as a foundational structure upon which the state is propped upon. It is also 'national' – a concept generally associated with states. According to Bílková 'what makes States different from other entities operating at the international scene, including international organizations, armed opposition groups or NGOs, is the possession of and control over a certain portion of the Earth's surface'.[38] Here too there is a reification of territory. International organizations may only be 'in' or 'on' these territories when states give their permission, prepositions that communicate a physical relationship to the space in question. 'Territory' is something 'accessed'[39] not practiced.

Each of the accounts given above of territory say something about the essentials that are assumed about that concept: territory is an object. It is an object that is physical and reified; it is something 'over' which a state exercises power as opposed to *in relation to which* states (alone) exercise power and it is a base or something that can be *possessed* as a state's *own*. There is often a property-like legal relationship assumed, which presupposes title to an *a priori* thing. These examples and the underlying assumptions of territory they display can be clearly identified as part of the pre-1970s spatial paradigm where space generally was reified.

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33 Hersch Lauterpacht, *International Law, a Treatise By L. Oppenheim, Volume 1. Peace.* (8th Edition, Longmans, Green & Co 1955) para 171.

34 Jan Klabbers, *International Law 2nd Edition* (2 edition, Cambridge University Press 2017) 256.

35 Article 1, ICAO Convention (n 204). (emphasis added).

36 Indeed, territory is usually a concept belonging to general international law.

37 J Summers, 'Jurisdiction and International Territorial Administration', *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 530.

38 Bílková in Kuijer and Werner (eds), *Netherlands Yearbook of International Law 2016 – The Changing Nature of Territoriality in International Law*, vol 47 (TMC Asser Press, Springer 2017) 21–22.

39 Schermers and Blokker (above, note 15).

Territory continues to be understood in a stato-centric and reified manner in international law. It is conceived of as only one layer deep and apportioned among states like pieces of a jigsaw puzzle, without overlap. This understanding pervades international law discourse. In his Foreword discussing the flawed yet stubborn invocation of functionalism, Klabbers mentions that 'the exercise of multiple authority over the same territory would by no means be impossible, as authority can take place through the parcelling out of functions.'[40] This demonstrates the point neatly. The implications of equating territory with the physical world means states are understood to have the monopoly on territory, such that it could only be imagined that multiple actors must then be acting in the same (state) territory. Yet where they are really acting is over the same physical space. With territory supposedly apportioned among states, it is conceivable that functionalism was the best theory to turn to in order to account for international organizations and their exercise of authority. We see this concerning the Postal Union's and EU's territories. Of them, Schermers and Blokker say these are 'fictitious, functional territor[ies]'[41] – assuming that the territories in question *must* be functional territory as it is impossible that they are the physical territories that states 'possess'. In the pre-1970s paradigm, it is inconceivable that there may be more than one territory constituted by different actors in relation to the same physical facts. How then might the spatiality of international law be viewed if we were to embrace an alternative conception of territory?

3 An Alternative Conception of Territory: Socially Constructed Through the Exercise of Control

Let us now turn to the insights of the post-1970s spatial paradigm. In his work, Lefebvre cautioned against assuming a particular form for or reification of space. He argued:

> Vis-à-vis lived experience, space is neither a mere 'frame', after the fashion of the frame of a painting, nor a form or container of a virtually neutral kind, designed simply to receive whatever is poured into it. Space is social morphology: it is to lived experience what form itself is to the living organism, and just as intimately bound up with function and structure.

40 J Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9, 48–49.

41 Schermers and Blokker (above, note 15) 3, 152.

> To picture space as a 'frame' or container into which nothing can be put unless it is smaller than the recipient, and to imagine that this container has no other purpose than to preserve what has been put in it – this is probably the initial error.[42]

In this with this understanding, I propose understanding territory, not as containing the state nor as a base for the state, but as something produced by the exercise of power. Lefebvre also rejected the reification of space in the following terms: '[i]s this [state] space an abstract one? Yes, but it is also 'real' in the sense in which concrete abstractions such as commodities and money are real. ls it then concrete? Yes, though not in the sense that an object or product is concrete.'[43] Here, territory is understood as concrete to the extent that it is a sustained institutional fact and produces real world effects. Thus, territory manifests and becomes real through the exercise of power.

