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Transnational Human Rights Litigation and Territorialized Knowledge: Kiobel and the ‘Politics of Space’

Philip Liste

Editors:

Peer Zumbansen (Osgoode Hall Law School, Toronto, Director Comparative
Research in Law and Political Economy)

John W. Cioffi (University of California at Riverside)



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Keywords: Territoriality; Spatial Turn; Transnational Law; Transnational Human Rights Litigation; Conflict of Laws; Political Theory; Alien Torts Statute; *Kiobel*.

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On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.²

The logic of government is the logic of jurisdiction—question it and all that is solid melts into air.³

¹ Dr. Philip Liste, University of Hamburg, Faculty of Economics and Social Sciences (Political Science, esp. Global Governance), Allende-Platz 1, 20146 Hamburg, Email: philip.liste@wiso.uni-hamburg.de. For insightful critique on earlier versions of the paper, I am grateful to Tanja Aalberts, Fred Aman, Hauke Brunkhorst, Hannah Buxbaum, Daniel Chernilo, Lauren Coyle, Andreas Fischer-Lescano, Katja Freistein, Alexis Galan, Thomas Gammeltoft-Hansen, Morag Goodwin, Friederike Kuntz, Hans Lindahl, Nick Onuf, Sven Opitz, Nik Rajkovic, Umut Turem, Wouter Werner, Antje Wiener, Peer Zumbansen and the participants of the *Global Governance Colloquium*, August 21, 2013 at University of Hamburg.

² *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, slip op. (US Supreme Court Apr. 17, 2013) (hereinafter: *Kiobel*), 14.

³ Richard T. Ford, "Law's Territory (a History of Jurisdiction)" (1999) 97 *Michigan Law Review* 843, 851.

1. INTRODUCTION

In the recent decision on *Kiobel v. Royal Dutch Petroleum*⁴ the US Supreme Court has put transnationalism in its place by strongly relying on the territorial logic of jurisdiction. The background was an attempt to escape from a Kafkaesque situation caused by abusive corporate power in the Global South. Royal Dutch Petroleum/Shell was accused of having aided and abetted in massive violations of human rights in Nigeria. The claims against the corporations were based on international law—for example, international norms against extrajudicial killings, crimes against humanity, and torture. None of the alleged violations of rights did occur in the United States nor was any of the petitioners a US citizen; and none of the corporations were having their headquarters in the United States. Nonetheless, the plaintiffs filed their claims against the corporations in a US District Court (*Southern District of New York*) relying on the *Alien Tort Statute* (ATS)—part of a Judiciary Act enacted by the First Congress of the United States in 1789. This ‘transnational situation’ can thus be said to transcend space and time. The Supreme Court has now decided that the claims that have been put forward by the petitioners do not ‘touch and concern the territory of the United States [...] with sufficient force’.⁵ The previous judgment of the Court of Appeals of the 2nd Circuit⁶ that had rejected the case in 2010 was thus affirmed.

In this paper I assume that space is not a neutral category, not an objective fact. The making of any legal arguments presupposes a spatial knowledge that had become a critical matter of controversy in the field of transnational human rights litigation. What is at stake is

⁴ *Kiobel*.

⁵ *Kiobel*, p. 14.

⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2010). For the case history: United States District Court Southern District of New York, *Kiobel, et al. v. Royal Dutch Petroleum et al.*, 02 Civ. 7618 (KMW) (HBP), Order, Sep 29, 2006; *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (U.S. Court of App., 2nd Cir. 2010); Oral argument before the Supreme Court of the United States, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, Washington, D.C., Feb 28, 2012 < http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf >; Oral argument (Reargument) before the Supreme Court of the United States, *Kiobel, et al. v. Royal Dutch Petroleum Co., et al.*, Washington, D.C., Oct 1, 2012 < http://argument_transcripts/10-1491rearg.pdf >.

normativity in a global scale whereas the domestic courtroom is turned into the site of spatial contestation. Although the decision on *Kiobel* is arguably a moment of juridico-political *gravity*, with critical repercussions for the future possibilities of suing transnational corporations before US courts, the core interest of this paper is not primarily ‘juridical.’ The major interest is on the construction of ‘the transnational’ *as* space which implicates a ‘politics of space’ at work underneath the exposed surface of legal argumentation.

This struggle for spatial normativity, however, should not be taken as another dichotomous deployment of ‘the national’ vs. ‘the global’ in the sense of a globalization literature suffering from a binary conceptualization of the state on the one hand and a global society on the other.⁷ Even in the global scale, the everyday politics of the production of space operates in various sites, from international to sub-national settings. The ‘*Kiobel* situation’ as it unfolded before the Supreme Court fits nicely in this frame of locally contested global normativity. In this paper, *Kiobel* is thus addressed as example of a perhaps broader picture including a variety of contested spatial elements: a spatial condition of modern nation-state territoriality; the production of ‘counter-space’,⁸ eventually undermining the spatial regime of inter-state society; and the state (in a broad sense) not accepting its withering away.⁹ The paper will question the production of normative space in the field of transnational human rights litigation. More specifically it will ask: How are normative boundaries between the involved jurisdictional spaces drawn? How do the ‘politics of space’ work underneath or beyond the moments of judicial *gravity*? In other words, *how territorialized is the legal knowledge at work and how does territoriality work in legal arguments?*

Although finally decided in a highly territorialized way, *Kiobel* has up to this point caused enormous trouble. When starting from a nation-state paradigm, the mere possibility of

⁷ For the criticism, see Saskia Sassen, “Neither Global nor National: Novel Assemblages of Territory, Authority and Rights” (2008) 1 *Ethics & Global Politics* 61.

⁸ Henri Lefebvre, “The State in the Modern World (1975)” in Neil Brenner and Stuart Elden (eds) *State, Space, World* (Minneapolis: University of Minnesota Press, 2009), 117.

⁹ Henri Lefebvre, “The Worldwide Experience (1978)” in Neil Brenner and Stuart Elden (eds) *State, Space, World* (Minneapolis: University of Minnesota Press, 2009), 278.

suing non-US private corporations for human rights violations in whatever places of the world before US courts can be said to be subversive. *Kiobel*, by representing the putative possibilities of the ATS, implicated a somehow disturbing ‘worldness’.¹⁰

Before I can analyze how spatial politics are at work in the recent Supreme Court decision, I will first review a body of work in the social sciences including legal studies that is inspired by insights in critical geography and ask how in particular the field of transnational law has taken up this ‘philosophy of social space’¹¹ (section 2). Taking up the concept of ‘little nothings’,¹² I will argue that critical reconfigurations of space do happen underneath the surface of exposed legal arguments. The focus will thus have to be shifted to what in following International Relations scholar Jef Huysmans I call ‘little litigation nothings’ (section 3). The analysis will then illustrate how in *Kiobel* territoriality was weighted remarkably high by juxtaposing the Supreme Court majority’s *spatial mode of production* with ‘counter-spaces’ as raised in the concurring opinion by Justice Breyer (section 4). Finally, I will end with a cursory evaluation of what *Kiobel* may mean to social space (section 5).

