

## **Panel “The Future of the Past – The Nation State, the Notion of Sovereignty, Territory, Diversity and Pluralism and Map-Making and its Geopolitical Significance”**

### ***The end of territory? The re-emergence of community as a principle of jurisdictional order in the Internet era***

Cedric Ryngaert and Mark Zoetekouw, Utrecht University

Lawyers, and especially international lawyers, have difficulties in conceiving alternatives to territoriality as a principle of global jurisdictional order. This has historical reasons, as, from the 16<sup>th</sup> century onwards, philosophers and rulers came to see the territorially delimited nation-state as the *locus* of governmental power and of internal and external sovereignty.<sup>1</sup> To date, our system of public governance remains characterised by the universally accepted notion of territoriality,<sup>2</sup> which could be defined as ‘the organization and exercise of power over defined blocs of space’,<sup>3</sup> or a government’s control over a physical territory. Jurisdiction has acquired a distinctly territorial flavour,<sup>4</sup> which lawyers – and others interested in regulation – appear to have come to consider as inevitable or natural.

To be sure, abandoning territoriality as the ordering principle may equate to abandoning the concept of sovereign-made law in favour of a fuzzier concept of transnational ‘social norms’<sup>5</sup> that may put traditional lawyers out of work. Thus a good deal of professional strategizing might be at work in the defense of territoriality by lawyers. One may yet forgive them for such petty considerations if one were to follow the observation of the influential international relations scholar Friedrich Kratochwil, that ‘although clear boundaries create

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<sup>1</sup> The classic philosophical treatises of the early modern time indeed define sovereignty as absolute territorial control. See Jenik Radon, ‘Sovereignty: a Political Emotion, not a Concept’ 2004 (40) *Stanford Journal of International Law* 195, 196.

<sup>2</sup> (‘universal recognition of territorial sovereignty as the differentiating principle in the international arena’), Friedrich Kratochwil, ‘Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System’ (1986) 39 *World Politics* 27, 42 (although also noting ‘the erosion of boundaries through the increasing interdependencies of modern economic life’).

<sup>3</sup> Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford University Press 2009), 5.

<sup>4</sup> (‘Territory, jurisdiction and competence were marked by the same borders.’) Larry Catá Backer, ‘Governance Without Government: An Overview’ in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalisation* (Martinus Nijhof Publishers 2012) 87, 91. (State jurisdiction ‘is largely manifest in territorial terms’) Daniel Bethlehem, ‘The End of Geography: The Changing Nature of the International System and the Challenge to International Law’ (2014) 25 *European Journal of International Law* 9, 14.

<sup>5</sup> (Ascendency of ‘social norms’ and ‘spaces’ of governance and regulation. The importance of sociology and anthropology: these disciplinary perspectives ‘question the association of legal-rule creation with a territorially-fixed place’) Peer Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism’ in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalisation* (Martinus Nijhof Publishers 2012) 87, 59-60.

problems by excluding others, they also simplify international life'.<sup>6</sup> Indeed, do territorial boundaries not confer order and prevent chaos; a basic function of law?<sup>7</sup> Territorially conditioned as we are, the question appears to us as merely rhetorical. In spite of the apparent simplicity of territorially delimited spatial blocs as an organising principle and its virtually uncontested status as the primary nexus of jurisdiction, there is nothing natural about territoriality. Instead, as critical legal scholars have observed, territoriality is a social construct rather than a necessity. Like sovereignty, territoriality is not just a 'pure fact' that is external to the law, but is rather *determined by the law*.<sup>8</sup>

Hannah Buxbaum has pointed out that 'territoriality' and 'extraterritoriality' are 'claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.'<sup>9</sup> This speaks to territoriality being used to entrench positions of political power. The political character of territoriality could mean two things. On the one hand, it may refer to the open-ended, and thus malleable, nature of territoriality, which allows various actors to frame their claim in territorial terms, or to invalidate another actor's claim as being extraterritorial.<sup>10</sup> This open-endedness of territoriality is not unique if compared to other categories of international law. As Martti Koskenniemi has argued, in various areas of international law, 'legal management' takes place by 'open-ended standards that leave experts with sufficient latitude to adjust and optimize, to balance and calculate'<sup>11</sup> in light of momentary strategic preferences. On the other, the political character of territoriality may refer to territoriality being a seminal political choice that marginalized other forms of legal ordering which could pose a threat to the privileges of the powers-that-be. This corroborates the acumen of Richard Ford in his consideration that 'territories are made, not found', and that '[a]most anything that is organised territorially could be organised in some other way'.<sup>12</sup>

In this contribution, we examine the historical existence of jurisdictional alternatives to territory, in particular community-based systems, and inquire whether these alternatives have re-emerged in recent times, responding to the peculiar nature of the Internet as a borderless, *prima facie*, non-territorial phenomenon. Section 1 places territoriality and community in their historical context, with particular emphasis on the early modern period. This section maps how the rise of the nation-state with absolute territorial control did not fully

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<sup>6</sup> Kratochwil (n 2) 50.

<sup>7</sup> David S. Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem' (2014) 25 *European Journal of International Law* 25, 28 (submitting that 'by dividing the world into discrete territories, international law seeks to contain global flows within boundaries and to establish rules to regulate the crossing of these boundaries. It is this imposition of order on chaos which is the true function of international law.').

<sup>8</sup> Compare Martti Koskenniemi 'The Politics of International Law' (1990) 14 *European Journal of International Law* 4, 14 (terming the 'pure fact view' of sovereignty the view that sees '[s]overeignty and together with it a set of territorial rights and duties' as 'something external to the law, something the law must recognize but which it cannot control', and contrasting this with the 'legal view' which 'holds sovereignty and everything associated with it as one part of the law's substance, determined and constantly determinable within the legal system, just like any other norms').

<sup>9</sup> Hannah L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57(3) *American Journal of Comparative Law* 631, 635.

<sup>10</sup> See also Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62(1) *American Journal of Comparative Law* 87 (arguing that the distinction between territorial and extraterritorial legislation is often unclear).

<sup>11</sup> Martti Koskenniemi, 'Constitutionalism, Managerialism, and the Ethos of Legal Education' (2007) *European Journal of Legal Studies*, 8.

<sup>12</sup> Richard Thompson Ford, 'Law and Borders' (2012) 64(1) *Alabama Law Review* 123, 127.

sideline the continued existence of functionally differentiated pockets of economic communities constituting themselves as separate and recognised jurisdictional entities. Section 2 ascertains how community-based alternatives to territoriality have returned to the fore in the current Internet era, in which transnational communication and commerce render territorial boundaries increasingly futile, and where individuals identify with self-constituted communities rather than with the state. Such communities, while constituting separate jurisdictional systems that enact and enforce self-made rules for their members, typically exist in the shadow of the state and do not directly challenge the jurisdictional primacy of territoriality. However, as Section 3 shows by means of a concise analysis of a number of technological virtual communities' discourses *vis-à-vis* state regulation, challenges to, and even outright rejections of, territorial regulation in favour of exclusive subjection to corporate or community regulation are increasingly discernable. Section 4 concludes with a plea for a novel conceptualization of jurisdictional spatiality in the Internet era.

The analysis is deliberately interdisciplinary: it draws on such disciplines as international law, legal and economic history, political geography, political philosophy, and regulatory economics, which, from their individual perspectives, have assessed the problems inherent to state-based territorial models of jurisdiction and/or alternative, self-regulatory, community-based challengers. Such a holistic approach is especially called for to grasp as multifaceted phenomena as territory, jurisdiction, and cyberspace, which cannot be properly appreciated from the viewpoint of a single discipline. Eventually, however, these insights gathered from a variety of disciplines inform our understanding of a particularly *legal* category: jurisdiction, or an entity's normative authority over events.

## 1. Territoriality and its alternatives in historical context

Exactly how did the hegemonic struggle over the proper principles of jurisdictional order result in territory carrying the day? The Peace of Westphalia in 1648 may for the first time have arranged the political boundaries of Europe, and thus constituted the foundational moment for the territory-based world order as we know it.<sup>13</sup> The Westphalian concepts of territory did not arrive suddenly, however. It was the culmination of material, political, and epistemological changes that started in the 14<sup>th</sup> century. The feudal structure of medieval Europe,<sup>14</sup> the monetization of economic relations, the rediscovery of the concept of absolute and exclusive private property in Roman law, the use of a single perspective in visual representation,<sup>15</sup> the centralization of government and – not unimportantly – the development

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<sup>13</sup> Bethlehem (n 4) 10.

<sup>14</sup> Radon (n 1) 196. Admittedly, feudalism was essentially a set of reciprocal legal and military obligations among noblemen, with the King at its apex. See F. L. Ganshof, *Feudalism* (Philip Grierson tr, foreword by F.M. Stenton, 1st edn, Longmans Green Publisher 1952). But at the same time, suzerains granted possession of *fiefs* – these are *lands* or *territories* – to their vassals in return for certain duties performed by the latter.

