



MAPPING THE NOMOSCAPE:
TOWARDS A SPATIAL REIMAGINING OF INTERNATIONAL
CRIMINAL LAW

by

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INTRODUCTION

“We believe that spatialisation is a relevant avenue for law’s (re)conceptualisation because it moves away from a description of humanism based on the universality of subjectivity, and paves the way for a particularised and material description of law’s multiplicity that specifically addresses law’s social positioning”

Andreas Philippopoulos-Mihalopoulos and Sharron FitzGerald, ‘From Space Immaterial: The Invisibility of the Lawscape,’

International law retains an abiding place in the imaginations of those who yearn for a more justly ordered world. It holds out the promise of a cosmopolitan utopia, of a higher realm of justice beyond the confines of the state, based on the universal value of each human being. Yet that promise has come to resemble a paradox as the aspiration for justice is repeatedly dashed on the rocks of political reality. The animating concern of this thesis is to explore the antinomy at the heart of what is unselfconsciously referred to as international criminal justice. The intention is to investigate the contradictions of international criminal law, and the disjunctures between its pronouncements, actual praxis, and material effects in the world.

An examination of these contradictions can lead to the conclusion that the universal aspiration of the law is little more than a sham, a rhetorical and ideological fig-leaf to mask the actual existing power relations that animate international criminal law. The normative principles of universality and neutrality seem to be merely a means for those who rule to extend and camouflage their will to power, and to maintain their impunity from the law. However, I retain a belief in in the emancipatory potential of the law, a posture that insists on an ethical kernel of the legal that kindles every act of political struggle. Such a stance does not seek to deny the founding violence that is at the root of law and which continues to define the worldly presence of the legal, but instead follows Zizek in electing to emphasize “...the utopian beyond of law that persists within it.”¹

To reject law’s manifold descriptions of itself, its pompous claims of neutrality and hollow guarantees of justice, is to look outside the law for answers, to search beyond

¹ Jodi Dean, ‘Zizek On Law’ [2004] 15 *Law and Critique* 1, 23

legal closure for resolution and redress. Yet if all we discover beyond the legal is the Hobbesian schema of *realpolitik* then our hopes of glimpsing the ethical kernel of the law are surely dashed. Instead, what is required is to discard the redundant dichotomy between the legal and the political, to be released from the complicit binary that has allowed each to disown the other, and acknowledge the critical value of a third ethically grounded conceptual framework. To do so we must embrace the spatial.

The answer to the conundrum of international criminal law will not, then, be found in the norms that law ascribes to itself, nor in the hard-nosed realism of political calculation, but rather in “...the relationships between law and the ambiguous space of the global.”² The history and practice of international criminal law is rooted in geography. The field is full of evocations of space, place, and territory. Concepts such as sovereignty and nationality: empire, colony, state, and ‘the international community’; jurisdiction, legitimacy, and judgment; aggression, humanity, atrocity and war; tribunal, crime, indictment, and even justice itself are all bound up with concepts of *space*. Yet the field of international criminal law, which presumes an ideal of neutrality and universality, has yet to engage with its *worlding* and remains elusively *space-less* – applicable everywhere and simultaneously a view from nowhere. By investigating how international criminal law takes material form, by mapping international legal space, we may be able to (re)imagine international justice. To put it simply the materiality of the spatial is the means by which the ethical gap between international law and international justice may be bridged.

This thesis consists of four parts. Part I introduces the realm of spatiality and the pivotal conceptualisation of *space as the product of social relations*. Chapter 1 sets the scene by heralding the resurgence of critical theories of space, before highlighting the ethical potential inherent in the generative, multiplicitous, and open-ended nature of spatiality. Chapter 2 introduces the triad of physical, mental, and social space conceptualised by Henri Lefebvre. This schema of *spatial practices, representations of space* and *representational spaces* is what underpins the contemporary ‘spatial turn.’ Part II begins the process of bringing the spatial into conversation with the

² David Delaney, ‘Introduction: Globalization and Law’, in Nicholas Blomley, David Delaney, Richard T. Ford (eds) *The Legal Geographies Reader* (2001 Blackwell), 252

legal. Chapter 3 touches on some key landmarks of the emerging field of ‘law and space,’ including the nexus of society, space and law; the political origins of legal space; and, crucially for an understanding of the process of world-making that articulates international criminal law, the denial of space by the law. Chapter 4 provides a detailed summation of David Delaney’s theorisation of the *nomosphere* – an indivisible realm of the legal *and* the spatial. Delaney’s exhortation to conduct *nomospheric investigations* stands as a key inspiration for this thesis and his coherent conceptualisation of the *nomie* serves as a template for this work. Chapter 5 concludes the theoretical framework by tentatively mapping the contours of *international* legal space, through an elucidation of the tropes of *scale*, *spaceless-ness* and *visibility*.

Part III begins the process of applying that theoretical framework to the spatiality of international criminal justice. Chapter 6 proposes the *space of adjudication* as a heuristic device, which borrows from both Lefebvre and Delaney, to map how international criminal law is *worlded* through the production of adjudicative spaces – the *nomospheric settings* of international criminal justice. Through a consideration of the *spatio-legal assemblages* that produce adjudicative space – the people, places, and things that constitute the spatiality in which international criminal law is *performed* – Chapter 7 begins to chart the *nomospheric visibility* of the *space of adjudication*. Part IV then proceeds to map the *nomoscape* of international criminal law – the constellation of adjudicative spaces that together reify the space of adjudication. Mapping the *exemplary*, *anomalous*, and *exceptional nomospheric settings* of international criminal law thus tentatively reveals the materialisation of international criminal justice. In order to chart the spectrum between visible *international* legal space and invisible *national* legal space, Chapter 8 assesses the *hyper-visible nomospheric settings* of the UN sponsored tribunals – the *exemplary* adjudicative spaces of international criminal law. The boundary between international and national legal space is directly addressed in Chapter 9, through an analysis of how the Special Panel for Serious Crimes in East Timor came to be produced as an *anomalous* adjudicative space. The SPSC thus serves as an illuminating example of the ‘project of seeing and concealing’ through which the boundaries of international legal space are policed. Finally Chapter 10 considers the Kuala Lumpur War Crimes Tribunal as an example of how ideologically problematic, *exceptional* adjudicative spaces are rendered *invisible* and thus excluded from international legal space.

PART I: SPATIALITY

Did it start with Bergson or before? Space was treated as the dead, the fixed, the undialectical, the immobile. Time, on the contrary was richness, fecundity, life, dialectic.

Michel Foucault, 'Questions on Geography', in Power\Knowledge: Selected Interviews and Other Writings 1972-1977

Chapter 1: What is space?

1.1: Space and Time

In order to conduct a spatial analysis, to bring to bear the theoretical insights of the 'spatial turn,' it is necessary to set out a tentative definition of 'space;' to attempt to elucidate its nature, its characteristics and its properties. It is necessary to suggest how 'space' relates to 'society', to 'politics', to 'power', and eventually, to 'the law'. It is necessary to ask the question 'what is space'?

One possible starting point is the distinction between space and time. Time is a concept that maintains an everyday meaning; it serves as a tool of commonsense understanding. Time gives us both our daily routine; from our morning alarm to our hours of work, and our life's rhythm; from our summer holidays, and children's birthdays to our plans for retirement. But time has also bequeathed us history and progress, it has taught us to think of the world as made up of narratives, stories with a beginning, middle and an end. Our dominant cultural conception of time encourages us to imagine all things as linear, as starting from one point and finishing 'somewhere down the line.' This successive trajectory of time has a tendency to be all encompassing; it's intent is to order and arrange *all* things, *all* human activity, and indeed, *all* human civilization, along the *same* path.