If we take seriously the insight that space is 'something we produce by way of our social lives,'[44] it allows us to start identifying which social practices constitute territory and we can understand territory has something that must be constantly produced and reproduced through social practice. Geographers have already identified what these social practices are: the 'exercise of power through control or influence over a bounded space [territory].'[45] The practice of creating territory is realized by the exercise of control. *The law*, especially important for our purposes, is concerned with who has *the right* to exercise control. Poulantzas, who grappled early on with this idea, agrees that 'territory has nothing to do with the natural features of the land'[46] also outlines these social practices. According to him 'State[s] materialise this spatial matrix in its various apparatuses (army, school, centralized bureaucracy, prison system), patterning in turn the subjects over whom is exercises power.'[47] Territories,

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42 H Lefebvre, *The Production of Space* (Donald Nicholson-Smith tr, Wiley-Blackwell 1991) 94.

43 ibid 26–27.

44 Müller-Mall (above, note 4) 73.

45 McCarthy in Bevir, *Encyclopedia of Governance* (SAGE 2007).

46 N Poulantzas, *State, Power, Socialism* (Verso 2001) 103–104.

47 ibid 104. Poulantzas also offers an understanding as to why state territories have crowded our 'gaze' for so long: the making of territory is a process 'of an essentially political character, in that the State tends to monopolise the procedures of the organization of space.' ibid. Thus, it might be possible to say that what we have witnessed in the last 50 years or so in international law is an increasing redistribution of power between states and international organizations, and a removal of the state monopoly– even if the monopoly on space remains ingrained in our spatial imagination. This makes the territories of international organization even more relevant to study and better understand.

then, are created as a result of political processes as well as, according to Delaney 'fundamentally constitutive of the social orders whose features they express.'[48]

Control, and the power to and practice of exercising it, becomes the central 'test' – if you will – of constituting territory. In relation to the relationship between territory and states, this test is a familiar one. Generally, control is an important factor in international law, underpinning much of its legal reasoning: control is used to establish (individual criminal or state) responsibility[49] and to define jurisdiction ('jurisdiction [as] a consequence of the fact of control'[50]). In relation to state territory, control is a well-established element: the 'territory of the state is a part of geographic space which is under the control and sovereignty of the state.'[51] Control (and state interests in retaining that control) is a key component of territory in international law. For example, the need to control airspace is largely why this space became part of state territory (or at the very least became an appurtenance to territory).[52] Control was also the measure by which territory extended into the sea when better technology created access to the sea and its resources.[53]

What may be controversial is my problematising of *who* does *what* controlling. Control, it is understood here, must be exercised by *someone or some institution*; there must be an actor exercising some element of control or ability to influence or discipline a space and what happens within it. The concept of

48 D Delaney, *Territory: A Short Introduction* (Blackwell Publishing 2005) 10.

49 A Orford in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 275.

50 Anne Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2008) 30 *Michigan Journal of International Law* 981, 990.

51 Kuijer and Werner (n 38) 33.

52 International lawyers are deeply inconsistent as to whether airspace actually *is* territory or whether it is an appurtenance to territory. Where territory is understood as flat and horizontal, parcelled out over land, airspace is often conceived of as an appurtenance (ie, an attachment). Where territory is understood in more than two dimensions, airspace is part of the concept. This is not always consistent with particular scholars either. For example, according to Crawford '[s]tate territory and its appurtenances (airspace and territorial sea), together with the government and population within its boundaries, constitute the physical and social base for the state.' Crawford (n 22) 204. Shaw's concept of territory sometimes views land and airspace (and water) equally: '[i]t clearly includes land areas, subterranean areas, waters, rivers, lakes, the airspace above the land etc. and the territorial sea' MN Shaw, 'Territory in International Law' (1982) 13 Netherlands Yearbook of International Law 61, 66. Although in a different later text Shaw states 'the territorial sea appertains to the territorial sovereignty of the coastal state and thus belongs to it automatically' Shaw, *International Law* (n 4) 422.

53 J Gottmann, 'The Evolution of the Concept of Territory' (1975) 14 *Social Science Information* 29, 29.

territory present in international law understands only the state to be capable of exercising control over territory. This is a normative assumption. Rather than understanding territory as 'comprehensible only through its relation to the state and processes of statecraft',[54] I propose understanding territory in relation to non-state institutions. In adopting the test of control, when any actors exercise control over space territorially, it might be thought of as having a territory.