2. LEGAL TERRITORIALITIES AS SOCIAL SPACE

Since 1980 and the groundbreaking *Filartiga* case,¹³ human rights litigation cases have been brought to US courts by using the ATS which was enacted already in 1789 and holds that ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.¹⁴

¹⁰ *ibid.*

¹¹ David Harvey, “The Sociological and Geographical Imaginations” (2005) 18 *International Journal of Politics, Culture, and Society* 211, 213.

¹² See Jef Huysmans, “What’s in an Act? On Security Speech Acts and Little Security Nothings” (2011) 42 *Security Dialogue* 371.

¹³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (U.S. Court of App., 2nd Cir. 30 June 1980) (hereinafter *Filartiga*).

¹⁴ 28 U.S.C. § 1350. Corresponding ATS lawsuit are: *Filartiga*; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (hereinafter: *Sosa*); *Roe v. Bridgestone*, 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2010); *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind.

Hence, the ATS provides a critical *interface* of international law and domestic jurisprudence, no matter what substance international law had in the late 18th century.¹⁵ As such *interface* the ATS has been embraced particularly by various human rights advocates in order to sue private corporations for their involvement in diverse atrocities in the Global South, with *Kiobel* eventually being the most prominent—and perhaps sudden end point—of these lawsuits on abusive corporate power.

Territoriality

When understood as a signpost to an emerging transnational constellation, transnational litigation may indeed challenge the base lines of an inter-state world order with territoriality as its major principle. Taking this as a starting point, analysis could move towards various directions. First, the territoriality of an international normative order could be taken for granted, like a vast body of work in IR has done for decades.¹⁶ The primary concern would then be on the 'natural' limits of transnational human rights litigation and whether or not corresponding transnational legal strategies may someday succeed. Likewise the question could be raised as to how human rights could (or *should*) be enforced against the background

2010); and *Flomo v. Firestone Natural Rubber Co.*, 642 F.3d 1013 (2011). This script for the transnational legal process, to be clear, stems from the late 18th century and even precedes Immanuel Kant's seminal remark on the idea of a *Weltbürgerrecht* (cosmopolitan condition): "Da es nun mit der unter den Völkern der Erde einmal durchgängig überhand genommenen (engeren und oder weiteren) Gemeinschaft so weit gekommen ist, daß die Rechtsverletzung an einem Platz der Erde von allen gefühlt wird: so ist die Idee eines Weltbürgerrechts keine phantastische und überspannte Vorstellungsart des Rechts, sonder eine notwendige Ergänzung des ungeschriebenen Kodex, sowohl des Staats- als Völkerrechts zum öffentlichen Menschenrechte überhaupt, und so zum ewigen Frieden, zu dem man sich der kontinuierlichen Annäherung zu befinden nur unter dieser Bedingung schmeicheln darf." (Immanuel Kant, "Schrift Zum Ewigen Frieden," in Wilhelm Weischedel (ed) *Werkausgabe* (Frankfurt am Main: Suhrkamp, 1964 [1795]), 216-17).

¹⁵ See *Filártiga*, 881 ("Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.').

¹⁶ For the prototypical canon, see Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1978); Robert O. Keohane, "Institutional Theory and the Realist Challenge After the Cold War", in David A. Baldwin (ed) *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press, 1993); Andrew Moravcsik, "Liberal International Relations Theory: A Scientific Assessment", in Colin Elman and Miriam Fendius Elman (eds) *Progress in International Relations Theory* (Cambridge, Mass.: MIT Press, 2003), 159; Kenneth Waltz, *Theory of International Politics* (Boston: McGraw-Hill, 1979). For early criticisms, see John G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations", *International Organization* 47 (1993), 139-174; R.B.J. Walker, *Inside/Outside International Relations* (Cambridge: Cambridge University Press, 1993).

of an international regime of territoriality. Second, the challenge of transnational litigation could be taken for granted, e.g. as a now given phenomenon of globalization that the world of nation-states would have to cope with. The major concern would then be on normative order in the global realm. The question would be what normative changes may be caused or how a normative order touched by phenomena of transnational human rights litigation would look like. The assumption in this paper, however, is that these two views can hardly be separated. Both views relate to each other in highly productive ways; and I argue that ‘the political’ comes in with this inter-relatedness. The aim is thus to extrapolate the social productivity of the very relation between taken-for-granted territoriality and taken-for-granted phenomena of globalization.

Following a now remarkable body of work emphasizing the spatiality of state, sub-state, and non-state politics,¹⁷ such phenomena of contested normativity as contested space—and I see transnational litigation as one such phenomenon—can hardly be understood as operating against the background of an eternally fixed and externally given regime of territoriality. Rather, the meaning of territory or space turns into a matter of controversy. Following insights inspired by critical geography,¹⁸ space and territoriality cannot be treated as given but must be understood as contingent, i.e. as result of a history of territorial fixes,

¹⁷ John Agnew, “The Territorial Trap: The Geographical Assumption of International Relations Theory” (1994) 1 *Review of International Political Economy* 53; John Agnew, “Know-Where: Geographies of Knowledge of World Politics” (2007) 1 *International Political Sociology* 138; Neil Brenner, and Stuart Elden, “Henri Lefebvre on State, Space, Territory” (2009) 3 *International Political Sociology* 353; Neil Brenner and Stuart Elden, “Introduction. State, Space, World: Lefebvre and the Survival of Capitalism” in Neil Brenner and Stuart Elden (eds), *State, Space, World* (Minneapolis: University of Minnesota Press, 2009); Saskia Sassen, “Neither Global nor National: Novel Assemblages of Territory, Authority and Rights” (2008) 1 *Ethics & Global Politics* 61; Nisha Shah, “The Territorial Trap of the Territorial Trap: Global Transformation and the Problem of the State’s Two Territories” (2012) 6 *International Political Sociology* 57; Aradhana Sharma and Akhil Gupta, “Introduction: Rethinking Theories of the State in an Age of Globalization” in Aradhana Sharma and Akhil Gupta (eds), *The Anthropology of the State: A Reader* (Malden, MA: Blackwell, 2006), 1.