<sup>15</sup> John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations* (1993) 47 International Organization 139, 157-160. (pointing to changes in ecological, demographic and economic conditions, but also in social epistemes – a collectivity's mental equipment to imagine its existence – in particular Brunelleschi's introduction of the single fixed viewpoint in visual representation, i.e., the point of view of a single subjectivity 'against which all other subjectivities were plotted in diminishing size and depth toward the vanishing point'. Ruggie considered territorial sovereignty as the doctrinal counterpart – the spatial organization of politics – of this development (*Ibid.*, 159).

of the science of cartography,<sup>16</sup> have all been considered as contributing to the rise of territoriality, an ordering notion that was, after Westphalia, further cemented by the ascendancy of democracy as a principle of internal political life. As Radon asserted, democracy reaffirmed and legitimized political and physical boundaries, since democratic rights depend on territorially bounded citizenship and popular sovereignty forges a territorial identity.<sup>17</sup> This process has reinforced the self-identification of individuals with territorially defined units – i.e. states. Not only for lawyers, but for any individual, it is difficult to imagine one's existence and identity outside a territorial entity.

This however does not detract from the fact that territoriality is an 'invention',<sup>18</sup> an imagined community,<sup>19</sup> or at least is historically contingent, resulting from the happenstance confluence of a number of circumstances. Other forms of social organization are eminently feasible, and have historically existed, in particular tribal or community-based governance structures founded upon personal or kinship relations.<sup>20</sup> Admittedly, tribes occupied territory, but as John Ruggie has observed, it did not *define* them.<sup>21</sup> Even in medieval times, the ruler was considered to be the king of a people, not of a territory.<sup>22</sup> Until the late Middle Ages, it was common for foreigners not to be subject to the king or the prince's law.<sup>23</sup>

In modern times, while territoriality has replaced community as the ordering notion, community-based jurisdictional structures have been allowed to flourish within a territorial, state-based order, even until the present day. The development of the *lex mercatoria* by trans-'national' business communities since the late Middle Ages may serve as the most prominent example. The development of this non-state law can be traced to the rediscovery of the (long-range) 'interplace' trade,<sup>24</sup> for which local enforcement by Lord, City or social group did not

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<sup>16</sup> Ford, 'Law and Borders' (n 12) 134 ('[J]urisdiction is not a historical fixture of political organization. Instead, the emergence of jurisdiction is the product of the coincidence of two innovations, one technological – the science of cartography – and one normative – the ideology of rational, humanist government.'). See also Richard T. Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 Michigan Law Review 843, 874-875 (stating that the absence of topographical accuracy in medieval maps before the 15<sup>th</sup> century was 'not conducive to the creation of territorial jurisdictions') and 881 (noting that often a written narrative, rather than geodetic, precise maps, described a territory).

<sup>17</sup> Radon (n 1) 199.

<sup>18</sup> Ford, 'Law's Territory (A History of Jurisdiction)' (n 16) 929.

<sup>19</sup> Benedict Anderson, *Imagined Communities* (2nd edn, Verso 2006).

<sup>20</sup> Lewis H. Morgan, *Ancient Society Or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization* (MacMillan & Company 1877); Kratochwil (n 2) 29.

<sup>21</sup> Ruggie (n 15) 149.

<sup>22</sup> Ford, 'Law's Territory (A History of Jurisdiction)' (n 16) 873. And where he held authority over persons or territory, he owed this authority to an ultimate source of authority, the Holy Roman Emperor, who had succeeded to the Roman Emperor representing all peoples of the (known) world. James Gordley, 'Extra-territorial Legal Problems in a World without Nations: What the Medieval Jurists Could Teach Us' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalisation* (Martinus Nijhof Publishers 2012) 87, 40-41.

<sup>23</sup> This approach goes back to Roman times. See J. Plešcia, 'Conflict of Laws in the Roman Empire' (1992) 38 *Labeo* 30, 45-46, noting that aliens – *peregrini* – were not subject to the Roman *jus civile*, but to the *jus gentium* or even their *jus originalis*. The leading medieval commentator Bartolus wrote somewhat similarly in this *Commentaria Corpus iuris civilis*, Venice, 1615 that 'a foreigner cannot be punished for committing [local] crimes until he has lived in the city so long that he ought to know the statutes'.

<sup>24</sup> We use the term 'interplace' instead of 'international', because at the time, the (concept of the) nation-state did not yet exist. The term 'international' may only make sense from our current international law perspective. Paul R. Milgrom, Douglass C. North and Barry R. Weingast, 'The Role of Institutions on the Revival of Trade: The Law Merchant, Private Judges and the Campagne Fairs' (1990) 2 *Economics & Politics* 1, 19. W.P. Blockmans,

suffice.<sup>25</sup> This lack of enforcement potential caused merchants to explore ways to establish who was safe to do business with and who was not. This all began fairly locally, with merchants creating monopolistic controls stipulating who could come to trade in the local town and under what conditions,<sup>26</sup> accompanied with the jurisdictional power of the Merchant Guilds to deny the ability to trade if the merchant did not live up to specified rules and requirements.<sup>27</sup> But as interplace trade increased, Merchant Guilds needed a system that would also work outside the immediate vicinity of their place of origin or trade, so as to reduce the cost and risk of doing business with people from 'outside', whether locally or 'abroad'.<sup>28</sup> The system that was created was an enlargement of the pre-existing Guild system with local Guilds collaborating as larger groups.<sup>29</sup> The Hanseatic League is probably the one most commonly known today.<sup>30</sup> All this led to what is referred to as the emergence of a *lex mercatoria*, or merchant law, a non-state and non-territory-based conglomerate of rules and customs, buttressed by an enforcement system that transcended local sovereign-enforced law. An independent and exclusively mercantile legal system was thus created to resolve the problems inherent in interplace trade between places with differing laws.<sup>31</sup> The Merchant Guilds may have developed a rather unique interplace or transnational law without state intervention, but they were not the only structures to put in place non-state forms of jurisdictional order. In particular, the Craft Guilds, which developed concurrently to the Merchant Guilds to promote and protect largely craft-internal matters, gradually grew into independent regulatory spheres that existed within, but at the same time separate from, the greater structure of the town.<sup>32</sup> They upheld not only work standards and fair distribution of work amongst their members, but also provided care for the poor in general, sick guild members and judged (certain) (mis-)behaviour of their members.<sup>33</sup> Today, the fulfillment of such functions is often considered to be part of the dominion of the nation-state. Precisely

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'Vertretungssysteme im Niederländischen Raum im Spätmittel-alter' (1986) 7 *Der Ost- und Nordseeraum. Hansische Studien* 180, 180.

<sup>25</sup> Avner Greif, Paul Milgrom and Barry R. Weingast, 'Coordination, Commitment, and Enforcement: The Case of the Merchant Guild' (1994) 102 *Journal of Political Economy* 745, 747.

<sup>26</sup> *Ibid.* 757. And Milgrom, North and Weingast (n 24) 20.

<sup>27</sup> Milgrom, North and Weingast (n 24) 3-5. The local Guild would keep track of 'foreign' merchants' reputations and could check a potential trading partner's recorded reputation at the Guild. Local merchants ignoring their Guild's decisions and trading in ways not compliant with rules - or with people on record of not doing so - were at risk of being ostracized, losing their (preferential) status and with it their opportunities to make money in trade. Otto von Gierke, *Community in Historical Perspective* (Antony Black ed, Cambridge University Press 1990) 69. Greif, Milgrom and Weingast (n 25) 761.

<sup>28</sup> Greif, Milgrom and Weingast (n 25) 750. Ogilvie, *Institutions and European Trade: Merchant Guilds, 1000-1800* (Cambridge University Press 2011) 9 and 196-197.

<sup>29</sup> Ogilvie (n 28) 202-205.

<sup>30</sup> But by no means the only ones - there were several associations of merchants that followed patterns similar to the Hanse. For instance the Genoese and Venetian trader associations and perhaps the Maghribi Trader Coalition (some academic disagreement exists on that topic).

<sup>31</sup> See for instance F. W. Maitland, *Select Pleas in Manorial and Other Seignorial Courts* (London, B. Quaritch 1889) and Leon E. Trakman, 'The Twenty-First-Century Law Merchant' (2011) 48 *American Business Law Journal* 775, 775-834. This view is not uncontested, however. See for instance Stephen E. Sachs, 'From St. Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant' (2006) 21 *American University International Law Review* 685, 686-812, who puts forward that although merchant law was indeed sometimes referenced in proceedings, is a very large number of cases, there was no mention of it at all, which indicates that another set of rules was in fact used.

<sup>32</sup> Gierke (n 27) 49 and 52.

<sup>33</sup> *Ibid.* 54 and 55. J.-P. Peeters, 'Het Verschijnsel der Gilden en Hanzen in de Middeleeuwse Steden in de Nederlanden' (1984) 62 *Revue Belge de Philologie et d'Histoire* 271, 274 and Blockmans (n 24).

because Craft and Merchant Guilds fulfilled public functions, it was not unusual for them to integrate the formal governance structures of towns.<sup>34</sup>

The Guilds' eventual decline in importance did not draw the curtain for the jurisdictional powers of transnationally active non-state actors, however. For one thing, religious communities maintained jurisdictional prerogatives over their members, the Roman Catholic Church being a case in point.<sup>35</sup> For another, in the economic domain the Guilds were gradually being replaced by the newly created 'corporations': forms of association, fellowships, or ways to organise groups of men with concurrent goals into a (semblance of) unity,<sup>36</sup> which interacted as separate legal entities with each other and with states. Like their predecessors the Guilds, corporations were responsible for governing many aspects of the lives of those under their care, and they possessed both rights and responsibilities to create rules binding those under their jurisdiction, as well as to enforce those rules in case of breach. Like the Guilds before them, these corporations not only had an inward focus, but they also interacted with other corporations, as well as states, on behalf of the whole body.<sup>37</sup> In the empire-building era, corporations took on additional public governance tasks, having been given a mandate to settle or subdue overseas areas on behalf of states which relied upon their support to succeed in their imperial endeavors.<sup>38</sup> The Dutch and English East India Companies received corporate charters that limited the privileges of the issuing state and bestowed rights on them which are now associated with sovereigns.<sup>39</sup> Due to constraints of distance and control, these and similar companies were to some extent free to create whatever legal order they needed to work in the colonies,<sup>40</sup> and thus to create separate legal spheres.<sup>41</sup> Many parts of America, for instance, were settled by corporations created expressly for that purpose;<sup>42</sup> their formal subjection to the crown in reality was rather variable, partly due to the disparate character and charters of the corporations themselves, and subject to much debate, conflict and political maneuvering.<sup>43</sup> As the corporations were tasked with all manner of public duties like defence, public expenditure, local government, and law enforcement, it is unsurprising that some corporations put forward particularly strong, almost sovereign-like

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<sup>34</sup> Gierke (n 27) 52. Sachs (n 31) 708.