Of course, we know that states no longer enjoy exclusive competence within their territories.[55] But what takes place in the background of this choice of words is a flattening of the concepts of territory and physical geography *which also assumes* that in relation to any one particular piece of the physical geography there is one actor (the state) who exclusively can exercise all competences, rights, powers, etc. to that space. We know this to no longer be reflective of the distribution of the sovereignty bundle between state and non-state actors. Yet there continues to be the assumption that there is one territory in relation to that physical geography, and other actors exercise their competences…how? functionally? What of their spaces? This account is entirely missing. Instead, we might re-interpret the account as follows: actors constitute their own territories through the exercise of power. Whereas exclusivity has erroneously been assumed to be total control over all activities and peoples in that particular physical geography, it is instead *rights* that may be exclusive i.e., perhaps only one actor may exercise the right to exclude foreign nationals or the right to exploit natural resources. Exclusivity then, if we think about it, is about the nature of legal rights, and not a comprehensive right to the space as such. Thus, states exercise sovereign powers – which they may hold exclusively – in relation to their territory, and other actors exercise 'sovereign' powers – which they too may do so exclusively – in relation to their territory, and this may overlap the same physical geography.

From a social constructivist perspective, the question is not where did this social construction come from normatively, but: objectively, does this social construction appear to exist (as exhibited by the practices of the respective social actors) and is it experienced as real? Are states no longer freely able to control everything in relation to the physical geography they identify as their territory? Do other actors have the ability to discipline activities over that same

54 S Sassen, 'When Territory Deborders Territoriality' (2013) 1 Territory, Politics, Governance 21, 27.

55 Christian Tomuschat: 'Traditionally, international law rested on the principle of territoriality. Every State enjoyed exclusive competence for developments within its territory.' (Obligations for States, Volumer 241 *Recueil des cours,* 1993, at 210.

physical geography? If the answers are 'yes', that other actors do influence and discipline activities in a spatial matrix, then that is enough; for social constructivism, this is where the inquiry stops. The validity of a social fact lies in its existence. It does not require normative justification.

Thus, territory becomes understood as a space produced by activities, processes and relationships. Territory is not an object (natural or otherwise) belonging to the 'old' paradigm, but a space created by social processes. Those social processes may comprise practices to influence those seeking to access the space, including the repelling of migrants by 'moving' borders[56] as well as strategies to discourage movement in the first place (i.e. policies aimed at 'helping refugees as close to the source of the problem as possible').[57] It may also comprise placing restrictions on people and activities such as the exclusion of refugees from jobs and social life, disciplining 'sound' economic policies, or determining the licensing and exploitation of minerals from the Area. In short, there are many practices that may contribute to the constitution of a territory by non-state actors.

4 Analytical Clarity: Separating Functions and Territories

One of the key issues with contemporary discourse concerning functionalism and international organizations is that at a fundamental level there is a lack of analytical clarity; actors' spaces and actors' functions are conflated. Take for example, the following articulation of the difference between functionality and territoriality that would be familiar to most scholars of international law and especially the law of international organizations: 'Functionality (competence with regard to a particular function – varying among individual organisations – without *a priori* territorial limitation) and territoriality (competence with regard to all functions in a legal order with territorial limitation)'.[58]

Especially because functionalism is problematic for several reasons,[59] I advocate taking a step back from current approaches and implementing a structural analysis of the spatial distribution of functions and the spaces of the respective actors separately, with a view to more clearly identifying the pattern

56 E Arbel, 'Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States' (2013) 25 *International Journal of Refugee Law* 65, 65.

57 'The Best Way to Save Refugee Lives (Britain's Doing It)' *The Spectator* (2016).

58 Brölmann (above, note 9) 26.

59 Klabbers (above, note 40).

of (re)location of functions. If we were to undertake a spatial analysis of competences, we might describe competences as having shifted from one political/legal space to another. On this view of things, what is happening could be understood as a fundamental shift in the spatial organization of competences, whereby the distribution of competences and broad functional areas shift from a default position of concentration and synchronisation in the state (in other words, what is really being said by 'all functions in the legal order' above), where the entire bundle of competences is typically retained by one actor (the state), to a default position of dispersal, where the same competences are spread between different actors. In this understanding, competences are seen as being redistributed from one category of subjects (states) with spaces (state territories) to a wide range of different categories of subjects (international organizations and even private actors as in the case of transnational private networks) each of which has its own spatial logic. The proposed reconceptualization would result in separating the bundle of competences associated with sovereignty into its different constituent parts and tracing the patterns of their redistribution across differently configured legal and political spaces.

Indeed, the assumption that only states have territories is perhaps what also constitutes a faux binary between functionality and territoriality. The approach suggesting that functional regimes overlay territorial regimes[60] is one gigantic analytical conflation of registers: the focal point of the analysis shifts from a consideration of the spatial organization of one actor (territory of a state) to a consideration of the objective organization of functions. Functionalist accounts assume functions and competences have moved from the realm of territory to nowhere and everywhere. These accounts are spatially imprecise and they are thus because of the outdated spatial paradigm of international law. Sectoral regimes do not overlay territorial regimes. That is to confuse the registers of functions, actors, and spaces. The story that might instead be retold as functions (*functions*) that were once consolidated within one actor's, i.e., the state's (*actor*), territories (*space*), are instead (according to this explanation) being exercised by non-state actors (*actor*) in relation to their own territories (*space*).