In contrast, space is a concept that can suggest complexity rather than simplicity, multiplicity rather than uniformity. Unlike the calculable certainty of time, space holds no commonly accepted meaning and serves no predictable function in our daily

lives. Is space simply the air around us, or the ground we walk on? Is space the whole surface of the earth or indeed the existence of everything beyond earth – the eternity of ‘outer space’? Is space merely the solid, inert physicality of our world – the chairs we sit on, the buildings we live and work in, the landscapes we traverse? Or is space what we create around us as social beings – the ‘personal space’ we guard against unwanted intrusion? These manifold possibilities are a reflection of the multiplicity of human geography; from the immaterial geography of each individual subjectivity through the physical geography of the world around us, to the myriad social geographies of hamlet, city, tribe and nation; to the cosmopolitan geographies of a global community.

This disparity in articulation and comprehension – the exactness of time versus the obscurity of space – has led to the ascendancy of time and history. As Foucault implies, during the era of modernity, time in the guise of history and linearity was affirmed, while space in the guise of geography and multiplicity was neglected. Yet the reality, indeed the immanence, of geography could not be denied, the presence of space could not be entirely erased from the narrative of history. So instead the complexity, the profundity, the multiplicity of space was suppressed. Space was stripped of all generative meaning, it was conceived by modernity as a flat, inert, featureless backdrop, an empty container, a surface to be traversed, to be measured, and to be ordered. This ‘taming of space’ reverberated through the inequities of modernity, through the privileging of a single, enlightened, masculine, and European history over all others, through the materialization of power in service of a single, all encompassing, narrative.

Yet with the contemporary questioning of modernity, with the onset of a postmodern critique of linear narratives, comes a resurgence of space. As Edward Soja so gracefully articulates, it is precisely the postmodern sensibility that has alerted us to the liberating potential of (re)incorporating the spatial into our conception of society, power, and the law.

Understanding how history is made has been the primary source of emancipatory insight and practical political consciousness, the great variable container for a critical interpretation of social life and practice. Today, however, it may be space rather than

time that hides consequences from us, the ‘making of geography’ more than the ‘making of history’ that provides the most revealing tactical and theoretical world. This is the insistent premise and promise of postmodern geographies.³

1.2: *The Social Production of Space*

So if our aim, in light of the faltering hegemony of time, is the reassertion of space, how is this project to be undertaken? If space is complex and multiplicitous, what meaning(s) should we draw on, what characteristic(s) should we foreground, what conception(s) of space should we utilize? What understanding(s) of space must we bring to the intended analysis of law?

Over the last 20 years or so the reassertion of space in critical thought has manifested across a number of disciplines, ranging across the social sciences and humanities, and has taken a variety of forms. “It has arisen from all kinds of theoretical and practical impulses, but its effect has been clear enough: the identification of what seems like a constantly expanding universe of spaces and territories, each of which provides different kinds of inhabitation.”⁴ This efflorescence of new perspectives, this ‘spatial turn,’ has thrown up a multiplicity of definitions and utilizations of space, yet what arguably unites them all is the idea that *space is a product of human society*.

The generative source for a materialist interpretation of spatiality is the recognition that spatiality is socially produced and, like society itself, exists in both substantial forms (concrete spatialities) and as a set of relations between individuals and groups, an ‘embodiment’ and medium of social life itself.⁵

That space is produced by human society is the central idea, the root, of all critical articulations of space. Whether what is being described is the biological space of the womb, the mental space of consciousness, the private space of the home, the built space of the urban environment, the geo-physical space of the ‘natural’ world, the demarcated space of municipalities and states, the boundless space of cyberspace, the

³ Edward W. Soja, *Postmodern Geographies: The Reassertion Of Space in Critical Social Theory* (1989 Verso), 1

⁴ Nigel Thrift, ‘Space’, [2006] 23 *Theory Culture Society* 139, 139

⁵ Soja, *supra* note 3, 120

territorialised space of sovereignty, or the adjudicative space of the law; *all these spaces are produced by social interaction*. What is essential to highlight here is that the production of space by society applies to both the material, tangible, world around us - what Soja terms *concrete spatialities* - and the intangible world of *relations*. These immaterial spaces encompass the mental relations we form with ourselves through our reason, imagination, and fantasy; the emotional and cultural relationships we form with our friends, families, colleagues, and countrymen; and the relations of power, authority and affect that order society - from those that are learnt through socialization to those that are enforced through law.

This broad explication should not be read as collapsing all physical and mental phenomena into the definition of space, but rather as highlighting that *all social interaction must by necessity produce its own space*. This applies in equal measure to the physical construction of a prison, the drafting of criminal legislation, and the cultural trope of the gangster movie. This does not imply that the material space of the courtroom is synonymous with the shared cultural imagination of the archetypal criminal, merely that as subjects of knowledge and analysis they are also and always descriptions of social space, produced by social interaction. As Soja has written:

As socially produced space, spatiality can be distinguished from the physical space of material nature and the mental space of cognition and representation, each of which is used and incorporated into the social construction of spatiality but cannot be conceptualized as its equivalent.⁶

The limitless diversity of *social space* is a function of the process of meaning-making through which our social worlds are constituted. A womb is not merely a biological organ, it is also a *social space* inscribed with significant political, sociological, and legal meaning; a prison is not just a site of physical confinement it is also a *social space* constructed through competing ideologies of, for example race and class; a legal decision or rule is not only a text or an authoritative act, it is also constitutes *social space*; it embodies the performance of broader fields of power.

⁶ Soja, *supra* note 3, 120

David Delaney powerfully sets out the enormous breadth of *social space* at the opening of his recent work *Nomospheric Investigations*; a passage that can productively be set out in full:

The worlds of human experience are composed of an uncountable number and innumerable variety of social spaces. Some are global in extent, some smaller than your hand; some are fixed to particular landscapes, some are in motion. The ways in which these spaces are created and altered, assembled, disassembled and reassembled, strongly condition what the world is like and what it is to be in the world – that is, what this or that life is like. These spaces are meaningful – they signify, represent, and refer. They are therefore interpretable.... But meanings are not extrinsic to the spaces; rather, spaces are *constituted* by their meanings, or, as it is commonly expressed, such meanings are ‘inscribed’ onto segments of the lived, material world. Insofar as the meanings so inscribed are ambiguous (and amenable to reinterpretation) then so are the spaces, and so are the situations that unfold with reference to these spaces. Spatialized meanings are not inert or passively waiting to be read or interpreted.... they may be productively understood as performable – as able to be taken up through bodily comportments. Particular spaces... and constellations of spaces can therefore be investigated in terms of how they are performed. At the same time, such inscriptions and performances may accomplish the materialization of meaning. Signifiers may be given concrete expression in boundaries, checkpoints, fences, doors, and thresholds; or in the ways in which components of the built environment are assembled; or the ways in which more extensive landscapes are organized into fields of power.⁷

1.3: *Some characteristics of space*

To merely assert that ‘space is a product of human society’ is insufficient to elucidate a workable and productive conception of spatiality. In order to better understand how space is produced and the nature of its interaction with society, politics, and the law, some of the major characteristics of space must first be further illuminated. Doreen Massey, one of the leading theorists of spatiality, has suggested three propositions that might assist in the conceptualisation of space. Each attempts to define a central

⁷ David Delaney, ‘*Nomospheric Investigations: The Spatial, The Legal and The Pragmatics Of World-Making*’ (2010 Routledge), 5

characteristic of space while also hinting at how an incorporation of spatiality as a whole might be critically productive.