<sup>35</sup> Until this day, many states even continue to deal with the Holy See, the 'government' of the Catholic Church, as if it were a *state* rather than just a non-state actor, entering into treaties with it, and according immunity to it and its representatives. Note that the Holy See had a territorial base until the Italian unification (ending in 1871), and could thus qualify as a state in its own right (the 'Papal States'). See at length Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 *Göttingen Journal of International Law* 829.

<sup>36</sup> Such as for instance Philip J. Stern, '“Bundles of Hyphens”: Corporations as Legal Communities in the Early Modern British Empire' in Lauren Benton and Richard J. Ross (eds), *Legal Pluralism and Empires, 1500-1850* (New York University Press 2013) 21, 25.

<sup>37</sup> Gierke (n 27) 56 and 59. Stern (n 36) 21-23.

<sup>38</sup> Richard J. Ross and Philip J. Stern 'Reconstructing Early Modern Notions of Legal Pluralism' in Lauren Benton and Richard J. Ross (eds), *Legal Pluralism and Empires, 1500-1850* (New York University Press 2013) 109, 112.

<sup>39</sup> See for instance Grotius' statement about the rights of the private trading company VOC to engage in offensive warfare, Martine van Ittersum, *Profit and Principle, Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (Brill 2006).

<sup>40</sup> Ross and Stern (n 38) 109, 113 and 129.

<sup>41</sup> For instance the East India Company claimed as a general principle that 'the Company must always have Preference in India as His Majesty justly hath [in England]...' and that Company Laws and orders had to be considered 'As good Law as Magna Charta is to England', Stern (n 36) 21, 9. And Ross and Stern (n 38) 109, 141.

<sup>42</sup> Amongst others Massachusetts, Maryland, Carolina, New England, Wyoming etc. Stern (n 36) 21, 28, 31 and 33.

<sup>43</sup> Stern (n 36) 21, 29-31, 34 and 37.

claims of jurisdictional autonomy.<sup>44</sup> The Charter of Massachusetts Bay, for instance, gave the relevant corporation the rights to 'planting, ruling, ordering and governing of Newe England in America,' which included 'mynes and Myneralls,' as well as 'all Jurisdiccons, Rights, Royalties, Liberties, Freedomes, Immunities, Priviledges, Franchises, Preheminences, and Comodities whatsoever.'<sup>45</sup> The corporation's rights also included general law enforcement and adjudication, with Massachusetts Courts in fact claiming for themselves all powers that existed in England.<sup>46</sup> Like the fate that befell the Guilds in Europe before them, the jurisdictional autonomy of such corporations did not last. Their power waned as the territorially-bound nation expanded its power and sidelined other, community-based, ordering principles.

This overview illustrates that historically, jurisdiction was, or at least could be, based on communal or personal bonds rather than on a territorial nexus.<sup>47</sup> In the early modern time, this community-based model of jurisdiction developed in parallel to the rise of the modern territorial state, which may even be said to have relied on the former model to entrench its power. Self-regulation by Merchant and Craft Guilds strengthened the economic base of the modern nation-state, and the activities of chartered corporations were instrumental in building empires overseas on behalf of the various colonial powers.

## **2. The re-emergence of community as an alternative to territory in the Internet era**

The trans-'nationally' active Guilds and chartered corporations described in the previous section gradually disappeared in the late 18<sup>th</sup> and 19<sup>th</sup> century.<sup>48</sup> However, their community-based model of jurisdiction has survived as an epistemic alternative to territoriality as the ordering principle. The model has recently staged a scholarly comeback, notably in the work of Paul Schiff Berman, who has advocated a (transnational) community-based jurisdictional model that is decoupled from physical location.<sup>49</sup> Berman argues, quite convincingly, that as a result of migration and increased transnational communicative connections, many people no longer possess a single cultural or territorial identity, but rather belong to multiple,

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<sup>44</sup> Lauren Benton and Richard J. Ross 'Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World' in Lauren Benton and Richard J. Ross (eds), *Legal Pluralism and Empires, 1500-1850* (New York University Press 2013) 1, 1; Stern (n 36) 21, 28 and 30.

<sup>45</sup> Stern (n 36) 21, referencing Charter of Massachusetts Bay (1629) – full text: <[http://avalon.law.yale.edu/17th\\_century/mass03.asp](http://avalon.law.yale.edu/17th_century/mass03.asp)>.

<sup>46</sup> The exact wording: 'power of Parliament, King's bench, Common Pleas, Chancery, High Commission and Star-Chamber, and all other Courts of England' Stern (n 36) 21, 34, referencing Bilder, M.S., 'Salamanders and the Sons of God: The Culture of Appeal in Early New England' in Christopher L. Tomlins and Bruce H. Mann (eds), *The many legalities of Early America* (University of North Carolina Press 2008).

<sup>47</sup> See also Christopher Staker, 'Jurisdiction' in Günther Handl, Malcolm Evans (ed), *International Law* (3rd edn, Oxford University Press 2010) 313, 323, who observed that jurisdiction based on 'the national principle' has 'a longer history than jurisdiction based on the territorial jurisdiction'.

<sup>48</sup> See, e.g., the abolition of the Guilds during the French revolutionary period by the Le Chapelier Law of 14 June 1791, translated in John Hall Stewart, *A documentary survey of the French Revolution* (Macmillan 1951), 165-166.

<sup>49</sup> E.g. Paul Schiff Berman, 'Conflict of Laws, Globalization, and Cosmopolitan Pluralism' (2005) 51 *Wayne Law Review* 2005 1105, 1109. Somewhat similarly Ford refers to 'organic jurisdictions' (Ford, 'Law's Territory (A History of Jurisdiction)' (n 16) 859), as the natural outgrowth of a social, economic, or cultural community before State intervention. It appears, however, that Ford was referring to a group historically controlling *territory*, people tied to the land.

overlapping communities.<sup>50</sup> Jurisdiction should then become a function of which community has the strongest ties with a legal dispute. This community need not be a territorial one; instead it could be based on cultural, economic or technical links. This post-modern, pluralist conception of jurisdiction chimes well with the perception that ‘the world is flat’, meaning that geographically, remote individuals and entities could interact across borders.<sup>51</sup> Put differently, it may be more attuned to novel processes of globalisation that have reduced the importance of notions of time and space, and diminished the importance of territory as an ordering principle.<sup>52</sup> Importantly, a community-based conception of jurisdiction may allow it to move away from the political/governmental towards the technical,<sup>53</sup> in that it acknowledges the power of transnational technology-based networks to set and enforce norms without state mediation. In essence, this is little more than the system of the Guilds *redux*.

In a moderate version of a community-based jurisdictional model, state prescription and adjudication does not disappear, but in transnational disputes, legislators and courts inject non-territorial connecting factors into the jurisdictional analysis. This approach may be particularly appropriate with respect to acts committed in non-territorial cyberspace. Where a territorial model may struggle to bring foreign-based persons harming domestic persons within that forums jurisdiction,<sup>54</sup> a community-based model can more easily consider a remote foreign-based person targeting a domestic person to be part of the same community as the target, and thus falling within jurisdiction of that forum.<sup>55</sup> Such a community-based jurisdiction may, compared to the nation-state, more legitimately and capably assess the damage done to a particular community. Along similar lines, a (passive) personality-based model may bring an anti-competitive practice ‘located’ on an interactive foreign-based website within a State’s jurisdiction to the extent that one of its nationals, as consumers of the website, have been harmed.<sup>56</sup> Such an approach, although less revolutionary than the previous one, is nevertheless a clear departure from the dominant territorial approach to ‘reasonable’ jurisdiction epitomised by Section 403(2) of the US Restatement of Foreign Relations Law (Third), under which the reasonableness of a jurisdictional assertion is dependent, in the first place, on ‘the link of the activity to the territory of the regulating state, i.e., the extent to

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<sup>50</sup> Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia journal of transnational law 485, 515 (noting the disjuncture of place and culture, drawing on anthropological work).

<sup>51</sup> Bethlehem (n 4) 21, citing Thomas Friedman’s, 'The World is Flat'.

<sup>52</sup> *A contrario* Joachim Zekoll, 'Jurisdiction in Cyberspace' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalisation* (Martinus Nijhof Publishers 2012) 341, 341: in the past: geographical space, distance and borders limited human activity – territoriality was workable and legitimate.