60 Gunther Teubner and Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law*, Vol. 25, No. 4, 2004, pp. 999-1046 999, 1008–1009.

5 Applying The Alternative Conception

Having hopefully by this point, swept away some of the common cobwebs in our thinking and established an understanding of territory as socially produced space, I apply this different conception to the spaces of international organizations. The first example that I consider is the EU. The EU is often likened to a supra-state or semi-constitutional order, making it a prime possible example of an international organization having a territory. But the second example I give focuses on a 'function', for want of a better word, that is crucial to the exercise of public (and private) power, long monopolized by states and now increasingly exercised by international organizations: data. This second example traces the exercise of competences as the process of constituting the territories of non-state actors. It is a less 'acceptable' or 'easy' example, it is one of the least tangible competences exercised by state and non-state, and it is not geographically bound in a way that is as familiar to us as state or EU borders, but as a result is also best demonstrates the constitution of new territories through the exercise of that competence.

5.1 *Example A: the EU*

Of all international organizations, the EU is perhaps the most obvious and likely-to-be-accepted international organization with a territory.[61] The EU is sometimes referred to as a *sui generis* territorial entity; a category which this argument also disrupts, equalizing and regularizing in many ways the spaces of states and international organizations.[62] Despite EU space perhaps being more readily accepted as a territory, however, this territory is undertheorized in international law discourse. My investigations suggest that no one has explicitly and convincingly argued EU territory is territory concerning international law's concept of territory. Yet the term territory is sometimes used to discuss the space of the EU. It must be surmised some instances use the term territory not as a legal term but colloquially or informally. This is because, with one potential exception, no international law scholarship in its dealing with territory, include EU territory within the definition of territory for international law purposes.[63] I submit this undertheorizing of EU space as territory arises because,

61 I chose the EU because it is often the example that receives the most attention in textbooks and international law scholars. However, what applies to the EU example applies *mutatis mutandis* to other regional organizations such as ASEAN, AU and OAS.

62 M Shaw, *International Law* (7th ed., Cambridge University Press 2014) 175.

63 The one exception is Shaw. However, the presence of a *sui generis* category only proves the general rule, and Shaw leaves this unresolved.

as conventional and pre-1970s informed international legal theory stands, the EU's legal and political space is not and cannot be territory. The outcome is pragmatic: EU space is thought of like a territory; scholars use the terminology of territory on occasion, but the issue is not addressed systematically.

In the following study of the European Border and Coast Guard Agency (hereafter Frontex or 'the Agency'), I highlight the legal space created by EU law-making and the agency set up to monitor, undertake operations at, and control its borders – functions typically thought to be within the remit of a state. This is a striking indication of EU territory. The EU itself refers to this space as its territory in the Frontex Regulation: 'European Council called for wider efforts in resolving unprecedented migratory flows towards *Union territory* in a comprehensive manner'.[64] A number of remarkable features of this Agency add to the sense of EU territory. First, the Agency's staff and officers are employed by the EU, not member states (Article 58)[65] although the Agency can ask that staff from member states are seconded as national experts (Article 20 (11)). In terms of the governance structure, a Management Board takes all strategic decisions.

Agency functions indicating the sovereignty exercised by the EU can be categorized into two: first, are those that previously would have been undertaken by states and have been 'reterritorialized' into the EU; and the second are those created by the Regulations and are unique to the institution. Such new powers include: undertaking risk analyses; vulnerability assessments of the capacity of member states to deal with threats and challenges at the external borders; mandatory recommendations and assistance; sharing information between member states and Europol; launching rapid border interventions and maintaining a pool of rapid response teams and equipment; training specialists 'who have the skills and expertise required to carry out return-related activities'; training national border guards; managing 'research and innovation activities' for control and surveillance of external borders; cooperating with European Fisheries Agency and European Maritime Safety Agency; and assisting EUROSUR (Article 8). These are not minor functions and powers but core to the operations taking place at Europe's borders.