The first proposition is that "... we recognize space as the product of interrelations; as constituted through interactions, from the immensity of the global to the intimately tiny."⁸ Coupled with this recognition - that the field of spatiality is as broad as the totality of social interrelations - is the understanding that each of the spaces thus produced is individually situated; it occupies its own space, it inhabits its own geography. Nigel Thrift, who has also proposed a number of 'principles... that should be at the root of any approach to space,'⁹ and which echo those of Massey, makes this clear:

... everything, but everything, is spatially distributed, down to the smallest monad: since the invention of the microscope, at least, even the head of a pin has been seen to have its own geography. Every space is shot through with other spaces in ways that are not just consequential outcomes of some other quality but live because they have that distribution.¹⁰

What flows from these related principles – that space is the product of interrelations and that every space inhabits its own geography – is that neither space nor the social relations that constitute them exist independently of each other. As Massey suggests, "...space does not exist prior to identities/entities and their relations.... identities/entities, the relations 'between' them, and the spatiality which is part of them, are all co-constitutive."¹¹ Thus society produces space through each of its innumerable interactions, it inscribes meaning onto space and geography; and space in turn constitutes society through the performance of meaning that each situated space and place permits. In the words of Edward Soja:

All social relations become real and concrete, a part of our lived social existence, only when they are spatially "inscribed" – that is concretely represented – in the social production of social space. Social reality is not just coincidentally spatial,

⁸ Doreen Massey, *For Space* (2005 Sage Publications), 9

⁹ Thrift, *supra* note 4, 140

¹⁰ *Ibid*, 140

¹¹ Massey, *supra* note 8, 10

existing “in” space, it is presuppositionally and ontologically spatial. *There is no unspatialized social reality.* There are no aspatial social processes.¹²

Massey’s second proposition highlights the diversity of space, and suggests that “...we understand space as the sphere of possibility of the existence of multiplicity in the sense of contemporaneous plurality; as the sphere in which distinct trajectories coexist; as the sphere therefore of coexisting heterogeneity. Without space no multiplicity; without multiplicity, no space. If space is indeed the product of interrelations, then it must be predicated upon the existence of plurality. Multiplicity and space are co-constitutive.”¹³

The recognition of space’s multiplicity is particularly pertinent to the project of reasserting the significance of space as a field of analysis. The conception of space under modernity, as singular, as uniform, as a flat and inert surface, results in the erasure of multiplicity through the reconceptualisation of “...geography into history, space into time.”¹⁴ If history is a single narrative, a story told by and of modernity, of a Europe forged by the Enlightenment, then those who have a different history, a simultaneous story, yet one located outside of Europe, and outside of modernity, must somehow be assimilated into the singular narrative. This assimilation took the form of discovery.

... the way we imagine space has effects... conceiving of space as in the voyages of discovery, as something to be crossed and conquered, has particular ramifications. Implicitly, it equates space with the land and sea, with the earth which stretches out around us. It also makes space seem like a surface; continuous and given... It is an unthought cosmology... but it carries with it social and political effects. So easily this way of imagining space can lead us to conceive of other places, peoples, cultures simply as phenomena ‘on’ this surface. It is not an innocent manoeuvre, for by this means they are deprived of histories... They lie there, on space, in place, without their own trajectories.¹⁵

¹² Edward Soja, ‘Thirdspace: Journeys to Los Angeles and Other Real-And Imagined Places’ (1996 Wiley-Blackwell), 46 (emphasis in original)

¹³ Massey, *supra* note 8, 9

¹⁴ *Ibid*, 5

¹⁵ *Ibid*, 4

The third of Massey's propositions relates to what might be called *spacing* – the ongoing, the never ceasing, the never still or fixed nature of the production of space. As Thrift suggests, "... every space is in constant motion. There is no static and stabilized space, though there are plenty of attempts to make space stable and static."¹⁶ In order to appreciate the generative and critical potential of spatiality it is imperative, Massey states: "That we recognise space as always under construction. Precisely because space on this reading is a product of relations-between, relations which are necessarily embedded material practices which have to be carried out, it is always in the process of being made. It is never finished; never closed. Perhaps we could imagine space as a simultaneity of stories-so-far."¹⁷

Again, this dynamic property of space has a direct impact on the challenge to time posed by a resurgent spatiality. It is precisely through the fluidity that space provides, the lack of closure, and thus the potential for other, alternative, as-yet-unknown, outcomes, arising from the simultaneous coexistence of geographies, that subverts the inevitability of a linear historical narrative. For history does not only seek to order the past along a single trajectory, it also projects that same trajectory into the future, predetermining the possibilities, the outcomes, of all those brought within its purview. It is this critical potential of spatiality, inherent in the "... genuine openness of the future,"¹⁸ that Massey urges us to embrace:

Not only history but also space is open.... Here, then, space is indeed a product of relations (first proposition) and for that to be so there must be multiplicity (second proposition). However, these are not the relations of a coherent, closed system within which, as they say, everything is related to everything else. Space can never be that completed simultaneity in which all interconnections have been established, and in which everywhere is already linked with everywhere else. A space, then, which is neither a container for always-already constituted identities nor a completed closure of holism. This is a space of loose ends and missing links. *For* the future to be open, space must be open too.¹⁹

¹⁶ Thrift, *supra* note 4, 141

¹⁷ Massey, *supra* note 8, 9

¹⁸ *Ibid*, 11

¹⁹ *Ibid*, 11

In the end the recognition of the generative nature of space must include a parallel acknowledgment that the world is the way it is because of the spaces we create and the way these spaces create us. Any scholarly project that fails to scrutinise the spatial – that excludes considerations of space – can only ever provide a partial explanation of the social world.

“Space,” in these formulations, is clearly more than a backdrop or a stage *upon which* action takes place. It is also much more than inert fragments of discourse. When space is performed differently it *is* different. It *becomes* different and may have alternative differentiating effects. As it does, the world continuously *becomes* a different world.²⁰

²⁰ Delaney, *supra* note 7, 17

Chapter 2: Henri Lefebvre's Conception of Space

2.1: 'The Production of Space'

Henri Lefebvre is arguably the preeminent philosopher of space. Throughout his long and productive life, which spanned almost the entire twentieth century, he consistently prioritised the theoretical conceptualisation of space. The pinnacle of this project was a book, first published in French in 1974, titled simply '*The Production of Space*.' Lefebvre's work was, it turned out, ahead of its time, and it was not until its eventual translation into English in 1991, that '*The Production of Space*'²¹ began to have a defining influence. It is now widely acclaimed as being responsible for "...brashly reasserting the interpretive significance of space in the historically privileged confines of contemporary critical thought."²²

Lefebvre was a lifelong student of Marxism. The impetus behind his philosophical work on space was grounded in a desire to extend Marx's elucidation of the underpinnings of social interaction, to further illuminate the foundations of society. As Lefebvre's biographer Andy Merrifield has argued, just as Marx sought to explicate the 'true' workings of capitalism by digging down to uncover the 'social forces of production' - rather than being distracted by the fetishism of commodities, or by 'things in exchange' - so Lefebvre sought to elucidate the 'true' workings of society by digging down to uncover the 'production of space.'