<sup>53</sup> Bethlehem (n 4) 22.

<sup>54</sup> Cyberspace may indeed diffuse the effects of harmful activity over many centers, thereby possibly triggering near-universal jurisdiction. Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 Southern California Law Review 1155, 1182.

<sup>55</sup> This is possibly how one should interpret Association Internationale de Droit Pénal, Rio de Janeiro Conference 2014, Draft Resolution 7 ('States should exercise restraint in applying the effect theory in situations in which the effect is not “pushed” by a perpetrator into the State, but “pulled” into it by an individual in that State.').

<sup>56</sup> A. Themelis, 'The Internet, Jurisdiction and EU Competition Law: The Concept of Over-territoriality in Addressing Jurisdictional Implications in the Online World.' (2012) 35 World Competition Law and Economics Review 325, 337 (arguing that the ‘consumer extends the jurisdictional reach by shopping online outside the EU’, and terming this form of jurisdiction ‘over-territoriality’).



which the activity takes place within the *territory*, or has substantial, direct, and foreseeable effect upon or in the *territory*.<sup>57</sup>

In a more extreme version of a community-based jurisdictional order, the State disappears and corporations and communities regulate themselves, and constitute their own jurisdictional order, which may, or may not resemble a state-based order. As Catà Backer has insightfully observed, in this model, interest displaces territory and the market supplants popular sovereignty as the mechanism of jurisdictional legitimation.<sup>58</sup> Geography, once so important for power, loses its grip; jurisdictional power is instead vested in non-territorial, functionally differentiated communities below and beyond the state. The state as a territorially-bounded *civitas* disappears as the referent object, and is replaced by a non-territorial, non-state *societas*, and a universal one at that.<sup>59</sup> Or to cite Catà Backer again, ‘the old foundational notion of territoriality loses coherence as the marker *par excellence* of jurisdiction’ and a ‘new territory’ comes into being, a community of corporations.<sup>60</sup> For better or worse, this community, rather than the State, has jurisdiction over shareholders, suppliers, clients, affected communities, participants and other stakeholders.

This re-emergence of the concept of a community-based, self-regulatory model of jurisdiction is not merely theoretical; It is reflective of the current state of affairs also in the field of cyberspace regulation. Again, as in previous times, merchants and corporations prove to be significant contributors to this phenomenon. eBay, for instance, a leading Internet marketplace corporation, connects sellers and buyers from across the globe - spanning many jurisdictions with their concomitant differences in substantive law. From a regulatory perspective, just like the Guilds in earlier times, eBay provides a mechanism to gather information on the reputations of buyers and sellers. In so doing, it addresses enforcement problems that are difficult to remedy through direct customer-trader relationships or state intervention. Indeed, on the Internet, traders and customers are far removed from each other and have no ‘fair’ or common trading spot to meet and exchange information. A trader could consequently break his contracts quite often while maintaining a good enough reputation in the market as a whole as not to cause him significant losses in terms of the potential number of buyers and suppliers. State enforcement falls short in equal measure, as aggrieved persons do not go to court over the non-delivery of an item of only nominal value, and may be at loss as to which court would have jurisdiction when the trader and the buyer are placed in different states. In the face of territory, distance and enforceability issues render individual and state enforcement practically unfeasible; eBay, like a modern Guild realizing that a trader’s most valuable currency is its good reputation,<sup>61</sup> publishes data on traders’ reputation, thus allowing

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<sup>57</sup> Section 403(2)(a) of the Restatement (emphasis added). Note, however, that the same section in (c) and (d) also refers to ‘the character of the activity to be regulated’ and ‘the existence of justified expectations that might be protected or hurt by the regulation’. These criteria may well accommodate a community-based model.

<sup>58</sup> Backer (n 4) 110 and 114.

<sup>59</sup> The anthropological distinction between a *civitas* and a *societas* harks back to Morgan (n 20) Chapter 1 (‘It may be here premised that all forms of government are reducible to two general plans, using the word plan in its scientific sense. In their bases the two are fundamentally distinct. The first, in the order of time, is founded upon persons, and upon relations purely personal, and may be distinguished as a society (*societas*). ... The second is founded upon territory and upon property, and may be distinguished as a state (*civitas*)’). See also Zumbansen (n 5) 57 (observing that under his ‘transnational law’ approach society becomes ‘world society’, as specific states lose their salience).

<sup>60</sup> Backer (n 4) 122.

<sup>61</sup> This has been subject to a number of field experiments - see for instance: Paul Resnick and others, ‘The Value of Reputation on eBay: A Controlled Experiment’ (2006) 9 *Experimental Economics* 79; and Luís Cabral and Ali

buyers to take an informed decision. A traders' failure to live up to his obligations will have his reputation diminished and with it the opportunity to earn money.<sup>62</sup> If a trader commits regular or serious violations of his obligations, eBay may suspend or ban (close down) their account/shop/identity - a measure closely resembling ostracization as practiced by the Merchant Guilds.

Accordingly, eBay serves as an example of stakeholders (traders and buyers in this case) forming part of a separate non-state actor-created sphere of prescriptive and enforcement jurisdiction that exists alongside jurisdictional structures of the nation-state. While eBay's regulatory and enforcement system points to the existence of a legal-pluralistic world inhabited by various overlapping jurisdictional communities, it bears emphasis that eBay's system does not entirely replace the territorial state-based system. Indeed, eBay acknowledges the powers of states and works alongside them;<sup>63</sup> it merely provides an additional regulatory and enforcement layer within its own functionally differentiated sphere of influence. eBay constitutes a community-based alternative to territoriality, but it does not fully supplant it. The manner in which eBay thus operates is in fact not very different from the status of the *lex mercatoria* in previous times: authority over most matters at the famous St Ives fair, for instance, rested with the King of England and the Abbey of Ramsey, leaving the ordering of only a minor part of conflicts to be judged by the *lex mercatoria*.<sup>64</sup> This goes to show that trade-based systems of jurisdictional order, also in the Internet era, do not really challenge territoriality as the ordering principle: they are not entirely self-referential, but rather operate in the shadow of the state, dependent as they are on state regulatory fiat.

Other examples of self-regulatory virtual communities can also easily be found outside the context of trading. Many of these communities are based around games and are controlled by (large) corporations. EVE-online,<sup>65</sup> for instance, is a game well-known for players cheating and scamming each other, stealing from each other, engaging in 'corporate spying', hostile takeovers and speech and other interactions which might overstep the boundaries of what is legally permissible in 'real-life' in the countries from which they play. A significant part of the player base not only accepts this but revels in it as well. All of this is very much intended and supported by the game's publisher CCP.<sup>66</sup> It cannot be simply stated that all these actions

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Hortaçsu, 'The Dynamics of Seller Reputation: Evidence from eBay' (2010) 58 *The Journal of Industrial Economics* 54. It might be possible to shake a bad reputation by changing your identity (although background checking against that is also present), but it is very hard to recreate a new 'good' reputation. Since buyers will seek out traders with well supported positive reputations, the cost of losing a good reputation is dear. This explains why eBay's threat to ban non-compliant trade from selling is effective.

<sup>62</sup> Of course this does not work flawlessly or in every single instance, see: Bob Rietjens, 'Trust and Reputation on eBay: Towards a Legal Framework for Feedback Intermediaries' (2006) 15 *Information & Communications Technology Law* 55.

<sup>63</sup> Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press 2006), 143-145.

<sup>64</sup> Sachs (n 31) 693 (indicating, however, that the regular courts apparently included merchants' customs in their deliberations too, and questioning the strict division between local law and merchant law) and Ogilvie (n 28) 253-267.

<sup>65</sup> EVE online is a game in a science fiction space settings. It is a sandbox MMOG meaning many players are playing the same game at the same time and the game has no set 'win' conditions. Instead players can choose a goal for themselves and strive to achieve it. This results in much 'content' that is player driven. CCP - the game's publisher - is proud of this so-called emergent gameplay.

<sup>66</sup> The only real limits on behavior that CCP sets are abuse of coding errors to gain 'unfair' advantages and 'griefing' which is described as 'devoting much of [a players] time [with the intent of] making other [players] life miserable, therefore maliciously interfering with the game experience', however, 'non-consensual combat alone

exist only in a completely separated sphere, since in-game assets are not fully disconnected from 'real space'. Due to the (officially sanctioned) possibilities purchasing game-time<sup>67</sup> which is also tradable with other players for in-game cash, it is very possible to attribute real-money value to objects.<sup>68</sup> Like the in-game assets, the persons inside the game are not disconnected from persons in the real world. In fact, intra-game content - relationships, power blocs, disagreements and strife - in EVE has a tendency to spill over into other virtual communities and even real life.<sup>69</sup> Even if one is reluctant to accept online environments such as this one as communities in a general sense, when the threshold to real-life criminal action based on what happens in and around that environment is passed<sup>70</sup>, one will have to accept there is more to it than 'just a game'. The point is further strengthened by the fact the most severe punishment that seems to have come to pass after the event is done through the virtual community, not the real-world authorities.<sup>71</sup>

By launching the EVE online environment, CCP has created a non-territorial community spanning the globe,<sup>72</sup> which operates under a set of rules also created by CCP and covered by extensive published arrangements.<sup>73</sup> Within this environment, one finds rules (or the absence of them) that are (at least partly) at odds with the rules existent in real space in most nation-states from which the game is accessed and played - including that where the CCP's headquarters is based.<sup>74</sup> Obviously, being part of this specific corporation-owned sphere is only voluntary; no one is forced to play the game. Still, a player, once committed, is part of at least two spheres which possess the power to prescribe rules and enforce decisions without their further consent<sup>75</sup> (the company within the game and the country from which the

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is not considered to be grief'. Another hint may be taken from the rap song performed by CCP employees titled 'harden the f\*\*\* up', which is widely accepted as the unofficial game motto.