Remarkably Frontex 'may carry out operations on the territory of non-EU countries neighbouring at least one Member State, in case of migratory pressure at a non-EU country's border.'[66] This means for certain purposes and specified tasks and functions, the territorial framework is flexible and is contingent

64 Regulation (EU) 2016/1624 (September 2016) preamble, para 1. (emphasis added).
65 Unless otherwise stated, all Articles relate to Regulation (EU) 2016/1624 (September 2016).
66 Frontex 'Origin & Tasks'.

on one purpose and time. The EU's territory is not a container or unit, nor always uniform; for certain functions and limited periods of time, its territorial framework expands. The spatiality of the EU is an interesting but underexplored area, especially as a result of agreements with third states. Further study is required to understand how its territorial frameworks operate in practice but regrettably most agreements with third countries are not publicly available. However, what this insight tells us is that EU territory may at times differ from the member state territory that it most often overlaps.

This brief examination highlights the EU has a territory essential to how the organization organises its activities and governs. Frontex's tasks and functions demonstrate just how important it is to understand this issue, given the Frontex Regulation conferred major functions and powers on the organization. The proposed reconceptualization of territory allows us to make better sense of, and scrutinize, the legal arrangements and practices of the EU exercised in reference to its territorial framework.

5.2 *Example B: Data*

The exercise of power and legal rights regarding data is an overlooked function but, while subtle and rarely spoken about,[67] the power to gather and interpret data is a significant element of the 'original' sovereignty bundle currently exercised by international organizations. With a fundamental role in controlling and 'knowing' society, data have always been an important project of power: 'knowledge gives power, more power requires more knowledge, and so on in an increasingly profitable dialectic of information and control.'[68]

Indeed, one of the first practices credited as having empowered states to triumph over their competitor authority systems (city leagues, empire, etc.) are the early censuses centralising the collection and use of data.[69] This is one of the earliest of functions that, along with other 'little things'[70] such as cartography, were assembled together into the territorial logic of the first states.

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67 The main exception to this is Fleur E Johns, 'Data Territories: Changing Architectures of Association in International Law' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2810897 <https://papers.ssrn.com/abstract=2810897> accessed 8 February 2017; Fleur Johns, 'Data Mining as Global Governance' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook on the Law and Regulation of Technology*, vol 1 (Oxford University Press 2017). Johns' work on data territories is a brilliant contribution, but one which, I think, still primarily associates territories with states alone. See also: Johns in Kuijer and Werner (above, note 38).

68 Edward W Said, *Orientalism* (Penguin Books 2003) 44.

69 Jean Gottmann, *The Significance of Territory* (The University Press of Virginia 1973) 59.

70 Nigel Thrift, 'It's the Little Things' in David Atkinson and Klaus Dodds (eds), *Geopolitical Traditions. A Century of Geopolitical Thought* (Routledge 2000) 381–382.

There has been a general turn to data to inform governance and the exercise of control by states, international organisations (and corporations). Although the scope of governing by data through census, using data for economic planning (data on unemployment, recession data, inflation, exports, GDP, etc), about income for tax purposes, about housing for planning purposes, etc has colossally increased since Vauvan's first census, there is a noticeable turn to entrenched and more complex data governing made possible due to information technology developments. Outputs from large datasets are used by public and private sector actors, re-orientating business and political practices towards making best use of big data.

The legal rights and power associated with data are being re-assembled in complex relationships between non-state actors and states, determining policies and responses. This represents an unbundling from the state where formerly the state governed through access to such data; data were centralised. This relocation of collecting, determining, and using data from states to international organisations reflects the general trend of the shift in function from states to international organizations, and also generating anxiety amongst some of the displacement of the state in international law making. The competences in question might include, but are not limited to, data gathering – on, for example, the economy, incomes, population, education system, policing, etc. –; deciding what data to collect, by whom, and how frequently; its analysis, reporting and interpretation; its communication i.e. what story to tell from data; and using data to implement policies, discipline behavior, raise revenue, create laws and norms etc.

One key example of international organisations using data to govern is the attachment of conditions to assistance made by organizations and banks to states. Data influences the IMF's treatment of, and advice to, states. The IMF uses data to categorise some states as 'Fragile States' and this categorisation is informed by data capturing a range of social, economic and political factors, including conflict. Based on these determinations, the IMF and other international organizations and financial institutions make decisions, with an enormous capacity to influence 'development' policy, advice and lending decisions.[71] These categorisations influence IMF expectations regarding the direction of state policies – perhaps advising a policy of austerity, requiring a commitment to lower government spending by states. The IMF sees itself as 'helping to restore macroeconomic stability, build core macroeconomic policy institutions, and catalyze donor support' in countries 'deemed an international

71 Linnet Taylor and Ralph Schroeder, 'Is Bigger Better? The Emergence of Big Data as a Tool for International Development Policy' (2015) 80 *GeoJournal* 503, 506.