Lefebvre, correspondingly, tries to demystify capitalist social space by tracing out its inner dynamics and *generative moments* in all their various guises and obfuscations. Here, generative means 'active' and 'creative', and creation, says Lefebvre, 'is, in fact a *process*'. Thus getting at this generative aspect of space necessitates exploring how space gets *actively produced*.²³

The result of this intellectual labour was a new conceptualisation of space, a notion that the long established dichotomy between 'real space' and 'ideal space' was no

²¹ Henri Lefebvre, '*The Production of Space*' (1974/1991 Blackwell)

²² Soja, *supra* note 3, 11

²³ Andy Merrifield, 'Henri Lefebvre: A Socialist in Space', in Mike Crang and Nigel Thrift (eds) *Thinking Space* (2000 Routledge), 171 (emphasis in original)

longer sufficient. Lefebvre believed that the bifurcation between the ‘real space’ of the physical world around us, and the ‘ideal space’ of our mental conception of the world, no longer sufficiently defined the compass of social life, and thus social space.²⁴ Lefebvre’s proscriptio was to seek to elucidate how the two seemingly antithetical spatial realms – the physical and the mental; the material and the immaterial - might in fact interrelate, how they might be unified through the re-emergence of *social space*.

The key conceptual leap that propelled Lefebvre’s thinking was that, instead of conceiving of space as ‘an empty vessel existing prior to the matter which fills it,’ space was socially produced. Social space was constituted by each and every social interaction, so that “... every society produces its own space... I say society but it would be more accurate to say each mode of production along with its specific means of production”²⁵ In essence what Lefebvre sought was “...a unitary theory of physical, mental and social space,”²⁶ through which he hoped to illuminate the fundamental dynamism and diversity of the social world, a dynamism that could not be restricted, or corralled into the dualism of the sensory, physical world ‘out there,’ and the calculable, mental world ‘in here’.

Social space will be revealed in its particularity to the extent that it ceases to be indistinguishable from mental space (as defined by the philosophers and mathematicians) on the one hand, and physical space (as defined by practico-sensory activity and the perception of nature) on the other. What I shall be seeking to demonstrate is that such a social space is constituted neither by a collection of things or an aggregate of (sensory) data, nor by a void packed liked a parcel with various contents, and that it is irreducible to a ‘form’ imposed upon phenomena, upon things, upon physical materiality²⁷

2.2: A Spatial Triad

²⁴ Lefebvre, *supra* note 21, 14

²⁵ *Ibid*, 31

²⁶ *Ibid*, 21

²⁷ *Ibid*, 27

The means through which Lefebvre sought to demonstrate the productive intertwining of physical, mental, and social space was the theoretical conceptualisation of a new spatial triad. He proposed that space was constituted through the interaction of *spatial practices, representations of space, and representational spaces*.²⁸

Space is viewed in three ways: as perceived, conceived and lived— *l'espace perçu, conçu, vécu*. This Lefebvrian schema sees a unity between physical, mental and social space. The first of these takes space as physical form, space that is generated and used. The second is the space of *savoir* (knowledge) and logic, of maps and mathematics, of space as the instrumental space of social engineers and urban planners. The third sees space as produced and modified over time and through its use, spaces invested with symbolism and meaning, the space of *connaissance* (less formal or more local forms of knowledge), space as it is lived, social space.²⁹

This summation by Stuart Elden is a useful starting point for an understanding of Lefebvre's schema, particularly as it explicitly associates each element of the triad with physical, mental, and social space, in turn. This crystallization of Lefebvre's theory can be usefully paired with Chris Butler's description of the triad as "...a distinctive and sophisticated theory of space which draws attention to its physical, symbolic and lived dimensions."³⁰ Yet these brief distillations are only the first step towards understanding the intricacy and entanglement of Lefebvre's spatial triad and the critical potential inherent in his work.

2.2.1: Spatial Practices

The realm of *physical* space is obviously made up of the material world around us, including the objects of our daily lives, the built environment we occupy, and the 'natural' landscape we inhabit, but this description of the concrete does not go nearly far enough. If spatial practices merely defined the static materiality of the physical

²⁸ *Ibid*, 33

²⁹ Stuart Elden, 'Politics, Philosophy, Geography: Henri Lefebvre in Recent Anglo-American Scholarship' [2001] 33 *Antipode* 809, 816

³⁰ Chris Butler, 'Critical Legal Studies And The Politics Of Space' [2009] 18 *Social & Legal Studies* 313, 327

world, the notion would do no more than reinforce the ‘taming of space’ as an inert surface, set apart – set back - from social interaction. On one level spatial practices are constituted by our routine interactions with the materiality of our world, the patterns of use to which we put the things around us. Thus spatial practices embrace the functionality of things, for example the routine sequence of physical interactions we have with the objects of our home that we go through every morning, when we prepare ourselves for the day. Spatial practices also include the maintenance, upkeep, and embellishment of our material world; all the interactions through which we generate and renew the space around us, from sewing a button to building a house. As the scale of social interaction increases so does the complexity of the spatial practices that are constituted - that are produced - by our interaction with the space around us. As we move through space, for example, we do not merely traverse inanimate space on our journey to work. Instead, we actively create networks and pathways. Just as we inscribe meaning into the objects of our home as we use and maintain them over time, so we project meaning onto the familiar routes, intersections, and stopping points of the transport infrastructures we engage with. As Lefebvre suggests, there is thus a dialectical interaction at the heart of all spatial practices that allows us to draw meaning from the space we perceive around us, a meaning that in turn is reflective of how that space has been used and produced by our interaction with it.

Spatial practices are practices which Lefebvre says ‘secrete’ society’s space; they propound and presuppose it, in a dialectical interaction. Spatial practices can be revealed by ‘deciphering’ space and have close affinities with perceived space, to people’s perceptions of the world, of their world, particularly with respect to their everyday world and its space. Thus spatial practices structure everyday reality and broader social and urban reality, and include routes and networks and patterns of interaction that link places set aside for work, play and leisure.³¹

The term spatial *practices* therefore infers a space that is produced by our occupation of it, a ‘material’ social space that is modulated by the rhythms of social life, that is constituted by, and in turn constitutes, our social interactions. Spatial practices have been described as “...the physical practices, everyday routines, networks and pathways through which the totality of social life is reproduced. These practices

³¹ Merrifield, *supra* note 23, 175

include both individually embodied social rhythms and collective patterns of movement within cities and regions.”³²

2.2.2: Representations of Space

Representations of space are the abode of power, yet they originate in the realm of mental space and are grounded in knowledge, logic and rationality. Through the use of discourses of mathematics, engineering, urban planning, law, and indeed through all forms of ordering, the space of society is *represented*. Through the work of technicians, engineers, lawyers, and other categories of expert; through “...the various arcane signs, jargon, codifications and objectified representations used and produced by these agents and actors;”³³ through the multiple processes of discipline, systematization, and ranking; through what Foucault referred to as governmentality, the space of society is *conceived*. But it is conceived in the image of power and according to its aspirations. Representations of space are an instrument of power, and it is through the manifold deployments, the daily reiterations, of conceived space that the arrangement, the ordering of society, in the form desired by power, is expressed.