<sup>67</sup> Game time can be bought in the form of a subscription, but also in the form of 'gametime-cards' worth 1 month of gameplay time. In-game these are represented by/called PLEX (Pilot License Extension) which can be used as a high value trading object.

<sup>68</sup> This would in fact place them within the reach of provisions of criminal law even where theft of data or virtual goods has not been specifically criminalized. See for reference the Dutch caselaw of Habbo Hotel (Rechtbank Amsterdam, 2 april 2009, ECLI:NL:RBAMS:2009:BH9789) and Runescape (Hoge Raad 31 januari 2012 (Runescape) [ECLI:NL:PHR:2012:BO9251](#)) where the court decided that virtual items (in these specific surroundings) were 'goods' that could in fact be stolen.

<sup>69</sup> Andrew Eisen, 'CCP Investigates Eve Online FanFest Panel for Mocking Suicidal Player' (*GamePolitics.com*, 26 March 2012) <<http://www.gamepolitics.com/2012/03/26/ccp-investigates-eve-online-fanfest-panel-mocking-suicidal-player#>> and CCP Navigator, 'The 2012 Alliance Panel at Fanfest' (*Eve Community*, 28 March 2012) <<http://community.eveonline.com/news/dev-blogs/28575>> and Eve Forum, 'Cyber Bullying, a Definition, a Letter to The Mittani and Time for Some of You to Wake Up' (*Eve Online*, 2009) <<https://forums.eveonline.com/default.aspx?g=posts&t=91424>>.

<sup>70</sup> <<http://www.pcmag.com/article2/0,2817,2457800,00.asp>> and <http://www.themittani.com/features/monumental-mistakes-lessons-vandalism> and <<http://arcadesushi.com/ccp-police-investigating-eve-online-monument-vandalism/>>

<sup>71</sup> <https://forums.eveonline.com/default.aspx?g=posts&t=342705>

<sup>72</sup> CCP reports approximately 500.000 active subscriptions in 2013 (although the actual number of people involved might be smaller since it is not uncommon to have multiple accounts) CCP, 'CCP 6 Month Update' (CCP, September 2013) <<http://www.ccpgames.com/media/47392/ccp%206%20month%20update%20september%202013.pdf>>.

<sup>73</sup> Within the game sets of players banding together adhere themselves to communal sets of rules not at the direction of CPP but according to the mores of their own group, creating yet another layer of 'legal' pluralism.

<sup>74</sup> See also: Andrew Jankowich, 'EULAW: The Complex Web of Corporate Rule-Making in Virtual Worlds' (2006) 8 *Tulane Journal of Technology and Intellectual Property* 1, 5.

<sup>75</sup> *Ibid* 7. Note that there is some 'law' and 'law-enforcement' in parts/areas of the game. Moreover, in-game groups can and do set additional rules of conduct beyond the ones that are enforced by the environment. Whether all these qualify as law is very much dependent on the outlook on law one takes. see for instance: Ralf Michaels,

player is playing). Here too corporate enforcement consists mostly of temporary or permanent ostracisation from the community when one commits repeated small infringements, or one large infringement.<sup>76</sup> As exit may not be as realistic an option as it might appear,<sup>77</sup> participants in this functionally differentiated corporate system are fully subject to its rules in a way that is not all that different from a individual being subject to a nation-state's territorial law system, whether or not he or she agrees with its substantive content. For a frequent game participant, community-based game rules might in fact appear as much more 'real' than state rule, although again, as in the case of eBay, one cannot posit that a community-based game rules system has challenged or displaced the territorial regulatory structure.

### 3. Virtual communities' challenge to territoriality

That virtual communities such as eBay and EVE have not challenged the state-based territorial system of jurisdiction, does not mean that they never do. In fact, they have done so, and probably increasingly will do so, as Google's challenge to the EU's data protection and privacy system evidences.<sup>78</sup> Quite understandably, Internet corporations such as Google wish to influence the content of data protection law through heavy legislative lobbying,<sup>79</sup> especially where such a law could have 'extraterritorial' effect on their operations.<sup>80</sup> Googles' stance, however, goes beyond such lobbying. It has had a troubled relationship with EU regulators, which betrays hostility toward the pre-eminence of a state-based jurisdictional system and a plea for the superiority of stateless technology-driven regulation.

Google's troubles with European data protection regulators arguably started in 2012, when Google's announcement of a new privacy policy prompted an investigation by the French data protection authority. This investigation led to an increasingly unfriendly exchange between Google, the French Data Protection Authority (CNIL) and the EU Article 29 Working Party, with EU regulators asking increasingly extensive questions and Google responding by halting compliance and questioning the authority of the CNIL and the Article 29 Working Party.<sup>81</sup> This matter remained unresolved at the time of writing. In 2013-2014,

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'The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 Wayne Law Review 1209.

<sup>76</sup> Reputation is also a powerful aspect within the third sphere of EVE - players amongst each other. The majority of the content considered most valuable amongst players is at least partly dependent upon having a good reputation - at least with the groups one wishes to interact with.

<sup>77</sup> While there is a voluntariness in starting to play such a game, such significant time is spent on identity/persona whilst playing that the prospect of exit from that community is far less viable than one would think at first glance. See Jankowich (n 72) 21 referencing F. Gregory Lastowka and Dan Hunter, 'The Laws of the Virtual Worlds' (2004) 92 California Law Review 3, 54-55.

<sup>78</sup> At the time of writing, EU Data Protection Directive 95/46/EC was still in place, but was about to be replaced by a new EU Data Protection Regulation (draft COM(2012) 11 final 2012/0011 (COD)).

<sup>79</sup> A rather thorough and easily accessible overview of recorded statements and lobbying regarding the new EU Data Protection Regulation can be found here <[https://wiki.laquadrature.net/Lobbies\\_on\\_dataprotection](https://wiki.laquadrature.net/Lobbies_on_dataprotection)> (06-09-2012). This list is gathered and maintained by 'La quadrature du net' which promotes themselves as 'an advocacy group defending the rights and freedoms of citizens on the Internet'.

<sup>80</sup> See on extraterritoriality of EU data privacy law in particular: Dan Jerker B. Svantesson, 'The Extraterritoriality of EU Data Privacy Law - Its Theoretical Justification and Its Practical Effect on U.S. Businesses' (2014) 50 Stanford Journal of International Law 53.

<sup>81</sup> Eric P Fanner, 'French Agency Faults Google for Reply on Policy' *New York Times* (New York, 24 May 2012) B2 and Simon Davies, 'Google declares open war on Europe's privacy rights' (*The Privacy Surgeon*, 20 February 2013) <<http://www.privacysurgeon.org/blog/incision/google-declares-open-war-on-europes-privacy-rights/>>.

Peter Fleischer, Google's Chief Privacy Officer repeatedly and publicly denounced EU data privacy law, directly or indirectly,<sup>82</sup> while the Article 29 Working Party continued to remind Google of its obligation to comply with European and national legal frameworks for data protection.<sup>83</sup> A similar scenario plays out in respect of the verdict of the Court of Justice of the EU (CJEU) in the *Google Spain* case (2014), a leading case regarding the right of an individual to be forgotten on the Internet.<sup>84</sup> At first glance, Google appeared to be making an effort to comply with the verdict,<sup>85</sup> by posting removal request forms and regularly releasing numbers about the amount of requests received and processed.<sup>86</sup> In reality, however, this compliance effort does not seem to be especially sincere.<sup>87</sup> Immediately after the verdict became public, in contacts with the press, Google spokespersons called the ruling 'disappointing',<sup>88</sup> and David Drummond, Google's chief legal officer wrote an article in the *Guardian*<sup>89</sup> and several other European newspapers<sup>90</sup> in which he explicitly stated that Google disagrees with the Court's ruling, and expanded in detail on the reasons why. Google also announced the formation of an 'advisory council of experts',<sup>91</sup> not only to help them deal with particularly difficult removal requests, but also to '[think about] the implications of the

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<sup>82</sup> Amongst which on his own blog (see <<http://peterfleischer.blogspot.nl>>). Fairness dictates to repeat that he states on his blog that everything there is to be considered his, not Google's. Of interest for instance: February 17<sup>th</sup> 2013, April 4<sup>th</sup> 2013, October 22<sup>nd</sup> 2013, October 25<sup>th</sup> 2013, January 8<sup>th</sup> 2014.

<sup>83</sup> Letter from Isabelle Falque-Pierrotin to Mr Larry Page (23 September 2014) <<http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/>>.

<sup>84</sup> C-131/12 (*Google Spain in SL, Google Inc. v. Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez*) - english version to be found here <[http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3A0J.C.\\_2012.165.01.0011.01.ENG at 06-09-2014](http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3A0J.C._2012.165.01.0011.01.ENG at 06-09-2014)>.