priority because of their own great needs and the dangerous implications of persistent fragility for regional and global stability.'[72] According to the IMF, fragile states have 'generally limited capacity, weak governance, and often unstable political and security environment.'[73]

This designation influences more than simply the IMF's activities, but also whether and how other states engage in development and national policies, thought to be within the domain of the state to determine. Thus, the application of conditionality to assistance is a process which subtly changes the balance of power but with serious consequences. Tellingly, the IMF itself has realised the application of conditionality – which includes the rather vague 'prior actions, quantitative performance criteria, structural performance criteria, and structural benchmarks'[74] and 'a well-tailored pace of macroeconomic adjustment;' and 'a strictly prioritised, gradual agenda of key structural reforms'[75] – is unsuitable for 'fragile states'.[76]

What this example demonstrates is the multiple uses of data for governing: determining what criteria inform classification of a fragile state, which states are so classified, collection of social, economic and political data, its interpretation and determining what levels and kinds of adjustment and reform are required. A further striking example is the way data determined and influenced the reaction of the EU and other international organizations to the 2009 Greek economic crisis and the conditions attached to assistance. Notably the EU accused Greece of falsifying economic data,[77] begging the question of how the EU could argue this without first having determined what would be 'correct data'.

From the economic field to humanitarian intervention and the refugee crisis, data are increasingly central to governing. For example, data gathered by the UN in refugee camps determine the management of aid distribution and Johns recently drew attention to UNHRC programmes registering the biometric data of Afghan refugees and their role in allocating humanitarian assistance. During the Haitian cholera outbreak, data from the location of phones was used to extrapolate information about the movement of people and potential

72 'The IMF and Fragile States: 2018 Evaluation Report' (2018) 1.

73 ibid.

74 ibid 19.

75 ibid 20.

76 ibid 39.

77 Barber T, 'Greece condemned for falsifying data' *The Financial Times* (12 January 2010) <https://www.ft.com/content/33b0a48c-ff7e-11de-8f53-00144feabdc0> accessed 12 October 2019.

spread of cholera.[78] Recently, the UN Statistics Division and the World Bank launched a guide to help nations better manage geospatial data, especially in low- and middle-income countries. The 'Integrated Geospatial Information Framework', 'makes concrete recommendations on establishing national geospatial information management processes and putting that information to use.'[79] In the World Bank representative's own words:

> all governments hold a considerable amount of geospatial information, including databases on who has access to education; communities most affected by poverty; areas at risk of disasters; as well as mobile data that can keep more people informed about disease outbreaks and weather patterns …
>
> … The Framework will help countries in building capacity for using geospatial technology to enhance informed government decision-making, facilitate private sector development, take practical actions to achieve a digital transformation, and bridge the geospatial-digital divide.[80]

Lastly, although there are many more examples that could be given, there is the UN 'Global Pulse' Initiative, which attempts to 'harness big data for development and humanitarian action.'[81] The projects are already numerous and include 'Using Big Data To Study Rescue Patterns In The Mediterranean', 'Estimating Socioeconomic Indicators From Mobile Phone Data In Vanuatu', 'Using Mobile Phone Data And Airtime Credit Purchases To Estimate Food Security' and 'Detecting Structures In Satellite Images With A.I. During Humanitarian Emergencies'.[82] These 'Informing Governance With Social Media Mining'[83] projects mean international organizations steer state and non-state responses on everything from protests to preventing terrorism. Numerous actors are actively involved including local Pulse Labs in New York,

78 Taylor and Schroeder (n 71) 510.

79 'UN Launches Guide for Countries to Improve Location-Based Data Management to Better Inform Decision-Making' (*UN News*, 1 August 2018) <https://news.un.org/en/story/2018/08/1016162> accessed 29 July 2019.

80 ibid.

81 https://www.unglobalpulse.org.

82 https://www.unglobalpulse.org/projects. The list goes on and on… 'Using Call Detail Records To Understand Refugee Integration In Turkey', 'Understanding Perceptions Of Migrants And Refugees With Social Media', 'Exploring The Effects Of Extremist Violence On Online Hate Speech', 'An Analysis Tool For Insights Into The SDGs'. These are just a handful of big data projects underway by Global Pulse.

83 https://www.unglobalpulse.org/project/informing-governance-with-social-media-mining/.

Jakarta and Kampala, UN Innovation, UNHCR, and country teams, as well as partnerships with telecom operators, WFP, FAO, corporations like IBM and universities.