¹⁸ Michel Foucault, “Questions on Geography”, in Michel Foucault (ed.), *Power/Knowledge* (transl. by C. Gordon) (New York: Pantheon, 1980); Michel Foucault, “Of Other Spaces” (1986) 16 *Diacritics* 22; David Harvey, *Social Justice and the City* (Baltimore: Johns Hopkins University Press, 1973); Harvey, “The Sociological and Geographical Imaginations”; Henri Lefebvre, *The Production of Space* (Malden, MA: Blackwell, 1991); Edward W. Soja, *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* (London: Verso, 1989).

socially constructed in an ongoing social process. Criticism like that of the ‘territorial trap’,¹⁹ ‘methodological nationalism’,²⁰ or a state-centered ‘obstacle épistemologique’²¹ mark a fundamental engagement with eventually problematic categories. John Agnew has insightfully phrased this epistemological moment as ‘geographies of knowledge’.²² By knowledge, as he himself defines, he means ‘explanatory schemes, frames of reference, crucial sets of assumptions, narrative traditions, and theories’.²³ Geographical knowledge does underlie any practice relevant in the ongoing reproduction of space and place. In fact, the mere imagination of political rule as territorially fixed affects what forms of governance are conceivable and what not. The epistemological configuration of space matters because geographical knowledge is necessary for the legitimization of power.²⁴ Hence, governance agencies like those of the state are deeply involved in the production of space. They *create the space in which their legitimacy unfolds*.

Socially constructed space, in other words, serves a purpose—and is *produced* for particular purposes.²⁵ Space can thus no longer be understood as a physically given precondition of governmental formations but becomes itself subject to governance practice.²⁶ To analyze such ‘uses of space’ as meaningful for political, legal, economic or other social purposes, it is necessary to rely on practice, that is, *practice of rendering space meaningful* in particular ways. Borrowing from anthropological work, I will call this practice *knowledge*

¹⁹ John Agnew, “The Territorial Trap: The Geographical Assumption of International Relations Theory”.

²⁰ Ulrich Beck, *Macht Und Gegenmacht Im Globalen Zeitalter: Neue Weltpolitische Ökonomie* (Frankfurt am Main: Suhrkamp, 2002), ch. II.

²¹ Gunther Teubner, “Fragmented Foundations: Social Constitutionalism Beyond the Nation State,” in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010), 328.

²² John Agnew, “Know-Where: Geographies of Knowledge of World Politics”.

²³ *Ibid.*: 138.

²⁴ Shah, “The Territorial Trap of the Territorial Trap: Global Transformation and the Problem of the State's Two Territories”, 60.

²⁵ Lefebvre, *The Production of Space*.

²⁶ See Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations”.

practice;²⁷ and since this paper is concerned with litigation and the production of space, I am particularly interested in *spatial knowledge practice*.

As the political space of modern nation-state territoriality is entangled within a particular—and historically contingent²⁸—form of governance, spatial practice may affect the state. The reproduction of political space turns into a practice of governance itself and relates to what may be called a *spatial strategy*.²⁹ Thus understood, transcending the form of governance typical of the system of sovereign nation-states can be understood as a form of resistance against an established regime of space³⁰ or, to take up a concept of Henri Lefebvre, a ‘state mode of production [*mode de production etatique*]’.³¹ While the practice of filing transnational lawsuits in domestic courts (in the US) could then be analyzed as a resistant spatial strategy, corresponding practices of sustaining the territorialized *state mode of production* would be a counter-strategy. The State, as Lefebvre puts it, ‘will not let itself wither away or be overcome without resistance’,³² whereas ‘the state’ should here not be understood in a narrow sense only as state government.³³ The *territoriality of the state* finds itself confronted with a commonsensical *state of territoriality*, reproduced through a variety of different actors. In this paper, the courtroom will be focused as the site of corresponding spatial struggles—resistance and perpetuation.

Law and Space

²⁷ Annelise Riles, “Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage” (2006) 108 *American Anthropologist* 52.

²⁸ Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations”; Boaventura de Sousa Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law”, 14 *Journal of Law and Society* 279 (1987).

²⁹ Brenner and Elden, “Introduction: State, Space World: Lefebvre and the Survival of Capitalism”, 33; Henri Lefebvre, “Reflections on the Politics of Space (1970)” in Neil Brenner and Stuart Elden (eds), *State, Space, World* (Minneapolis: University of Minnesota Press, 2009), 180.

³⁰ See Henri Lefebvre, “The Worldwide and the Planetary (1973)” in Neil Brenner and Stuart Elden (eds), *State, Space, World* (Minneapolis: University of Minnesota Press, 2009), 204.

³¹ Henri Lefebvre, “Space and the State (1978)” in Neil Brenner and Stuart Elden (eds), *State, Space, World* (Minneapolis: University of Minnesota Press, 2009), 226.

³² Lefebvre, “The Worldwide Experience (1978),” 278.

³³ See Louis Althusser, “Ideology and Ideological State Apparatuses (Notes towards an Investigation),” in Aradhana Sharma and Akhil Gupta (eds) *The Anthropology of the State: A Reader* (Malden: Blackwell, 2006).

Speaking in terms of *legal* knowledge, we can now argue that practice like the making of international legal treaties is only rendered intelligible (or *knowable*) against the background of a particular kind of geographical knowledge, that is, an inter-state normative paradigm. In turn, the international legal conduct of states can be understood as a knowledge practice that reproduces this inter-state paradigm. Despite the perhaps internationalist orientation of its protagonists, the ‘esprit d’*internationalité*’,³⁴ international law builds upon a highly territorialized knowledge of the world.³⁵ Notably, things may be different with *transnational* law. I assume that transnational legal practice may (but not necessarily must) further an alternative body of spatial knowledge. A major concern of this paper is thus to establish a research framework for analyzing the production of *transnational law’s space*.

Before this argument can be unfolded it is necessary to elaborate the nexus between territory and law or the spatial moment of jurisdiction, respectively. Though not extending his consideration to the fields of international or transnational relations, a remarkable advance has been established by Richard Ford in his ‘Law’s Territory’.³⁶ Ford’s spatial argument parallels the above considered work on the geographical knowledge upon which governance (or in Ford’s case: government) bases. ‘The logic of government is the logic of jurisdiction—question it and all that is solid melts into air’.³⁷ With respect to the territoriality of jurisdictional claims, Ford convincingly suggests to understand jurisdiction as *discourse* or *social practice*,³⁸ respectively. This is not to say, as he moves on, that jurisdictional lines are not ‘real’ but, in fact, they have to be ‘made real’³⁹ by applying the law, e.g. in the daily administrative process or by determining its reach in the course of juridical decision-making.