<sup>85</sup> Future of Privacy, 'Google Responds Promptly to ECJ Ruling on "Right to be Forgotten"' (*Future of Privacy Forum*, 30 May 2014) <<http://www.futureofprivacy.org/2014/05/30/google-responds-promptly-to-ecj-ruling-on-right-to-be-forgotten/>> and The European data protection authorities, 'Press Release' (*Article 29 Working Party*, 6 June 2014) <[http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29\\_press\\_material/20140606\\_wp29\\_press\\_release\\_google\\_judgment\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20140606_wp29_press_release_google_judgment_en.pdf)>.

<sup>86</sup> For instance: Richard Waters, 'Google's Larry Page Resists Secrecy but Accepts Privacy Concerns' (*Financial Times*, 30 May 2014) <<http://www.ft.com/intl/cms/s/0/f3b127ea-e708-11e3-88be-00144feabdc0.html?siteedition=intl>> and Juliette Garside, 'Right to be Forgotten is a False Right, Spanish Editor Tells Google Panel' (*The Guardian*, 9 September 2014) <<http://hereisthecity.com/en-gb/2014/09/10/right-to-be-forgotten-is-a-false-right-spanish-editor-tells-goog/>>.

<sup>87</sup> See for instance: San Francisco Citizen, 'Google Seeks the "Right Balance" on the Right To Be Forgotten: "Expert Advisory Council" to Hold Meetings in Europe Soon' (*San Francisco Citizen*, 11 July 2014) <<http://sfcitizen.com/blog/2014/07/11/google-seeks-the-right-balance-on-the-right-to-be-forgotten-expert-advisory-council-to-hold-meetings-in-europe-soon/>> and Simon Davies, 'Time for Europe to get Serious about Investigating Google' (*The Privacy Surgeon*, 30 July 2012) <<http://www.privacysurgeon.org/blog/incision/time-for-europe-to-get-serious-about-investigating-google/>>. And Natasha Lomas, 'Google Super Successful At Spinning Europe's Right To Be Forgotten Ruling As Farce' (*TechCrunch*, 4 July 2014) <<http://techcrunch.com/2014/07/04/digital-theatre/>>.

<sup>88</sup> Loek Essers, 'Google must Delete Personal Data upon Request, Court Says' (*Computerworld*, 13 May 2014) <<http://www.computerworld.com/article/2489333/data-privacy/google-must-delete-personal-data-upon-request--court-says.html>> and Deutsche Welle, 'Google to "Take Time" Over Privacy Ruling' (*Deutsche Welle*, 13 May 2014) <<http://dw.de/p/1Byyl>>.

<sup>89</sup> David Drummond, 'We Need to Talk About the Right to be Forgotten' (*The Guardian*, 10 July 2014) <<http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate>>.

<sup>90</sup> The David Drummond, 'Löschen oder nicht Löschen?' (*Frankfurter Allgemeine Zeitung*, 10 July 2014) <<http://www.faz.net/aktuell/wirtschaft/netzwirtschaft/google/google-sucht-nach-balance-fuer-loeschantraege-13038864.html>>, David Drummond, 'Droit à l'Oubli sur Internet : Trouver le Juste Équilibre' (*Le Figaro*, 11 July 2014) <<http://www.lefigaro.fr/vox/monde/2014/07/11/31002-20140711ARTFIG00016-droit-a-l-oubli-sur-internet-trouver-le-juste-equilibre.php>> and David Drummond, 'En Busca del Equilibrio' (*El Pais*, 11 July 2014) <[http://elpais.com/elpais/2014/07/10/opinion/1405011109\\_754073.html](http://elpais.com/elpais/2014/07/10/opinion/1405011109_754073.html)>.

<sup>91</sup> Google Advisory Council, 'Advisory Council Public Meetings' (*Google Advisory Council*) <<https://www.google.com/advisorycouncil/>> date accessed 19 October 2014.

court's decision for European Internet users, news publishers, search engines and others',<sup>92</sup> as well as to 'hold public meetings this autumn across Europe to examine these issues more deeply'.<sup>93</sup> It should be noted that several members of the advisory council have already taken (prior) positions that indicate (varying levels of) disagreement with EU privacy law.<sup>94</sup> Not surprisingly, Google's initiative has failed to impress EU privacy regulators and other privacy proponents.<sup>95</sup> Conspicuously, Google's public commitment to complying with the CJEU's verdict is rather less eloquently published than their disagreement with it. In fact, Google appears to be taking active steps to challenge the legitimacy and limit the effectiveness of the verdict. For one thing, after processing removal requests, Google not only removes the result, but also displays a notice to the searcher that some results may have been omitted due to European data protection law.<sup>96</sup> Comparably, Google actively informs journalists whose information has been removed from Google Europe search results.<sup>97</sup> While laudable in light of transparency principles, these measures also predictably generate 'pushback',<sup>98</sup> by people whose work has been removed from the search results. In a similar vein, while answering the questionnaire about how Google will comply with the CJEU ruling,<sup>99</sup> Google makes it very clear that search results will be omitted only from EU-localized versions of the Google search engine. Queries put to the search engine from a non-European domain will yield the full range of results without omission. The ability to easily route your question through a non-EU version of the search engine, combined with the ample warnings that something was filtered in the EU versions, makes it exceedingly easy to obtain the information that had been filtered. This effectively guts the effect of the removal requests that Google was ordered to implement.

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<sup>92</sup> Emily Wood, 'Through the Google Lens: Search Trends July 18-24' (*Google Official Blog*, 25 July 2014) <[http://googleblog.blogspot.nl/2014\\_07\\_01\\_archive.html](http://googleblog.blogspot.nl/2014_07_01_archive.html)>.

<sup>93</sup> Aoife White, 'Google Trawls Europe to Search for Right-to-Be Forgotten Answers' (*Bloomberg*, 6 September 2014) <<http://www.bloomberg.com/news/2014-09-05/google-trawls-europe-to-search-for-right-to-be-forgotten-answers.html>>.

<sup>94</sup> General: Lauren C. Williams, 'Google Packs 'Right To Be Forgotten' Review Panel With Experts Who Hate The Law' (*Think Progress*, 11 July 2014) <<http://thinkprogress.org/world/2014/07/11/3459207/google-right-to-be-forgotten-committee/>>. A few specifics: Luciano Floridi, 'Google Ethics Adviser: The Law Needs Bold Ideas to Address the Digital Age' (*The Guardian*, 4 June 2014) <<http://www.theguardian.com/technology/2014/jun/04/google-ethics-law-right-to-be-forgotten-luciano-floridi>>; Natasha Lomas, 'Jimmy Wales Blasts Europe's "Right To Be Forgotten" Ruling As A "Terrible Danger"' (*TechCrunch*, 7 June 2014) <<http://techcrunch.com/2014/06/07/wales-on-right-to-be-forgotten>> and Reuters, 'Google Hosts Meetings Across Europe on Privacy Rights' (*Fortune*, 8 September 2014) <<http://fortune.com/2014/09/08/google-hosts-meetings-across-europe-on-privacy-rights/>>; Rich McCormick, 'Google's Top Lawyer Says EU's 'Right to be Forgotten' Restricts Freedom of Expression: David Drummond Says Results are Removed after 'Vague and Subjective Tests'' (*The Verge*, 11 July 2014) <<http://www.theverge.com/2014/7/11/5889133/google-top-lawyer-says-right-to-be-forgotten-restricts-rights>>; Rhiannon Williams, 'Eric Schmidt: ECJ Struck Wrong Balance over Right to be Forgotten' (*The Telegraph*, 15 May 2014) <<http://www.telegraph.co.uk/technology/google/10833257/Eric-Schmidt-ECJ-struck-wrong-balance-over-right-to-be-forgotten.html>>.

<sup>95</sup> *Ibid.*

<sup>96</sup> Lori Sandoval, 'Google Deletes Search Results in Europe, Abides by 'Right to be Forgotten' Rule' (*Tech Times*, 30 June 2014) <<http://www.techtimes.com/articles/9370/20140630/google-deletes-search-results-in-europe-abides-by-right-to-be-forgotten-rule.htm>> and Waters (n 84).

<sup>97</sup> Paul Bernal, 'Is Google Undermining the 'Right to be Forgotten'?' (*CNN*, 7 July 2014) <<http://edition.cnn.com/2014/07/07/opinion/bernal-google-undermining-privacy-ruling/>> and Letter from Peter Fleischer to Ms Falque-Pierrotin (31 July 2014) <<https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/edit?pli=1>>.

<sup>98</sup> James Ball, 'EU's Right to be Forgotten: Guardian Articles Have been Hidden by Google' (*The Guardian*, 2 July 2014) <<http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>> and Robert Peston, 'Why Has Google Cast Me into Oblivion?' (*BBC News*, 2 July 2014) <<http://www.bbc.co.uk/news/business-28130581>>.

<sup>99</sup> Fleischer (n 95).