By following an assemblage theory approach to understanding the relocation of data competences, we see that both state and no-state actors govern and discipline the activities and people in their spaces. The World Bank, the UN, the FAO, and countless organizations besides use their powers to exert influence and control activity. Importantly for the implication of territory, these organizations do not act through accidental means around the globe. They are not acting at random and moving 'through space like billiard balls.'[84] They follow their own territorial logic. This power doesn't float freely and unsystematically around the globe.

6 Distinct Persons; Distinct Territories

In closing, I turn to unravelling the final element of orthodox international legal thought which interprets the relationship of international organizations to territory as 'carry[ing] out the activity…on the territory of member states'[85] and not as having their own territories in relation to which they are carrying out these activities. In this section I outline how we might understand the territories of international organizations as distinct from the territories of their member states. To do so I turn to already established theory about the separate legal personalities and wills of international organizations. I argue the separateness of the legal personality and will of international organizations to the personalities and wills of its member states, can be equally applied to understanding the separateness of the territory of international organizations. In other words, the territory of an international organization is distinct from the territories of its member states and is not simply the aggregate of member states' territories. As a result, we might understand that international organizations exercise power and control vis-à-vis their 'own'[86] territories.

It is widely accepted that international organizations have *international legal personality* (as well as domestic legal personality) even if debate

84 Robert Sack, *Human Territoriality: Its Theory and History* (Cambridge University Press 2009) 26.

85 C Jura, 'Legal Personality of Inter-Governmental International Organizations' (2013) 8 EIRP Proceedings, European Integration – Realities and Perspectives 8, 10.

86 I use this term loosely to refer not to *own*ership, but to the territory created by a result of an international organization's own activities.

continues about the nature and creation of the personality.[87] This position was clarified and confirmed in DARIO, with Article 2 specifying '"international organization" means an organization…possessing its own international legal personality.'[88] Use of the term 'own' by the ILC, demonstrates international organizations with legal personality have a personality distinct from the states that created them. As a result, an international organization 'is capable of exercising certain rights and being subject to certain duties on its own account.'[89]

There remains debate as to how this legal personality should be understood – whether it is created because member states willed a separate legal personality or whether international legal personality is objective.[90] Regardless of the merits and specificities of this debate (but noting that legal realists and social constructivists would adopt an objective approach), both theories conclude the legal personality of an international organization is separate to, and distinct from, the personality of member states. There is an objective *test* for the legal personality of international organizations.[91] For the purposes of this paper, the most pertinent point is that international organizations have distinct legal personalities from the states that created them or subsequently became members; a new and separate legal entity results from the creation of an organization and this new and separate legal entity will have its own space.

Concerning the *will* of international organizations, while there has also been significant debate about its nature and separateness from the wills of member states,[92] it is now generally accepted an international organization

87 There has been debate surrounding the legal personality of international organizations in legal discourse and whilst the intricacies are not relevant to the scope of this thesis, some of its broader themes are pertinent to the analysis. For further study on these particular debates see: Collins and White, *International Organizations and the Idea of Autonomy* (Routledge 2011); Jura (n 18); Menon (n 17); Ana Sofia Barros and Cedric Ryngaert, 'The Position of Member States in (Autonomous) Institutional Decision-Making' (2014) 11 International Organizations Law Review 53; Philippe Sands, Pierre Klein and DW Bowett, *Bowett's Law of International Institutions* (6th ed, Sweet & Maxwell 2009); Gazzini in Jan Klabbers and Åsa Wallendahl, *Research Handbook on the Law of International Organizations* (2nd ed, Edward Elgar Publishing Limited 2014); CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd Ed., Cambridge University Press 2005).

88 DARIO 2011.

89 Menon (above, n 17) 122.

90 See discussion by Gazzini in Klabbers and Wallendahl (above, n 87) 33–55.

91 Gazzini in ibid 33.

92 Barros and Ryngaert (above, note 87); Jean d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2007) 4 *International Organizations Law Review* 91; White in Jacob Katz Cogan, Ian Hurd and Ian Johnstone, *The Oxford Handbook of International Organizations* (Oxford University Press 2016).

with distinct personality, has a separate will. When the UNGA or UNSC votes, the outcome is the will of the organization, as well as, but distinct from, the will of the states participating in the vote.[93]

If the legal personality and will of organizations are distinct from, and are not an aggregate of, those of its member states, I argue we might understand that the same is true for the space of international organizations. A wholly new space is created by the establishment of a new organization through the exercise of its power over functions and in implementation of its mandate. The spaces of international organizations are separate to, and distinct from, the space of member states; they are not an aggregate of member states' spaces.

Applying the earlier insights as to the constitution of territory through social and institutional practices, the space in relation to which the international organization exercises control and has legal rights, is its territory, where territory is the space constituted as a result of controlling, disciplining and directing people, activities, institutions, processes, policies, etc. An international organization does not 'share' the space of its member states, although it may often overlap the same physical geography.