³⁴ Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002), 13.

³⁵ Karen Knop, “Statehood: Territory, People, Government,” in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012).

³⁶ Ford, “Law’s Territory (a History of Jurisdiction)”.

³⁷ *Ibid.*: 851.

³⁸ *Ibid.*: 855.

³⁹ *Ibid.*: 856.

What is important is that we are concerned with just another—now legal—dimension of the constructed reality of governance. ‘Lines on a map may anticipate jurisdiction, but a jurisdiction itself consists of the practices that make the abstract space depicted on a map significant’.⁴⁰ The determination of jurisdictional boundaries, of the *law’s territory*, to take up Ford’s title, consists in an everyday legal practice of such signification.⁴¹ What works well for the political deployment of geographical knowledge as a means of governance, does also work for jurisdiction—in the sense of a *spatial politics of law*. Whether and how different *things or individuals* are (or become) subject to regulation depends on how jurisdiction is framed. Thus understood, *jurisdiction is but a technology of governance*.⁴²

The framework provided by Ford can easily be extended to the global realm where jurisdiction though organized along the lines of nation-state boundaries for centuries is contested and national jurisdiction finds itself challenged by legal practice, especially with respect to *universal jurisdiction*.⁴³ Hence, as technology jurisdiction is also applied in the global realm, in various social settings and times. The political moment of this can hardly be formulated smarter as through the final words of Ford’s insightful piece:

The history of space and spaces offers a rogue’s gallery of cartographers, imperialists, merchant adventurers, medieval rulers, town constables, urban visionaries, architects, judges and jurists. But in all these there are only protagonists, no heroes. The heroes and heroines, perhaps, are yet to come.⁴⁴

It could be added that an evolving transnational space may be their stage. That said, the questions can be raised what a ‘transnational space’ is, how it comes into being, and what role legal practice plays in that process.

⁴⁰ Ibid.

⁴¹ For a useful concept of signification, see Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London and New York: Verso, 2001). For a concept of the ‘everyday,’ see Michel de Certeau, *The Practice of Everyday Life* (translated by Steven F. Rendall) (Berkeley: University of California Press, 1988).

⁴² See Ford, "Law's Territory (a History of Jurisdiction)," 867.

⁴³ See William J. Aceves, “Liberalism and International Legal Scholarship: The Pinochet Case and the Move Towards a Universal System of Transnational Law Litigation” (2000) 41 *Harvard International Law Journal* 129; Wolfgang Kaleck, “From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008” (2009) 30 *Michigan Journal of International Law* 927.

⁴⁴ Ford, "Law's Territory (a History of Jurisdiction)," 930.

Transnational Space

The term *transnational law* has been introduced into legal studies in the 1950s by Philip Jessup who used it in order to ‘include all law which regulates actions or events that transcend national frontiers’.⁴⁵ ‘Transnational situations,’ as Jessup held, ‘may involve individuals, corporations, states, organizations of states, or other groups’.⁴⁶ Facing such multiplicity of actors beyond the confines of the territorial state, a clear-cut demarcation of domestic and international legal spheres can hardly be upheld. *Transnational situations* may indeed challenge the inter-state paradigm—not only with respect to legal relations.

More recently, Harold Koh relies on the ‘transnational legal process’ in order to explain state compliance with international law. The argument is that international law is already operating on various sub-state levels in such a way that state governments are no longer free in their decision to opt out. The ‘[t]ransnational legal process,’ as Koh puts it,

describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.⁴⁷

While neither interest-based nor identity-based theories would provide convincing answers to the compliance puzzle, Koh assumes that it is the repeated interaction of a variety of actors within the nation-state but also across state boundaries that generates a situation in which breaches of international would cause frictions.⁴⁸ A network of legal interactions across national boundaries does also play a decisive role in the work of Anne-Marie Slaughter who holds that various state agencies would increasingly cooperate across boundaries with their

⁴⁵ Jessup, *Transnational Law*, 2.

⁴⁶ *Ibid.*, 3.

⁴⁷ Harold Hongju Koh, “Transnational Legal Process” (1996) 75 *Nebraska Law Review* 181, 183-4.

⁴⁸ *ibid.*, 203-4.

foreign counterparts. While this narrative of what Slaughter calls a ‘New World Order’,⁴⁹ indeed involves the development of border-transcending governance networks, the focus remains on state actors though ‘disaggregated’ in their sovereignty.⁵⁰ Slaughter’s account can thus be considered ‘trans-governmental’ rather than ‘transnational.’

Facing the transnational challenges of law, some legal scholars have also relied on the global or transnational realm as *space*. Proponents of the *Global Administrative Law* (GAL) project argue

that current circumstances call for *recognition* of a global administrative space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.⁵¹

What is coming to the fore in this passage is that the mentioned ‘global administrative space’—as now being ‘recognized’—is in *need of regulation*, that is, a particular kind of regulation which emancipates itself from the nation-state constitutional bonds though taking up impulses from ‘administrative law.’ But we should be aware that this is a normative argument since the GAL approach takes for granted that regulatory space—including its particular needs of being governed—*is already there*. What is neglected is that the practice of (global) administration, in turn, also affects (or even creates) space. GAL already implicates a certain normative order which is axiomatically set beyond the approach’s theoretical reflection. GAL, in other words, lacks a theoretical account on power, i.e. a theory of *how space comes into being* by way of everyday politico-legal practice. In so doing, the approach is by no means less ‘normative’ than the constitutionalist accounts criticized by GAL as too wide-ranging in a normative sense.⁵²

⁴⁹ Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

⁵⁰ Anne-Marie Slaughter, “International Law in a World of Liberal States” (1995) 6 *European Journal of International Law* 503, 505.

⁵¹ Benedict Kingsbury, Nico Krisch, and Richard B. Steward, “The Emergence of Global Administrative Law” (2005) *Law and Contemporary Problems* 15, 26 (my emphasis).

⁵² Nico Krisch, “Global Administrative Law and the Constitutionalist Ambition” (2009) *LSE Law, Society and Economic Working Papers* 10/2009. For the debate on global constitutionalism, see Jan Klabbbers, “Setting the Scene,” in Jan Klabbbers, Anne Peters and Geir Ulfstein (eds) *The Constitutionalization of International Law*

Some global⁵³ or transnational⁵⁴ legal pluralists have indeed offered a more sophisticated account of transnational space. While in part, ‘transnational space’ is used as a rather empty label,⁵⁵ Paul Schiff Berman by relying on insights in the field of critical geography criticizes that ‘although the social and political construction of space is a fundamental aspect of legal ordering, the constructed nature of the enterprise disappears from analytical purview’.⁵⁶ Instead of elaborating the nexus of the construction of space and legal ordering, however, the argument widely circles around the concept of ‘community’.