The fact has obviously not escaped the European regulators as they have, quite specifically, set out that they require measures taken to 'give full effect to the data subjects' rights' in their most recent press release on the matter. Google's solution of localized delisting is explicitly stated to be insufficient.<sup>100</sup>

Google's token compliance with the verdict shows that its acceptance of state or EU jurisdiction is rather minimal; exploiting the borderless nature of the Internet, it can easily avoid genuine subjection to state/EU enforcement jurisdiction. Therefore, one is left to wonder whether, by essentially disagreeing with the EU's stance on data protection, ultimately, Google is not challenging the jurisdictional primacy of nation-states and propounding a non-territorial, liberal system of Internet content regulation.<sup>101</sup>

A similar challenge to territorial, state-based regulation, and a plea for community-based regulation, has been made by Uber, a company that aims to provide taxi or rideshare service through a smartphone app, thereby providing an alternative to traditional government-regulated taxi services. Uber aims to better cater to consumer wishes at a lower price point (per service level) than regular taxi services. Uber's operations model (UberPOP), however, conflicts with regulations of certain nation-states, such as the Netherlands and Germany. In the Netherlands, the authority charged with oversight of transportation services,<sup>102</sup> ILT, has deemed (parts of) Uber's services illegal and has warned that it will enforce the law against illegal taxi services.<sup>103</sup> Uber counters this jurisdictional assertion, with the local Uber CEO commenting that Dutch law in this regard is unclear and 'old-fashioned', and oozing confidence that the law will be adapted to allow for services like Uber's.<sup>104</sup> Meanwhile Uber is continuing its operations in the Netherlands and planning further expansion despite ILT's statements about its illegality. In Germany, the UberPOP service, after having been forbidden in several cities (but continuing to operate nevertheless), was banned nation-wide in 2014, after the Frankfurter Landesgericht declared the service in violation of the German Passenger

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<sup>100</sup> <[http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29\\_press\\_material/20141126\\_wp29\\_press\\_release\\_ecj\\_de-listing.pdf](http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20141126_wp29_press_release_ecj_de-listing.pdf)>

<sup>101</sup> Compare: Bernal (n 95), Davies (n 79) and Andrew Orłowski, 'Slippery Google Greases up, Aims to Squirm out of EU Privacy Grasp' (*The A Register*, 17 June 2014) <[http://www.theregister.co.uk/Print/2014/06/17/for\\_mon\\_how\\_google\\_plans\\_to\\_torpedo\\_your\\_privacy\\_rights](http://www.theregister.co.uk/Print/2014/06/17/for_mon_how_google_plans_to_torpedo_your_privacy_rights)>.

<sup>102</sup> Inspectie Leefomgeving en Transport (ILT).

<sup>103</sup> Inspectie Leefomgeving en Transport, 'Inspectie Waarschuwt Illegale Taxichauffeurs' (*Ministerie van Infrastructuur en Milieu*, 21 August 2014) <[http://www.ilent.nl/actueel/inspectie\\_waarschuwt\\_illegale\\_taxichauffeurs.aspx](http://www.ilent.nl/actueel/inspectie_waarschuwt_illegale_taxichauffeurs.aspx)> So far however the actual level of enforcement deployed is reported to be very low. RTL Nieuws, 'Nog Geen Boetes voor UberPOP' (*RTL Nieuws*, 8 September 2014) <<http://www.rtlnieuws.nl/nieuws/binnenland/nog-geen-boetes-voor-uberpop>>.

<sup>104</sup> NOS, ' "Huidige wetgeving onduidelijk en verouderd" ' (*NOS*, 30 July 2014) <<http://nos.nl/video/680896-huidige-wetgeving-onduidelijk-en-verouderd.html>>. Google makes an appearance again here: Google is Uber's main investor, and its Chief Legal Officer David Drummond has joined Uber's board of directors, Robert Hof, 'As Google Ventures Invests \$250 Million In Uber, What's Next? Driverless Cars On Demand?' (*Forbes*, 23 August 2013) <<http://www.forbes.com/sites/roberthof/2013/08/23/as-google-ventures-invests-250-million-in-uber-whats-next-driverless-cars-on-demand/>>. By voice of Eric Schmidt CEO, Google has also told Europe that, in respect of Uber-offered taxi services, it needs to 'accept and embrace disruption'. See Eric Schmidt, 'Embracing a New Digital Era in Europe' (*European Commission*) <[http://ec.europa.eu/commission\\_2010-2014/kroes/en/content/embracing-new-digital-era-europe-eric-schmidt](http://ec.europa.eu/commission_2010-2014/kroes/en/content/embracing-new-digital-era-europe-eric-schmidt)> accessed 19 October 2014 and Gregory Ferenstein, 'Eric Schmidt to European Union: Accept Uber-style Disruption or Face Unemployment' (*Venture Beat*, 22 September 2014) <<http://venturebeat.com/2014/09/22/eric-schmidt-to-european-union-accept-uber-style-disruption-or-face-unemployment/>>.

Transportation Act.<sup>105</sup> Several German Uber spokespersons nevertheless stated that Uber would continue to operate, while appealing the decision with all possible means.<sup>106</sup>

Whereas Google still upheld a semblance of compliance with the law, the example of Uber shows that Internet corporations may not shy away from openly challenging the state's jurisdiction to make and enforce rules in its territory: despite state laws and courts disallowing particular transportation services, Uber wilfully continues its illegal activities.

Uber is not necessarily an outlier when it comes to challenging territorial jurisdiction. Its run-ins with state law may in fact be a harbinger for more radical cyber-inspired alternatives to territoriality. Notably, in the United States initiatives have been launched to 'exit' the state and to form new, self-regulatory, and mainly technological communities. For example, Tim Draper, a Silicon Valley venture capitalist, has proposed to split up California into six separate states,<sup>107</sup> stating that because of recent social and economic changes, California has become 'nearly ungovernable'.<sup>108</sup> A ballot initiative to accomplish this necessitates a required amount of supporting votes before it will actually go forward, but Draper has pledged millions to achieve this.<sup>109</sup> Draper is not the only proponent of such a move: Balaji Srinivasan, Chief Technological Officer of a Silicon Valley-based clinical genome center, gave a speech in October 2013 about Silicon Valley's ultimate 'exit', in which he sets out two strategies for dealing 'with a company or country in decline'.<sup>110</sup> Exit here means 'leaving to create a new system', i.e., separating Silicon Valley from the 'Paper Belt' – the conglomeration of law-makers and regulators of Washington D.C., and by extension government regulation in general – so as to realize the 'build[ing of] an opt-in society, ultimately outside the US, run by technology,' with nation-state governments unable to intervene'.<sup>111</sup> In the same vein, if not quite as far-reaching, are the thoughts of Larry Page,

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<sup>105</sup> Frankfurt am Main Zivilkammer, 'Beschluss' (*Frankfurt am Main Zivilkammer*, 25 August 2014) <[http://docs.dpaq.de/7814-beschluss-landgericht-ffm\\_uber-taxi-deutschland\\_2014-09-01.pdf](http://docs.dpaq.de/7814-beschluss-landgericht-ffm_uber-taxi-deutschland_2014-09-01.pdf)> and Reuters, 'Uber Taxi App Banned in Germany Following Court Ruling' (*EurActiv*, 3 September 2014) <<http://www.euractiv.com/sections/social-europe-jobs/uber-taxi-app-banned-germany-after-frankfurt-ruling-308187>>.

<sup>106</sup> Stephan Dörner, 'Uber will deutschlandweites Verbot ignorieren' (*The Wall Street Journal*, 2 September 2014) <<http://www.wsj.de/nachrichten/SB10001424052970204275904580128921339732814?mg=reno64-wsjde>> and Kevin Rawlinson, 'Uber Service 'Banned' in Germany by Frankfurt Court' (*BBC News*, 2 September 2014) <<http://www.bbc.com/news/technology-29027803>> and Julana, 'Keep Calm and Uber On' (*Uber*, 2 September 2014) <<http://blog.uber.com/uberonEN>> and Handelsblatt, 'Uber will trotz Gerichtsverbots expandieren' (*Handelsblatt*, 3 September 2014) <<http://www.handelsblatt.com/unternehmen/handel-dienstleister/online-fahrdienst-uber-will-trotz-gerichtsverbots-expandieren/10650584.html>>.

<sup>107</sup> See <<http://www.sixcalifornias.com>>, Philip Bump, 'There's a plan to split California into 6 states. Here's what it might look like.' (*The Fix*, *Washington Post*, 15 July 2014) <<http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/15/theres-a-plan-to-split-california-into-6-states-heres-what-it-might-look-like/>> and Thijs Kleinpaste, 'Voor Silicon Valley is democratie de grootste vijand van vooruitgang' (*de Correspondent*, July 2014) <<https://decorrespondent.nl/1538/Voor-Silicon-Valley-is-democratie-de-grootste-vijand-van-vooruitgang/51244622-ee4e89c1>>.

<sup>108</sup> See Patrick McGreevy, 'Six Californias' Backer Submits Signatures for 2016 Ballot' (*Los Angeles Times*, 15 July 2014) <<http://www.latimes.com/local/la-me-pol-six-californias-20140716-story.html>>.

<sup>109</sup> As per 12 September 2014 the required amount of votes to put the initiative on the 2016 ballots seems not to have been reached, Kevin Li, 'Six California Initiative Fails: Silicon Valley Petition Doesn't Get Enough Signatures to Make 2016 Ballot' (*Latin Post*, 13 Sept 2014) <<http://www.latinpost.com/articles/21415/20140913/six-california-initiative-fails-silicon-valley-petition-doesnt-get-enough-signatures-to-make-2016-ballot.htm#ixzz3GjAUQqc3>>.

<sup>110</sup> The speech was made at a Y Incubator (A Silicon Valley Startup Incubator) meeting. Transcript to be found here: <<http://nydwacu.wordpress.com/2013/10/28/transcript-balaji-srinivasan-on-silicon-valleys-ultimate-exit/>>.