Chris Butler highlights the centrality of power in his analysis, describing representations of space as “...forms of abstract knowledge generated by formal and institutional apparatuses of power engaged in the organization of space. Obvious examples include the work of planners, bureaucrats, social engineers, cartographers and the variety of scientific disciplines holding socially recognized ‘expertise’ in the management and control of spatial form.”³⁴ Although representations of space are necessarily abstract, Lefebvre attributed the *conceived* space with significant affective properties. “Is this space an abstract one? Yes but it also ‘real’ in the sense that concrete abstractions like money and commodities are real. Is it concrete? Yes, but not in the sense that an object or product is real. Is it instrumental? Undoubtedly, but like knowledge it extends beyond instrumentality.”³⁵

³² Butler, *supra* note 30, 320

³³ Merrifield, *supra* note 23, 174

³⁴ Butler, *supra* note 30, 320

³⁵ Lefebvre, *supra* note 21, 27

If representations of space are the abode of power and instrumentality, then they must also be the realm of *ideology*. Representations of space are deployed in order to propose a particular conception of society, perhaps even an ideal of society. However those technocrats and experts engaged in the ‘management and control of spatial form,’ must order social space to fit with the prevailing norms, they must “...identify what is lived and perceived with what is conceived.”³⁶ They must seek to assimilate the messy, multiplicitous realms of physical and social space, with the logic of mental space – with the abstract ideal of society and space proposed by power.

We may be sure that representations of space have a practical impact, that they intervene in and modify spatial textures which are informed by effective knowledge and ideology. Representations of space must therefore have a substantial role and a specific influence in the construction of space. Their intervention occurs by way of construction – in other words, by way of architecture, conceived of not as the building of a particular structure, palace or monument, but rather as a project embedded in a spatial context and texture that call for representations that will not vanish into the symbolic or imaginary realms.³⁷

Of the three elements of the spatial triad, it is representations of space that are “...the dominant space in any society,”³⁸ they are “...intimately tied to the relations of production and to the ‘order’ which those relations impose, and hence to knowledge, to signs, to codes, and to ‘frontal’ relations.”³⁹ The dominant ideology of our era is capitalism, and it was capitalism as an ideological project embedded in a spatial context that Lefebvre expressly set out to analyse. The ubiquity of late capitalism has, according to Lefebvre, amplified the dominance of the representation of space. “Lefebvre labels this abstract space – the fragmentary, pulverised space created by the imperatives of capital and the state’s management and domination of space. It not only nurtures and facilitates the reproduction of capitalist social relations; it actively excludes alternative spatial uses.”⁴⁰ The abstract conception of space, aligned with the uniform logic of capitalism has significantly repressed social space and impacted catastrophically on physical space.

³⁶ *Ibid*, 38

³⁷ *Ibid*, 42

³⁸ *Ibid*, 38

³⁹ Merrifield, *supra* note 23, 174

⁴⁰ Butler, *supra* note 30, 323

...an unrestrained capitalism always and everywhere gives primacy to the conceived realm... the social space of lived experience gets crushed and vanquished by an *abstract* conceived space. In our society, in other words, what is lived and perceived is of secondary importance compared to what is conceived. And what is conceived is usually an objective abstraction, an oppressive *objective abstraction*, which renders less significant both conscious and unconscious levels of lived experience.⁴¹

Yet this objective abstraction of the totality of social space is never complete, never isomorphic. The intertwining of physical, mental, and social space in the construction of society requires a certain coherence – a certain reflection – between the three. Representations of space cannot altogether discard, exclude or ignore the ‘reality’ of social and physical space. Thus the dynamism of social space and the potency of physical space, the *constant motion* of space, insists on a certain consistency between conceived, lived, and perceived space. The “...established relations between objects and people in represented space are subordinate to a logic that will sooner or later break them up because of their lack of consistency”⁴² If the constituents of social space resist the objective abstraction of conceived space, if there is protest or even revolution; if the manifestations of physical space no longer fit the ordering schema of conceived space, if, for example, the organic spread of informal housing disturbs the imposed urban plan, then the resulting inconsistency between the conceived logic of ‘the relations between objects and people in represented space’ will be unsustainable and the abstract space of power will be forced to adapt.

2.2.3: Representational Spaces

Finally, representational spaces are the seat of social space, they are ‘produced and modified’ over time. Representational spaces are *performed* by the constituents of social space through an endless interaction with both the ‘routines, networks and pathways’, the spatial practices of perceived space, and the abstract dictates, the ordering logics, of conceived space. Social space is thus *lived* as it is performed and is enmeshed with the myriad symbolic meanings drawn from the interaction with

⁴¹ Merrifield, *supra* note 23, 175

⁴² Lefebvre, *supra* note 21, 41

physical and mental space, the hybrid images and imaginaries that borrow from what is perceived and what is conceived to create local, anarchic, forms of knowledge.

Representational space is directly *lived* space, the space of everyday experience. It is the space experienced through complex symbols and images of its ‘inhabitants’ and ‘users,’ and “overlays physical space, making symbolic use of its objects.” Representational space may be linked to underground and clandestine sides of social life and doesn’t obey rules of consistency or cohesiveness, neither does it involve too much ‘head’: it is more felt than thought. It is simply *alive*.⁴³

However, representational spaces are paradoxical, and exhibit a certain degree of fragility. Social space is at one and the same time a generative space of creativity and resistance, “...a means of human *reappropriation* through the development of *counter-spaces* forged through artistic expression and social resistance,”⁴⁴ and a space vulnerable to suppression and ideological influence. Lived space is “...the dominated - and hence passively experienced – space which the imagination seeks to change and appropriate.”⁴⁵

Lived space is an elusive space, so elusive in fact that thought and conception usually seek to appropriate and dominate it. Lived space is the experiential realm that conceived and ordered space will try to intervene in, rationalize, and ultimately usurp. On the whole, architects, planners, developers, and others are, willy-nilly, active in this very pursuit.⁴⁶

2.3: A Unitary Spatiality?

Having set out a brief explication of the three elements of Lefebvre’s triad it is important to end by highlighting that the three aspects of spatiality should not be imagined as *distinct spaces* that occupy their own exclusive enclave. Lefebvre’s intention was to better understand how the three elements of spatiality – the physical, the mental, and the lived - come together to form a unitary space. What is therefore important to interrogate is how the three elements of the triad interact with each other,

⁴³ Merrifield, *supra* note 23, 174 (emphasis in original)

⁴⁴ Butler, *supra* note 30, 320 (emphasis in original)

⁴⁵ Lefebvre, *supra* note 21, 39

⁴⁶ Merrifield, *supra* note 23, 174

how the *perceived*, *conceived*, and *lived* contribute towards the production of spatiality as a whole. At one level this is simply a question of acknowledging that the production of spatiality is an open ended, dynamic process, and that each element will be generative at different times and in different ways. As Lefebvre put it:

It is reasonable to assume that spatial practice, representations of space and representational spaces contribute in different ways to the production of space according to their qualities and attributes, according to the society or mode of production in question, and according to the historical period.⁴⁷

Although Lefebvre is notoriously opaque in the ‘Production of Space’ about how the three elements of his schema interact, one useful starting point is to imagine that to some extent physical space, the material world around us, serves as the field of action for mental and social space. The *perceived* space of *spatial practices* might be said to moderate between the *conceived* and the *lived*. As the instrumental space of logic and power, the *representations of space* are forever in contest with *representational spaces*; the dynamic, shifting, meanings and symbols of social *lived* space. As Merrifield has suggested; spatial “...practices embrace both production and reproduction, conception and execution, the conceived and the lived, and somehow ensure societal cohesion, continuity, and what Lefebvre calls a ‘spatial competence’.”⁴⁸