Paralleling the ‘imagined community’ argument by Benedict Anderson,⁵⁷ Berman takes issue with the detaining of community in the nation-state. The particular modes how community is constructed and how the practice of community-building relates to law, however, remain underdeveloped—although this would be the crucial point. While this criticism on setting the nation-state as the natural space for community is indeed an important requisite for doing away with the ‘state-based focus of international law’,⁵⁸ the arguments of a constructed nature of things, as well as, the objectification of communal and/ or legal knowledge are not fully exhausted. In the end, community building is ‘transnational’ when transcending the boundaries of the nation state. The more far reaching claim in line with insights in critical geography,⁵⁹ however, would be to say that building community would mean to *create* space, i.e. the *construction of community* and the *production of space* will always go hand in hand. The notion of a constructed community alone cannot provide satisfying answers to how law and space are interrelated.

(Cambridge: Cambridge University Press, 2009); Antje Wiener, Anthony F Jr Lang, James Tully, Miguel P Maduro and Mattias Kumm, “Why a New Journal on Global Constitutionalism? Editorial” (2012) 1 *Global Constitutionalism* 1.

⁵³ Paul Schiff Berman, "The New Legal Pluralism" (2009) 5 *Annual Review of Law and Social Sciences* 225.

⁵⁴ Peer Zumbansen, “Transnational Legal Pluralism” (2010) 1 *Transnational Legal Theory* 141.

⁵⁵ T. Alexander Aleinikoff, "Transnational Spaces: Norms and Legitimacy" (2008) 33 *Yale Journal of International Law* 479.

⁵⁶ Paul Schiff Berman, "From International Law to Law and Globalization" (2005) 43 *Columbia Journal of Transnational Law* 485, 514. See also Ford, "Law's Territory (a History of Jurisdiction)."

⁵⁷ Benedict R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1999); see Berman, "From International Law to Law and Globalization," 516-17.

⁵⁸ Berman, "From International Law to Law and Globalization," 518.

⁵⁹ Harvey, “The Sociological and Geographical Imaginations”.

While implicating a similar criticism, Peer Zumbansen in a number of articles proposes a ‘methodological’ approach to ‘the transnational’: It is not the ‘extension of [...] normativity across borders’ that the term transnational points to.⁶⁰ ‘Instead,’ as Zumbansen holds,

the term transnational identifies an intricate connection of spatial and conceptual dimensions: in addressing, on the one hand, the demarcation of emerging and evolving spaces and, on the other, the construction of these spaces as artifacts for human activity, communication and rationality, the term transnational is conceptual. To declare an activity as being transnational is not just the result of an empirical observation.⁶¹

What is at issue is but the *productivity* of transnational observations. The critical question is thus how we can *know* a transnational constellation when seeing it. Put differently, observing ‘the transnational’ already implies certain preconditions. By describing an interaction as transnational we already assume—i.e. *construct*—a certain space where this interaction takes place. Using the term ‘methodology,’ however, does not prompt clarification. The crucial question is one of *epistemology*—how we are able to *know* the transnational—and Zumbansen rightly holds that we cannot *know* by just recognizing a social interaction as crossing nation-state borders.⁶² In fact, the interesting moment is not the crossing of jurisdictional boundaries itself but the way how the meaning of such border-crossing phenomena is conceived and determined. *Kiobel*, as will be illustrated below, is a nice example of how spatial meaning is produced. Since transnational law—now understood as such epistemological practice—may consist in the creation of its own operational space, knowledge provided in the course of the transnational legal process *generates* ‘truth’. Transnational law, when understood as *spatial knowledge practice* is to be conceived as

⁶⁰ Peer Zumbansen, "Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order" (2012) 1 *Global Constitutionalism* 16, 22; see also Zumbansen, "Transnational Legal Pluralism."; Peer Zumbansen, "Transnational Law, Evolving," *Osgoode Hall Law School Comparative Research in Law and Political Economy Research Paper Series* Reserach Paper No 27/2011 (2011).

⁶¹ Zumbansen, "Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order," 22.

⁶² *ibid.*

highly political because as practice it immediately affects the knowledge-power nexus and contributes to generating a *régime du savoir*.⁶³ To take this ‘political moment’ of spatial knowledge into account a framework of analysis must remain open for discursive interventions putting transnational law in charge as means for whatever ends. In principle, this could include both, spatial resistance as well as a perpetuation of the established ‘state mode of production’.⁶⁴ Transnational law is to be understood as a *technique* of spatial production,⁶⁵ and is thus deeply involved in a *politics of space*.

This is the broader frame in which this paper seeks to analyze the production of space in the course of transnational human rights litigation. If the ‘domestic’ courtroom becomes (or: is transformed into) a site where the production of space is ‘negotiated’ by means of transnational law, the dense and historically congealed link between territoriality and jurisdiction⁶⁶ and thus the established demarcations between *national* and *international* affairs, as well as, between public and private forms of governance⁶⁷ are made subject to highly contested legal knowledge practice.

In this respect, the aim is to put the phenomenon of transnational human rights litigation in broader perspective. *It cannot be taken for granted that transnational law is but a manifestation of a globalized world.* In the process of transnational litigation different actors—petitioners and respondents, as well as, sympathizers of either of the two sides—may use ‘transnational law’ for different purposes like the perpetuation of jurisdictional state boundaries, the establishment of universal jurisdiction, or the exclusion of private enterprise

⁶³ Michel Foucault, "The Subject and Power" (1982) 8*Critical Inquiry* 777, 781.

⁶⁴ Lefebvre, "Space and the State," 226.

⁶⁵ See Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (Chicago: University of Chicago Press, 2011), 228-30.

⁶⁶ For this inter-linkage, see Ulrich K. Preuss, "Disconnecting Constitutions from Statehood: Is Constitutionalism a Viable Concept?" in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010).