<sup>111</sup> *Ibid.*



CEO of Google, at the Google I/O talk of 2013, where he discussed the need to set aside a part of the world as 'safe places' for unregulated experimentation because, amongst other things, many laws are old and prevent the materialisation of many important and exciting things.<sup>112</sup> Such safe places need not necessarily be virtual, but could also be territorial, albeit under a new conception of territoriality: plans are circulating to create new territory located outside the jurisdictional reach of any existing sovereign. Since most land in the world already falls under one jurisdiction or another,<sup>113</sup> this plan focuses on (eventually) creating floating communities in the oceans, an effort called Seasteading.<sup>114</sup> To this end a Seasteading Institute<sup>115</sup> has been founded, whose original mission statement was '[t]o establish permanent, autonomous ocean communities to enable experimentation and innovation with diverse social, political, and legal systems'.<sup>116</sup> Again, significant funding has been forthcoming from Silicon Valley, this time from Peter Thiel, the co-founder of PayPal. The idea has proved substantial enough to not only garner attention in the popular press but also in academic circles.<sup>117</sup>

Efforts such as these are driven by a need to be free from legal restrictions on technological and societal experimentation, and from a democratic process that is considered to be too slow and non-accommodating with regard to technological progress. They envisage a radically different world that is no longer dominated by territorially delimited states, but by (transnational) technological communities living under their laws, or under no law whatsoever. One should not be deluded into thinking that such claims are somehow interest-neutral. To paraphrase Hannah Buxbaum, jurisdictional claims are 'claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.'<sup>118</sup> There can be no mistake that the aforementioned technology-based alternatives to territoriality promote the substantive interests of corporations. Still, while these claims might appear to be self-serving, they are not necessarily less self-serving than state-based claims. What distinguishes them from the latter, is simply that they are community-rather than territory-based: they speak to a desire of technological communities to wrest regulatory control from what they see as outmoded and even illiberal territorial states that do not understand, or even undermine the liberating capabilities of the Internet and technology in general.

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<sup>112</sup> TechHive Staff, 'Hello, Larry! Google's Page on Negativity, Laws, and Competitors' (*TechHive*, 15 May 2013) <<http://www.techhive.com/article/2038841/hello-larry-googles-page-on-negativity-laws-and-competitors.html>> and Nathan Ingraham, 'Larry Page Wants to 'Set Aside a Part of the World' for Unregulated Experimentation' (*The Verge*, 15 May 2013) <<http://www.theverge.com/2013/5/15/4334356/larry-page-wants-to-set-aside-a-part-of-the-world-for-experimentation>>.

<sup>113</sup> The remainder is (more or less) agreed upon not to be viable for (new) claims of jurisdiction like the Antarctic landmass. See for instance The Antarctic Treaty System.

<sup>114</sup> Which is a play on the practice of Homesteading which was used to settle large parts of America.

<sup>115</sup> See <<http://www.seasteading.org/?intro=close>>.

<sup>116</sup> See <<http://www.seasteading.org/2009/03/tsis-mission-statement/>>, proposals to change the mission statement have been made since then.

<sup>117</sup> See O. Shane Balloun, 'The True Obstacle to the Autonomy of Seasteads: American Law Enforcement Jurisdiction over Homesteads on the High Seas' (2010) 24(2) *University of San Francisco Maritime Law Journal* 409 and Paolo Luca Bernardini, 'Storia e Normativa del Seasteading Corredata da Esempi Pratici' (2013) *Università degli Studi dell'Insubria* 1 <[http://www.academia.edu/4495703/Seasteading\\_Law\\_and\\_History](http://www.academia.edu/4495703/Seasteading_Law_and_History)>, more to be found at <<http://www.seasteading.org/law-and-policy/>>.

<sup>118</sup> Buxbaum (n 9) 635.

#### 4. Concluding observations

As our short exploration has demonstrated, territoriality has historically been a political construction that prevailed over ancient community-based visions for jurisdictional order, while not being able to marginalize them completely. With today's fast international travel, near-instant worldwide communication, and the possibilities to interact socially, commercially or otherwise in an entirely novel way where space and time appear to collapse, it can be argued that we have seen the heyday of nation-state jurisdiction based on sovereignty and territoriality, and that the pendulum is swinging back toward a more community-based jurisdictional order. New technological communities, which have little or nothing to do with the constructed communities that are nation-states, are emerging, coalescing around technological corporations and digital platforms, which sometimes rival the nation-state in power and influence. As a result of this evolution, jurisdiction may no longer be radiating outward from a territorial point, but from a group to which individuals belong, or of an activity in which they participate. In this model, functionally different communities exercise jurisdiction over distinct, de-territorialized legal spheres and 'slices of life',<sup>119</sup> without claiming exclusivity. These spheres can co-exist peacefully, but can sometimes forcefully collide.

In such a new constellation, territoriality, as one of the jurisdictional communities with which individuals identify, appears to take a back seat. It would be incorrect, however, to posit that territoriality has disappeared, or should disappear in the face of novel challenges posed by cyberspace. After all, there is no denying that cyberspace has a connection to territory. In their seminal article, Johnson and Post may have described, or rather advocated, the existence of a 'legally significant border between cyberspace and the 'real world'',<sup>120</sup> it is an unrefutable fact that cyberspace makes use servers, cables, modems, and computers,<sup>121</sup> which and affects persons who are physically located in a territory.<sup>122</sup> Cyberspace participants can even purposely locate themselves within the territory of a state via geographic indicators that link a virtual network to a state's jurisdictional remit.<sup>123</sup> Equally incorrect, however, is to maintain that cyberspace issues can simply be solved by applying the classic rules from the pre-technology era. Cyberspace, and the communities which it creates, are -although not entirely virtual or spaceless - not simply connected to one specific place. The unique nature of the Internet may necessitate a paradigmatic shift in how we conceptualize spatiality and hence the exercise of jurisdiction if law is to fulfill its role within modern society.<sup>124</sup> Cohen has argued in this respect that cyberspace calls for a new 'heterotopian' spatiality,<sup>125</sup> which

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<sup>119</sup> Thomas Schultz, 'Carving up the internet: Jurisdiction, Legal Orders, and the private/public International Law Interface' (2008) 19 *European Journal of International Law* 799.

<sup>120</sup> David R. Johnson and David Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367, 1378.

<sup>121</sup> Ford, 'Law and Borders' (n 12) 123-124.

<sup>122</sup> Jack L. Goldsmith, 'Against Cyberanarchy' (1998) 65 *University of Chicago Law Review* 1199, 1240.

<sup>123</sup> Joel R. Reidenberg, 'Technology and Internet Jurisdiction' (2005) 153 *University of Pennsylvania Law Review* 1951, 1971 (in so doing, through architectural design, cyberspace participants may subject them to *safe* jurisdictional zones).

<sup>124</sup> H. Brian Holland, 'The Failure of the Rule of Law in Cyberspace?: Reorienting the Normative Debate on Borders and Territorial Sovereignty' (2005) 24 *John Marshall Journal of Computer and Information Law* 1 (arguing that cyberspace has its own nature, and that the traditional jurisdictional rules may have to be adapted).

<sup>125</sup> J.E. Cohen, 'Cyberspace as/and Space' (2007) 107 *Columbia Law Review* 210.

jurisdictionally blends online and offline spatiality. Such heterotopian spatiality may acknowledge the jurisdictional interest of territorial sovereigns that is triggered by the territorial links of cyber-activity (e.g., in terms of such activity producing territorial effects), while concurrently considering cyberspace as a *res communis*: a space of informational passage that cannot be jurisdictionally appropriated by a sovereign. To prevent cyberspace from being exclusively ‘occupied’, or monopolised by the most powerful sovereign(s), in a mode outside the law, Hildebrandt has suggested the attribution of subjective natural rights based on a ‘distributed control’ over cyberspace infrastructure, in much the same way as Grotius, in the 17<sup>th</sup> century laid the basis for the freedom of the high seas and functional maritime jurisdiction of states.<sup>126</sup> It was not our aim here to chart the exact parameters for such a distributed control in practice. But if, for pragmatic reasons, we are not willing to jettison the state as the jurisdictional *locus* just yet, it appears clear that proximity between the harmful act or tortfeasor on the one hand, and the state’s territory or nationals on the other, should be one of the guiding principles. These parameters can be agreed upon in multilateral treaties,<sup>127</sup> but it is more likely that, in line with how the rules of jurisdiction have historically evolved, these will take shape organically via practice, thus potentially grounding new rules of customary international law.

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<sup>126</sup> M. Hildebrandt, ‘Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace’ (2013) 63 *University of Toronto Law Review* 196, 224. She does not indicate, however, how exactly this ‘distributed control’ has to be operationalized. In fact, she remains agnostic as to what road to take in real-life jurisdictional dilemmas, e.g., where she refuses to take sides in the dispute whether states should be allowed to carry out remote searches on computers and networks located outside their territory. Cohen (n 122) 222 (only warning of the dangers of ‘a-legal *occupatio*’).

<sup>127</sup> See, e.g., Holger P. Hestermeyer, ‘Personal Jurisdiction for Internet Torts: Towards an International Solution’ (2006) 26 *Northwestern Journal International Law & Business* 267, 288 (advocating the adoption of a multilateral convention on the cyberspace ‘targeting’ approach).