Finally what is most important for a spatial analysis of law and the legal is to recall that Lefebvre’s schema was intended as an analytical tool, a heuristic device, through which the spatial distribution of power in the real world could be better understood. As Lefebvre himself was keen to stress “...the perceived-conceived-lived triad... loses all force if treated as an abstract ‘model’. If it cannot grasp the concrete (as distinct from the immediate), then its import is severely limited amounting to no more than one ideological mediation among others.”⁴⁹

⁴⁷ Lefebvre, *supra* note 21, 46

⁴⁸ Merrifield, *supra* note 23, 175

⁴⁹ Lefebvre, *supra* note 21, 40

PART II: LAW AND SPACE

The great obsession of the nineteenth century was, as we know, history: with its themes of development and of suspension, of crisis and cycle, themes of the ever-accumulating past, with its great preponderance of dead men and the menacing glaciation of the world... The present epoch will perhaps be above all the epoch of space. We are in the epoch of simultaneity: we are in the epoch of juxtaposition, the epoch of the near and far, of the side-by-side, of the dispersed. We are at the moment, I believe, when our experience of the world is less that of a long life developing through time than that of a network that connects points and intersects with its own skein. One could perhaps say that certain ideological conflicts animating present-day polemics oppose the pious descendants of time and the determined inhabitants of space.

Michel Foucault, 'Of Other Spaces'

Chapter 3: The Spatial and the Legal

Over the last decade or so the legal academy has begun to take notice of the 'spatial turn'. Although the engagement was tentative at first, and restricted to an incorporation of geographical concepts in the analysis of legal practice, it has blossomed into a critical examination of the capacious implications of *space* for the practice, politics, and philosophy of the law. The publication of a number of anthologies⁵⁰ over the last few years have not only heralded the burgeoning field of 'law and space' but have highlighted the pertinence of a spatial perspective for all realms of legal scholarship; from the analysis of the 'private' relations of the body and home, the ordering of 'public' space, the regulation of property, through environmental law and the law of the sea, to the relations between the state and the

⁵⁰ Nicholas Blomley, David Delaney, Richard T. Ford (eds) *The Legal Geographies Reader* (2001 Blackwell); Franz von Benda-Beckmann, Keebert von Benda-Beckmann, and Anne Griffiths (eds) *Spatializing Law: An Anthropological Geography of Law in Society* (2009 Ashgate); Jane Holder and Carolyn Harrison (eds) *Law and Geography: Current Legal Issues* (2003 Oxford University Press); William Taylor (ed.) *The Geography of Law: Landscape, Identity and Regulation* (2006 Hart); Sarah Blandy and David Sibley (eds) 'Law, Boundaries and the Production of Space' [2010] *Social and Legal Studies* 19(3) (Special Issue); 'Panel: Law And Geography' [2007] *Santa Clara Journal of International Law* 5 (Special Issue); 'Legal Spaces' [2005] *Law/Text/Culture* 9:1 (Special Issue).

citizen and questions of global governance. This chapter will provide an overview of some of the key theoretical issues within the field of 'law and space,' as an introduction to the work of David Delaney, whose comprehensive project is summarised in Chapter 4.

3.1: The Nexus Of Society, Space And Law

If the key conceptualisation underpinning the 'spatial turn' is that space is *socially produced* - or in the words of Edward Soja, "social life is both space forming and space contingent"⁵¹ - then how does this co-constitution of the spatial and the social impact on the production of law and the legal? One useful starting point might be to acknowledge the seemingly ubiquitous role of the law in the construction of our social world; and thus to recognise, as some of the leading scholars of 'law and space' suggest, that our very sense of ourselves as social beings, all our social relations, are to a significant extent constituted by legality.

It seems uncontroversial, even banal, to say that so much of the world we live in is shaped by and understood (by ordinary people as well as experts) in terms of law. Our everyday conceptions of authority, obligation, justice and rights, our dealings with others and our relations to collective institutions such as the state are all structured, in part by legal norms, discourses and practices.⁵²

If one accepts the premise that society and space are co-constitutive and further that the relational fabric of society is buttressed by the legal, then it follows that there exists *an ontological nexus between society, space, and the law*. Firstly, "if social reality is shaped by and understood (or constituted) in terms of the legal, it is also shaped by and understood in terms of space and place."⁵³ And in turn, "...law is constitutive of social relations and relational identities,"⁵⁴ and finally that, "...the law both structures our understanding of certain spaces, while at the same time those

⁵¹ Soja, *supra* note 3, 12

⁵² Nicholas Blomley, David Delaney, and Richard T. Ford, 'Preface: Where is Law?', in Nicholas Blomley, David Delaney, and Richard T. Ford (eds) *The Legal Geographies Reader*, (2001 Blackwell), xiv

⁵³ *Ibid*, xv

⁵⁴ *Ibid*, xv

spaces themselves radically transform the experience, application, and effect of the law.”⁵⁵

3.2: The Immanent Intertwining Of Space And Law

Once the nexus between society, space and the law is acknowledged, the immanence of the relationship between the legal and the spatial becomes apparent. In particular, it becomes clear that “... “law” and “geography” do not name discrete factors that shape some third pre-legal, aspatial entity called society. Rather the legal and the spatial are, in significant ways, aspects of each other and as such, they are fundamental and irreducible aspects of a more historically conceived social-material reality.”⁵⁶ Thus far from being “...a body of doctrine and rules totally independent of social constraints and pressures, one which finds its foundation entirely within itself,”⁵⁷ the law has, from its inception, been ‘both space forming and space contingent.’ In stark contrast to the ‘pure theory of law’, in which the law is conceived as excluding all considerations external to itself, a conception of the law that engages with its social and spatial positioning reveals that all questions that implicate law also and always implicate space,⁵⁸ whether that is the private space of the home, the virtual space of the internet, or the territorialised space of sovereignty.

Another way to imagine the immanent intertwining of space and law is proposed by Igor Stramignoni, who suggests we consider “... how law is everywhere in space but also, and somewhat more radically, how space is everywhere in law.”⁵⁹ What is particularly productive about this articulation is the invitation to “...move beyond the law/space binary,”⁶⁰ to start to think about the relationship between the spatial and the legal not through the lens of the “...inherited conceptual dualisms”⁶¹ of two distinct fields of scholarly inquiry, but, to echo a central thread of Delaney’s work, as an

⁵⁵ Desmond Manderson, ‘Interstices: New Work On Legal Spaces [2005] 9 *Law/Text/Culture* 1, 1

⁵⁶ Blomley, Delaney, and Ford, *supra* note 52, xviii

⁵⁷ Pierre Bourdieu, ‘Force of Law: Toward a Sociology of the Juridical Field’, [1986] 38 *Hastings Law Journal* 814, 814

⁵⁸ Blomley, Delaney, and Ford, *supra* note 52, xiv

⁵⁹ Igor Stramignoni, ‘Francesco's Devilish Venus: Notations On The Matter Of Legal Space’ [2004] 41 *California Western Law Review* 147, 184

⁶⁰ Delaney, *supra* note 7, 12

⁶¹ *Ibid*, 12

indivisible realm of the legal *and* the spatial. Stramignoni fleshes out his initial formulation by firstly describing the apparent ubiquity of the legal; revealing a dominant conception of the law as a preexistent phenomena, separate from and immune to the vicissitudes of social life and, crucially, of power. The law is thus conceived as being *everywhere in space*:

First, I have suggested, law is everywhere in space (or so it is seen to be). What precisely do I mean by that? Quite simply, what I mean is that in the West, law's many places always appear to be *in* as well as *of* some sort of linear, measurable, calculable Space... Such a Space, in particular, seems to exist *be-fore* we and law's many places come to be... and it seems to continue to be there once we and those many domains have changed, moved on or disappeared. The *same* irrespective of which space it is (the specific object that it might be), of who you are (the particular subject that might inhabit it) or of where it comes from (the institutional context of which it might be each time a different result) - such a Space, moreover, seems to be wholly *co-extensive* to what legal places (sites, instructions or people) may or may not go, each time, to occupy or reproduce it.⁶²

On the other hand, Stramignoni asserts that the law's ubiquitous 'occupation' of space must be simultaneously constituted by the horizons of meaning that each particular space presents. Space is thus *everywhere in law* as a result of the *contingent performance of the law that is facilitated by the particularities, the anchored specificities, of space and place*. The law is thus both *in* space "...or, else, of Space."⁶³

Now, law's many locations, people and instructions, etc. are, we usually assume, in space (physical or institutional)..., at the same time as they are *in* space, *each of those many locations, people and instructions carefully carve-out and punctiliously define some further legal places*, as a result of being in some physical or institutional space and having thus seized that space for their own particular ends.⁶⁴

3.3 The Political Origins Of The 'Space Of Law'

⁶² Stramignoni, *supra* note 59, 183 (emphasis in original)

⁶³ *Ibid*, 183

⁶⁴ *Ibid*, 183 (emphasis added)

If society, space and law, are inexorably intertwined, then what is their relationship to the political? If every question that implicates law also implicates space, then is power not also implicated? By acknowledging the spatial referent of the legal, and moreover by inquiring into the genesis of the production of legal space one arguably takes the first step in questioning the conventional view that the legal and the political occupy separate socio-spatial realms.

I suggest, to *question the origins of legal space* rather than to examine the form or contents of a particular theory or practice - thereby positing those origins as given. As we will see, to posit the origins of legal space as given would be to imply the universality and neutrality of legal space and so to deny, in particular, what I would describe as the *evidence* of its politics.⁶⁵

What this passage suggests is an immanent link between the spatiality and the politics of the law. Stramignoni contends that the political and ideological content of the law can only be fully comprehended by reference to spatiality of the legal, and moreover, that the contours of legal space cannot be mapped without an examination of its political origins. One only needs to glance at the historical record to grasp that the roots of law, the basis of the regulation of society, lie in the regulation of geography; in the power of the king to “separate, divide, and distribute.”⁶⁶ By drawing a line in the soil and investing the division with the power of the sovereign, the law “...brings into existence that which it utters.”⁶⁷

It is certainly true that the law’s main concern could be said to be boundaries of one kind or another, as implied by the derivation of *nomos* (‘law’ or ‘custom’ in ancient Greek) from *nemo*, meaning to separate or divide: ‘the *nomos* opens with a drawing of a line in the soil. This very act initiates a specific concept of law, which derives order from the notion of space’⁶⁸

⁶⁵ *Ibid*, 156 (emphasis in original)

⁶⁶ Bourdieu, *supra* note 57, 837

⁶⁷ Pierre Bourdieu, ‘*Language and Symbolic Power*’ (1991 Polity Press), 42. Cited in Sarah Blandy and David Sibley, ‘Law, Boundaries and the Production of Space’ [2010] 19(3) *Social and Legal Studies* 275, 278

⁶⁸ Blandy and Silbey, *supra* note 67, 278

If the historical origin of the law is the spatial articulation of power, the right to “set boundaries,”⁶⁹ then the adoption of a spatial analysis is arguably central to a explication of law’s contemporary particularity. Without an acknowledgement of “the collocation of space-power-meaning [that] gave rise to the very idea of law,”⁷⁰ it is impossible to understand law’s contemporary political function.

3.4: The Fusion Of Space-Law-Power

The contemporary social world is marked by an innumerable multiplicity of ‘lines in the sand.’ Indeed one of the defining features of modern life is arguably the preponderance of *boundaries*. One possible strategy for revealing the present manifestation of ‘the collocation of space-power-meaning’ is to focus on these boundaries, on the borders between different spaces, and the legality inscribed or projected onto those boundaries. By scrutinising these boundaries - be they territorial, discursive, or performative - the instrumental nature of legal space is brought to the fore.

Territorial structures, from the micro-spaces of, say, racially segregated seating assignments on city buses to those implicated by reference to the globally inclusive international system of states are bounded spatial entities. Boundaries *mean*. They signify, they differentiate, they unify the insides of the spaces that they mark. What they mean refers to constellations of social relational power. And the form that this meaning often takes – the meaning that social actors confer on lines and space – is *legal* meaning. How they mean is through the authoritative inscription of legal categories, or the projection of legal images and stories on the material world of things. The trespasser and the undocumented alien, no less than the owner and the citizen, are figures who are located within circuits of legally defined power by reference to physical location vis-à-vis bounded spaces.⁷¹

An interrogation of spatio-legal boundaries reveals that the function of legal space is to give material form to power. Once one acknowledges ‘the nexus of society, space and law,’ and in turn ‘the political origins of the ‘space of law,’ the immanent

⁶⁹ Bourdieu, *supra* note 57, 837

⁷⁰ Delaney, *supra* note 7, 25

⁷¹ Blomley, Delaney, and Ford, *supra* note 52, xviii

“...fusion of space-law-power”⁷² is revealed. The implication of power in legal space is an inevitable result of the multiple ways in which ‘bounded spaces’ authorise and prohibit: “As Henri Lefebvre has written, “*That space signifies is incontestable. But what it signifies is dos and don’ts, and that brings us back to power.*” And that brings us back to law.”⁷³

Claudia Aradau, has taken the ‘fusion of space-law-power’ to its logical conclusion in arguing that law is “...essentially legitimated through the concrete orientation of space... Law gains full legitimacy only through the combination of order and orientation.”⁷⁴ Through distinguishing the “sovereign decision”⁷⁵ from the “concreteness of spatial divisions and orientation”⁷⁶ Aradau asserts that the materialization of power in society, and thus the construction of legal regimes is dependent not on the contingent decision of sovereign power – on *order* - alone but on the generative function of space - on *orientation*.

Without the concreteness of space, order cannot achieve its validity. One can reverse the statement and say that any constitution of a particular order depends on the imaginary redistribution of spaces, on enclosures and limits. A new order is constituted by the spatialisation of practices that govern order and disorder, law needs the concrete embodiment of space to sustain its ordering function.⁷⁷

3.5: The Denial of Space by the Law

Perhaps the revelation of the ‘fusion of space-law-power’ is the first step to understanding the pervasive *denial of space by the law*. Perhaps it is power’s desire to disavow its implication in the production and performance of legal space that leads to the denial of the intertwining of the spatial and the legal. Whatever the reason; “...in spite of the ubiquity of Space in law’s many legal domains – or perhaps, precisely because of that ubiquity – modern Western law seems to pay little attention to it.”⁷⁸

⁷² *Ibid*, xix

⁷³ Delaney, *supra* note 7, 4

⁷⁴ Claudia Aradau, ‘Law Transformed: Guantanamo and the ‘Other’ Exception’ [2007] 28(3) *Third World Quarterly* 489, 492