⁶⁷ See A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (Albany: State University of New York Press, 1999); Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

from public (legal) regulation.⁶⁸ The dichotomist assumption of ‘national jurisdiction and the state’ vs. ‘transnational legal process as globalization’ would be like tapping into the ‘territorial trap’⁶⁹ while walking along the legal path. In order to remain open for actual (legal) relations of production, analyses may not reproduce the zero-sum imaginary of more globalization and less state.⁷⁰

3. LITTLE LITIGATION NOTHINGS

The recent Supreme Court decision on *Kiobel* significantly cuts future possibilities to sue human rights violators before US courts, particularly when the relevant conduct occurred on the territory of a foreign sovereign. While human rights advocates criticize the decision as disappointing,⁷¹ those speaking in the name of private business hail the judicial strengthening of the state.⁷² In fact, the decision points to an exclusion of private conduct beyond the jurisdictional boundaries of the United States from being adjudicated through US courts, even when massive violations of human rights are at issue. But at the same time this exclusion is achieved only by way of a perpetuation of nation-state boundaries: transnational private governance goes hand-in-hand with ‘modern’—perhaps ‘post-modern’—nation-state practice.

Although the decision on *Kiobel* can be understood as a moment of juridico-political ‘gravity’, the mentioned spatial issues are somehow ‘subliminal,’ i.e. not present on the surface of legal argumentation. A mainly ‘legal’ analysis of the decision, however, risks

⁶⁸ For a similar argument with regard to global financial markets, see Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets*.

⁶⁹ Agnew, “The Territorial Trap: The Geographical Assumption of International Relations Theory.”

⁷⁰ A similar argument against the dichotomist view is made strong by Sassen, “Neither Global nor National: Novel Assemblages of Territory, Authority and Rights.”

⁷¹ Brad Weikel, Jen Nessel, and Lisa Cohen, "Kiobel v. Shell: Supreme Court Limits Courts' Ability to Hear Claims of Human Rights Abuses Committed Abroad" < <http://www.earthrights.org/media/kiobel-v-shell-supreme-court-limits-courts-ability-hear-claims-human-rights-abuses-committed> >; Brenda Bowser-Soder, "Kiobel Ruling Undermines U.S. Leadership on Human Rights", < <http://www.humanrightsfirst.org/2013/04/17/kiobel-ruling-undermines-u-s-leadership-on-human-rights/> >; Katie Redford, "Commentary: Door still open for human rights claims after Kiobel", < <http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/> >

⁷² Walter Olson, "SCOTUS Gets It Right in Kiobel", < <http://www.cato.org/blog/scotus-gets-it-right-kiobel> >; "Business Hails Supreme Court Ruling on Alien Tort Statute", < <http://www.uscib.org/index.asp?documentID=4486> >.

veiling the micro-politics at work in everyday legal knowledge practices. While true, territoriality was weighted remarkably high in the Supreme Court's *Kiobel* decision, debate is rather focusing on future possibilities of litigation, not the spatial repercussions of the case.⁷³ But it is this latter moment that interests me from a social science perspective. It is this latter perspective on global normativity that puts the 'workings of geographies of knowledge'⁷⁴ on the agendas of an empirical engagement with transnational law. The (global) regulation of world society operates in a variety of (local) sites—a 'good part of globalization consists of an enormous variety of subnational micro-processes'⁷⁵—with the domestic courtroom as one of these sites.

In sum, the underlying idea is to analyze *Kiobel* with respect to how territoriality and space are constructed, i.e. whether and how taken positions are built upon bodies of territorialized knowledge and how these positions, in turn, contribute to the *regime of space*. To this end, *Kiobel* is deployed analytically as the site to observe a legal politics of space at work. Being inspired by Jef Huysmans' concept of 'little security nothings,' I switch the focus to *little litigation nothings*—'devices, sites, practices without exceptional significance'.⁷⁶ In so doing, I also follow a stream of 'ethnographic' work on inter- or transnational relations as outlined, *inter alia*, in early feminist studies in IR (in the late 1980s).⁷⁷ Culminating in the slogan that 'the personal is international',⁷⁸ Cynthia Enloe argues that 'we can acquire a more realistic understanding of how international politics actually "works"'⁷⁹ by analyzing politics

⁷³ See only Ingrid B. Wuerth, "The Supreme Court and the Alien Tort Statute: *Kiobel* v. Royal Dutch Petroleum Co." (2013) 103 *American Journal of International Law* (forthcoming, SSRN: http://ssrn.com/abstract_id=2264323); Christopher A. Whytock, Donald Earl III Childress and Michael D. Ramsey, "After *Kiobel*—International Human Rights Litigation in State Courts and Under State Law" (2013) 3 *UC Irvine Law Review* 1.

⁷⁴ Agnew, "Know-Where: Geographies of Knowledge of World Politics," 141.

⁷⁵ Sassen, "Neither Global nor National: Novel Assemblages of Territory, Authority and Rights," 74.

⁷⁶ Huysmans, "What's in an Act? On Security Speech Acts and Little Security Nothings," 377.

⁷⁷ More recently, this focus has obviously been revisited in IR; see Emanuel Adler and Vincent Pouliot, "International Practices" (2011) 3 *International Theory* xxx. It must be noted, however, that in IR the concept of the "everyday" is not as "new" as it seems. See Enloe, "The Mundane Matters." and de Certeau, *The Practice of Everyday Life*.

⁷⁸ Enloe, *Bananas, Beaches & Bases: Making Feminist Sense of International Politics*, ch. 9.

⁷⁹ *Ibid.*, 4.

beyond the visible international situations like international meetings of the (mostly male) heads of states.

While *Kiobel* is considered a landmark decision, exceptional in a way, the territorial patterns at work are not the exposed matter of attention. The *little litigation nothings*, it is now argued, do the reproductive work on the meaning of jurisdictional space and/ or the spatial knowledge of law, respectively. The core analytical assumption is that legal arguments, though not necessarily intended to reproduce social space, tend to take on a life of their own. It is thus not the substance of a legal argument but the way how these arguments are used as a ‘crucial technology’ of the ‘legal infrastructure’⁸⁰ that tells us a lot about the political moment of transnational litigation. By analyzing one transnational legal process with respect to such *little litigation nothings* I do, at the same time, propose a type of analysis that focuses on the everyday life of ‘the transnational.’ It is only this perspective on the *little litigation nothings* rendering the hidden politics of space visible.

4. *KIOBEL*: THE SPATIAL POLITICS OF LAW AT WORK

In *Kiobel*, a *politics of space* became most obvious when the Supreme Court in March 2012 switched the focus from the question of corporate liability to territoriality.⁸¹ While the Appeals Court of the 2nd Circuit had rejected the *Kiobel* case for reasons of corporate liability (or non-liability, to be clear),⁸² the Supreme Court, after having heard oral arguments in February 2012, invited the parties for another round of ‘rearguments,’ focusing on the question of ‘Whether and under what circumstances the Alien Tort Statute allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.’ In the judgment, the court widely concentrates on this spatial dimension of the case—while, at the same time, treating the questions of corporate

⁸⁰ See Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets*, 45.