A further implication of note in relation to the distinctiveness of international organization territory is that the territory may not always map onto the same physical geography as its member states. In relation, for example, to Frontex, it is the EU that extends its territory, i.e., it's sphere of control, and **not** the member state, where the EU concludes agreements with third party states. Frontex 'may carry out operations on the territory of non-EU countries neighbouring at least one Member State, in case of migratory pressure at a non-EU country's border.'[94] In such circumstances, it is the distinct territory of the EU that may change during the course of these operations, and **not** the territory of the member state that neighbours the non-EU state.

Thus, spaces produced are those of international organizations, *separate to member state spaces, given that these spaces are constituted by the acts of a different institution*. By applying the same approach as that adopted for legal personality and will, the territories of international organizations are understood as distinct and separate from its member states and not an aggregate of their

93 As scholars point out, the extent of this will depend on the organizational structure and voting procedure. Majority or unanimous voting and the nature of membership are factors in considering the extent and nature of the will, and it is possible that this will differ between organs of the same international organization. The different composition and voting procedures of the UNSC and UNGA are cases in point. For a full discussion see White in Cogan, Hurd and Johnstone (above, note 92) 562.

94 Frontex 'Origin & Tasks'.

territories. Thus, in short, where international organizations exercise powers and control in relation to their space, it is their *own* territory.

7 Conclusion

What I have argued in this paper, is, as already indicated, no small claim given it is generally agreed by scholars that international organizations lack territories. However, this spatial perspective truly pushes our understanding of international organizations and the law related to them in a new direction – and in one which exposes the exercise of power by these actors. It is however an insight that can never be realised unless or until international law 'updates' its spatial paradigm and shakes off the old associations and their implications for the law of international organizations.

For if norm creation, law making, and governance – through standards, regulations, interpretation of data, decisions about resource allocation, decisions about the best direction for currency, economic policy, macro and micro interests, lending, bank regulation, austerity, pandemics, refugees registration, etc. – are increasingly undertaken by international organizations, the study of these organizations and the territories in relation to which they exercise control is vital. Retaining associations of concepts, such that of territory, and the confused and incapable theory of functionalism, that described and suited a different social and legal reality cannot inform such a study. Instead what we are left with are increasing numbers of *sui generis* situations like international territorial administration by the UN and *sui generis* actors like that EU.[95]

The implications of this reconsideration of the space of international organizations are clear and, in some respects, fairly fundamental in terms of its effect both on the law of international organizations but also of general

95 I too think paradigmatic change is over used cf Klabbers (n 40) 10. But we might think of the liberal usage of *sui generis* this and that as anomalies à la Thomas S Kuhn, *The Structure of Scientific Revolutions* (3rd ed, University of Chicago Press 1996). 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. When the exceptions were discrete and limited, as with the Holy See or Sovereign Order of Malta, or temporally limited, as is the expectation regarding internationally administrated territory, legal theory could continue to operate by adding to the category of *sui generis*. After all 'paradigms are not challenged by discrete anomalies' (Nicolas Guilhot, 'The Kuhning of Reason: Realism, Rationalism, and Political Decision in IR Theory after Thomas Kuhn' (2016) 42 *Review of International Studies* 3, 21.) The anomalies in our theories are less and less discrete.

international law. Often perceived as often 'spaceless' and most certainly 'territory-less', international organizations law is fundamentally altered. As a result of seeing like an international organization,[96] the law of international organizations is transformed in how it accounts for the relations between international organizations and states, the mandate of international organizations, and their exercise of power. The insights can be applied to differently explain the role and exercise of power by international organisations in relation to everything from their activities in relation to warzones and places of humanitarian catastrophes to those disciplining activities in the fields of finance and economics.

International lawyers ended the 20th century by retheorizing the *dramatis personae* of international law, taking account of the plurality of actors involved in the legal system, but without questioning the spatial imaginary of international law and instead continuing to operate with the spatial logic of only one of these categories of actors. State space is only one territorial framework among many of relevance to contemporary international law, and the bundle of competences and powers constituting this type of space remains in a constant process of being reassembled between different actors. This paper offers a new perspective and calls for a fundamental reconsideration of the spaces of international organizations and for a better understanding of the implications of different spatial paradigms (pre and post 1970s) on the law of international organizations.

96 James Ferguson, 'Seeing Like an Oil Company: Space, Security, and Global Capital in Neoliberal Africa' (2005) 107 American Anthropologist 377; James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998).