⁸¹ Order in Pending Case, *Kiobel v. Royal Dutch Petroleum*, 10-1491, Oder List: 565 U.S., March 5, 2012.

⁸² *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2010).

liability and the substance of international law to be applied under the ATS as rather peripheral. Space, in other words, was chosen as the very core of the case.

By more or less replicating the mentioned question for the rearguments session, the court points out in the decision that ‘[t]he question presented is whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States’.⁸³ In the opinion, the principle of the *presumption against extraterritorial application*—that is, a principle that US law shall not be applied beyond the state borders—was introduced as a ‘natural’ limit to ATS litigation. ‘That canon,’ as the court’s majority put it, ‘provides that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none”’.⁸⁴ In general, the rationale behind the presumption is to prevent interferences of US law into the sovereignty of foreign states. No doubt, the claims brought against Royal Dutch Petroleum/ Shell possess such extraterritorial reach. The question was thus whether there is something in the ATS that would *rebut* the presumption.⁸⁵ The majority’s answer was: No. ‘The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States’.⁸⁶

Although being an interface between international law and domestic jurisprudence, the extraterritorial reach of the statute is not acknowledged. The ATS is interpreted as falling short of giving a ‘clear indication of an extraterritorial application’.⁸⁷ The question can be posed, however, whether the absence of a ‘clear indication’ really is that clear. Indeed, diverse objections to the majority’s reasoning of the decision were raised. ‘The ATS,’ as Justice Breyer holds, ‘was enacted with “foreign matters” in mind. The statute’s text refers explicitly

⁸³ *Kiobel*, 1.

⁸⁴ *Kiobel*, 4.

⁸⁵ *Kiobel*, 6-7 and 13.

⁸⁶ *Kiobel*, p. 7.

⁸⁷ *Kiobel*, p. 4.

to “alien[s],” “treat[ies],” and “the law of nations”.”⁸⁸ And by relying on the judgment in the *Sosa* case,⁸⁹ he argues that ‘at least one of the three kinds of activities that we found to fall within the statute’s scope, namely piracy [...] normally takes place abroad’.⁹⁰ Against the backdrop of these alternatives, the argumentative path chosen by the majority is hardly as self-evident as it is presented. Thus understood, the ATS although ‘bringing international law home’,⁹¹ falls short of transcending national territoriality. In order to make this a case, the court pursues a ‘politics of space.’

The spatial moment in the Supreme Court decision, strangely enough, finds an expression in the way how *Kiobel* is related to piracy. In the historical record of jurisprudence, piracy was brought up as a possible target of ATS litigation,⁹² so that today there is hardly any doubt that pirates would be liable under the statute. But what do pirates have to do with human rights violations through private corporations? In fact, piracy was discussed with regard to the question of corporate liability. While despite the sometimes obviously abusive conduct of private corporations it would be difficult to argue that corporations act like pirates, a parallelization of conduct of pirates and corporations is interesting from a legal point of view: since pirates clearly pursue an economic objective they may indeed be ‘like’ corporations. As a result, the argument could be raised that if pirates are liable under the ATS, so are corporations.⁹³

⁸⁸ *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, slip op. (US Supreme Court Apr. 17, 2013) (Breyer, concurring) (hereinafter: Breyer), p. 3.

⁸⁹ *Sosa*, 732.

⁹⁰ Breyer, p. 4.

⁹¹ Harold Hongju Koh, “Bringing International Law Home” (1998) 35 *Houston Law Review* xxx.

⁹² *Sosa*, 732.

⁹³ In fact, this hypothetical parallel finds its expression in *Kiobel* as ‘Pirates Inc.’ In the first of two oral argument sessions when the focus of the case seemed to be on corporate liability, Justice Breyer confronted Kathleen M. Sullivan—she was pleading in front of the court for the respondent side—like this: ‘Do you think in the 18th century if they brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he says, oh, it isn’t me; it’s the corporation—do you think that they would have then said: Oh, I see, it’s a corporation. Good-bye. Go home.’⁹³ Sullivan’s answer was this: ‘Justice Breyer, yes, the corporation would not be liable.’ The NGO *Earth Rights International* has put a video on its website taking up this somehow bizarre conversation from the oral argument session in order to make a point on ‘abusive corporate power’. See < <http://www.toobigtounish.org> >.

But piracy stayed an issue, even after the court had switched the focus to territoriality—perhaps even as a hidden (‘invisibilized’) Achilles’ heel in the court majority’s opinion. The reason for this is that piracy, no doubt, has an extraterritorial dimension. While it seems to be established that pirates would be liable under the ATS and, at the same time, the extraterritorial dimension of piracy is taken for granted, it is eventually inconsistent to say that the ATS has no extraterritorial reach. Acknowledging the right under international law to seize pirates in whatever place may not be compatible with saying that nothing in the ATS would rebut the extraterritorial presumption.

Applying U. S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign [...]. Pirates [...] generally did not operate within any jurisdiction. [...] We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves.⁹⁴

In fact, pirates are *made* a ‘category unto themselves’ within this passage by being located somewhere beyond territorial jurisdiction, i.e. in a *non-space*. Piracy is de-territorialized. That productive determination, however, is hardly without any alternative. ‘The majority,’ as Justice Breyer puts it,

cannot wish this piracy example away by emphasizing that piracy takes place on the high seas [...]. That is because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies.⁹⁵

And that would of course, as Breyer continues, ‘typically involve applying our law to acts taking place within the jurisdiction of another sovereign.’⁹⁶ The issue at stake is, in other words, how to locate piracy in a normative space. Piracy is spatially signified and thus ascribed with a certain spatial meaning that, in turn, generates an Achilles’ heel of the legal argument. The majority’s construction of piracy while operating in a normative *non-space*

⁹⁴ *Kiobel*, 10-11.

⁹⁵ Breyer, p. 4.

⁹⁶ *ibid.*, p. 4-5.

contributes to the plausibility of the whole spatial story that is put forward with the decision. Since pirates are granted a certain position in the record of ATS jurisprudence, locating their activity on another sovereign's territory would undermine the 'extraterritorial presumption' argument. In sum, piracy is not a mere sideshow. The spatial construction of piracy as a 'category unto themselves' rather contributes to a productive spatial narrative and is thus brought up as a decisive tool in the rejection of the case.

As a result, the *Kiobel* decision curtails the scope for future human rights suits against transnational private corporations remarkably. The role which the underlying spatial knowledge plays becomes highly obvious in the last passages of the opinion. In the text, limits to future lawsuits against corporations are particularly established through an emphasis on the relation between corporative conduct and the territory of the United States.

And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application [...]. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.⁹⁷

With regard to the future scope of legal possibilities one could raise the argument that the court has left things in the dark.⁹⁸ The 'touch and concern' formula is setting a fluid criterion. While the mere corporate presence on US territory is now said to be an insufficient relation, this would not *per se* preclude creative constructions of inter-relations between space and conduct in the future.⁹⁹ From a social science point of view—and particularly with regard to the theoretical argument on the production of space—the problem is more fundamental and

⁹⁷ *Kiobel*, 14.

⁹⁸ For disappointed but still optimistic position, see Redford, "Commentary: Door still open for human rights claims after *Kiobel*."

⁹⁹ But see *Balintulo v. Daimler AG*, 09-2778-cv(L) (U.S. Court of App., 2nd Cir. 2013), 20 ('The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. [...]. The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant "conduct" or "violation," at least eight more times in other parts of its eight-page opinion; and it affirmed our judgment dismissing the plaintiffs' claims because "all the relevant conduct took place outside the United States," [...]. Lower courts are bound by that rule and they are without authority to "reinterpret" the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants.' [citations and footnotes omitted]).

grounds in a problematic spatial circularity of the discussed legal decision. Although deeply involved in the production of space, *the court presents territory as physically given*. Territory is thus ‘naturalized’ and, in so doing, *a veil is drawn over the political nature of social space*. The court works with the very notion of territory and space which is so fundamentally questioned by the literature in the field of critical geography and beyond. In sum, if we assume that territory is constructed and that legal text like a decision of the US Supreme Courts participates in an ongoing process of the production of space, the ‘touch and concern’ formula appears in a different light.

5. CONCLUSION

In this paper I have argued that transnational human rights litigation may cut through the heart of a territorialized legal knowledge. In order to establish a framework for the critical analysis of human rights litigation, territory and space have been understood as not physically given but as constructed in an ongoing social and socio-legal process. Legal practice like in *Kiobel* makes sense only against the background of a particular spatial knowledge. ‘Transnational’ jurisprudence is affected because, in the first place, legal practice will have to make sense of ‘the transnational.’ Put differently, ‘the transnational’ will have to be constructed *as* a space within which a certain legal practice makes sense. Since the established construction of territory has such critical repercussions on how legal arguments can be developed, *territoriality turns into a legal technology*.

Where the congealed notion of territorial jurisdiction is questioned, the solid ground of historically congealed governance structures ‘melts into air’.¹⁰⁰ By borrowing from Marx’ and Engels’ *Manifesto* Ford nicely points out how much is at stake where space become a matter of controversy, even where the spatial moment of controversy is not made too explicit. In this paper, *Kiobel* has been understood as a critical site of such contestation. When facing such a

¹⁰⁰ Ford, “Law’s Territory.”

threat to established modes of governance—the *state mode of production*—state institutions, like courts, cannot be expected to ‘let itself wither away or be overcome without resistance’.¹⁰¹ On the one hand, the Supreme Court’s decision on *Kiobel* could be interpreted as such resistant practice in a world of states challenged by globalization. On the other hand, this interpretation draws on a too broad-brushed narrative of globalization and the state, no longer (if ever) suitable for depicting global complexity.

By curtailing further possibilities of suing private corporations under the ATS the Supreme Court has effectively closed a door for transnational human rights litigation and preserved a certain space for private enterprise in the global realm. While the spatial restrictions on jurisdiction as reproduced in the *Kiobel* decision reinforce state boundaries they also affect the conditions of private enterprise beyond these now reinforced boundaries. Limiting the jurisdiction of the nation-state means by implication that evolving structures of private governance in the Global South will not become subject to state regulation. This adds up to the argument that the state is not a victim of globalization but is itself deeply involved in the construction of ‘globalized’ space.¹⁰² In turn, transnational private corporations are—perhaps paradoxically—involved in the preservation of the state and its jurisdictional space. What emerges is a *public-private partnership* in its own right,¹⁰³ with the result that the Kafkaesque situation of—in this case Nigerian—individuals not permitted entrance to the law remains in ‘place.’

The attempt to establish universal jurisdiction can of course be seen as problematic, for example in the sense of a *de facto* imperial projection of US jurisdiction to the world. Likewise, the criticism can be raised with respect to unintended reciprocity. The mere possibility of courts in other countries deciding on corporate conduct in the US may prompt

¹⁰¹ Lefebvre, “The Worldwide Experience,” 278.

¹⁰² Sassen, “Neither Global nor National: Novel Assemblages of Territory, Authority and Rights”; Sharma and Akhil Gupta, “Introduction: Rethinking Theories of the State in an Age of Globalization”.

¹⁰³ See the Marxist criticism of International Organizations as a ‘nascent world state’ serving a global capitalist class: B. S. Chimni, “International Institutions Today: An Imperial State in the Making,” *European Journal of International Law* 15, no. 1 (2004).

serious doubts. The spatial analysis of *Kiobel*, however, indicates that if seen as problematic universal jurisdiction is only problematic for a particular reason: the social construction of space. Territory is not a *natural thing* but is in need of being ‘naturalized.’ Universal jurisdiction is thus not *per se* problematic but only due to a spatial constellation of jurisdiction which is subject to a *politics of space*. ‘There is a politics of space because space is political’.¹⁰⁴ Because of this political ‘nature’ of space, it is problematic to locate the transnational legal process *per se* in a ‘transnational space’ that, as a matter of consequence, cannot be implicated as already existing. Rather, we find the social—or here: socio-legal—construction of ‘the transnational’ *as* space, whereas a controversy arises about how the meaning of such space is to be determined. While the global human rights community has hoped to effectively construct ‘the transnational’ *as* space in such a way that international human rights norms are superior to territorial jurisdiction, the court has sustained the established construction of ‘the transnational’ *as* space with the state as the gatekeeper even of global law.

“What do you still want to know, then?” asks the gatekeeper. “You are insatiable.” “Everyone strives after the law,” says the man, “so how is that in these many years no one except me has requested entry?” The gatekeeper sees that the man is already dying and, in order to reach his diminishing sense of hearing, he shouts at him, “Here no one else can gain entry, since this entrance was assigned only to you. I’m going now to close it.”¹⁰⁵

¹⁰⁴ Lefebvre, "Reflections on the Politics of Space (1970)," 174.

¹⁰⁵ Franz Kafka, *Before the Law* (transl. by Ian Johnston) < <http://www.kafka-online.info/before-the-law.html> >