⁷⁵ *Ibid*, 492

⁷⁶ *Ibid*, 492

⁷⁷ *Ibid*, 492

⁷⁸ Stramignoni, *supra* note 59, 179

This lack of attention, this contrived ignorance of the generative nature of space, is reflective of how "... traditional legal consciousness has viewed space as either an inert backdrop against which legal actors play out their disputes or otherwise the deadened material over which legal disputes take place."⁷⁹

The denial of its spatial referent by law is rooted in a broader denial of space under modernity; an insistence that space be tamed, that the multiple and open narratives that space engenders be suppressed in favour of a single, 'universal' narrative. Instead of recognising space as "...the sphere of possibility of the existence of multiplicity in the sense of contemporaneous plurality,"⁸⁰ and thus acknowledging that the legal is also ambiguous, particular, and contingent, the law has sought to assert its positivity by flattening, ordering, and gridding space. The law has continually sought to *control* the spatial and thus, "...traditionally fixes space, turns it into points, tight measurements of distance and propinquity, normative geometries, lines of connection that do not allow any excess to surface. Space is terminally unfolded by law, opened up as a canvas on which legal operations take place. Law reduces space into law's saturable, controlled context while refusing to (admit that they) operate together in a folded becoming."⁸¹

Yet modernity's constraining view of space is far from a natural, pre-given, perspective; in fact it does crucial ideological work in decoupling law from its spatial context, in sustaining a perception of the law as merely "...a series of abstract propositions, a structure of norms in search of application."⁸² Just as a spatial perspective is productive of a critical analysis of all fields of law, the ideological impact of the denial of space by the law arguably resonates through every field of legal scholarship. At its core this ideological project is concerned with maintaining "...the assumed divide between law and social and political life that undergirds the *soi-distant* objectivity of law;"⁸³ a self-styled objectivity that is built on the twin

⁷⁹ Keith Aoki, 'Space Invaders: Critical Geography, The 'Third World' In International Law and Critical Race Theory' [2000] 45 *Villanova Law Review* 918, 937

⁸⁰ Massey, *supra* note 9, 9

⁸¹ Andreas Philippopoulos-Mihalopoulos, 'Spatial Justice: Law And The Geography Of Withdrawal' [2010] 6(3) *International Journal of Law in Context* 201, 208

⁸² Manderson, *supra* note 55, 1

⁸³ Nicholas Blomley, '*Law, Space and the Geographies of Power*'. (1994 Guilford Press), cited in Doris Buss, '*Austerlitz and International Law: A Feminist Reading at the Boundaries*' in Doreen Buss and Amreena Manji (eds) *International Law: Modern Feminist Approaches* (2005 Hart), 88

pillars of universality and neutrality. The complex, historical enmeshing of space, law, and power, has, according to Andreas Philippopoulos-Mihalopoulos and Sharon FitzGerald, engendered multiple reasons for the denial of the spatial by the legal:

Amongst them one could enumerate the prioritisation of time over space, largely due to the pure abstraction of the latter; the not-so-well concealed necessity to dissimulate the specific geography of the origin of the law, for otherwise the law could not claim its placeless universal applicability; or, conversely, the need to disengage law from any spatial geographical (imperialistic, nationalistic, supremacist, capitalist) bias.⁸⁴

In order to affirm ‘the ubiquity of Space in law’s many legal domains’ what is required is “...a spatial analytics that does not treat space as an empty surface marked by the inscriptions of power and knowledge but which discloses the implication of spatiality in the *production* of power and knowledge.”⁸⁵ Indeed one of the central theoretical aims of this project is to question this common perception of the relationship between international law and global space, a perception “...which takes for granted the objective status of an imperialist, positivist law imprinting itself on a passive space conceived as a flat surface or empty container.”⁸⁶

⁸⁴ Andreas Philippopoulos-Mihalopoulos and Sharron FitzGerald, ‘From Space Immaterial: The Invisibility Of The Lawscape’ [2008] 17 *Griffith Law Review* 438, 441

⁸⁵ Reuben S. Rose-Redwood, ‘Governmentality, Geography, and the Geo-Coded World, [2006] 30(4) *Progress in Human Geography* 469, 480

⁸⁶ Nicholas Blomley, ‘*Law, Space and the Geographies of Power*’. (1994 Guilford Press), cited in Butler, *supra* note 30, 315

Chapter 4: ‘The Spatial, The Legal And The Pragmatics of World Making’

4.1: The ‘Worldly Presence’ of the Law

The title to this chapter is borrowed from the subheading of David Delaney’s recent work, entitled *Nomospheric Investigations*,⁸⁷ in which he has sought to (re)conceptualise the emerging field of ‘law and space’ so as to propose a coherent “... analysis of how their practical intertwinings are accomplished and transformed.”⁸⁸ Delaney’s endeavour is an ambitious project, which draws on the work of Lefebvre, in order to begin to articulate an indivisible realm of the legal *and* the spatial – *the nomosphere*. The merging of law and space that constitutes *the nomosphere* refers to “...the cultural-material environs that are constituted by the reciprocal materialization of ‘the legal’, and the legal signification of the socio-spatial, and the practical, performative engagements through which such constitutive moments happen and unfold.”⁸⁹ As the title implies, the work seeks to provide a framework, a set of tools, even a new vocabulary, through which to conduct *nomospheric investigations*.

This is our topic: world and space; space and meaning; meaning and experience; experience, power, and embodiment, as bound, and unbound, through what we call law. This project is organized by the following interrelated lines of inquiry: (i) how, under what conditions, and with what consequences is that domain of the social that is identified as “law” spaced or spatialized, how is it *worlded*? (ii) how are the processes, projects, practices, and performances of legal-spatialization implicated in the operations of social power? (iii) what might a close and wide-ranging investigation of these reveal about the pragmatics and politics of world-making, and contribute to richer understandings of what it is like to be in worlds so made? (iv) what useful insights might be gained about the social phenomena of the “law” and “the production of space” through such an investigation?⁹⁰

At the heart of Delaney’s project is an insistence on two insights, drawn from contemporary conceptions of spatiality. Firstly that the law is ontologically *worldly*,

⁸⁷ Delaney, *supra* note 7

⁸⁸ *Ibid*, 13

⁸⁹ *Ibid*, 25

⁹⁰ *Ibid*, 8 (emphasis in original)

and that the *performativity* of the legal – the law as a *happening* – must be acknowledged:

But the legal too is so much more than this. The legal is more *worldly* than this. We need to think about the legal in more performative and material terms. As noted above, the legal is continuously performed, re-enacted. The legal is continuously and creatively *done* and redone. The legal is always *happening*. It is performed not only by those we identify as “legal actors”... but by everyone who acts in accordance with (or with transgressive reference to) understandings of rules, authority, rights, permissions, prohibitions, duties, and so on.⁹¹

The second, related, insight is that the law is inherently *material*. Delaney draws on contemporary studies of the constitutive role played by barbed wire in the construction of modernity, and the notion that “...it is through the prevention of motion that space enters history,”⁹² to assert that at its root the law is concerned with the corporeal disciplining of individual bodies, and as such is dependent on the materiality of force. Thus Delaney challenges the conventional wisdom that “...the ‘legal’ is fundamentally, ontologically, different from ‘the medical’ or ‘the musical’, precisely because it does not depend on materiality to generate effects in the world. These are reasonable objections to the very idea of legal materiality. I would suggest, though, that their reasonableness is an effect of dogmatic assumptions that require the alignment of the ‘legal’ with the immaterial – and the immaterial with mind and reason over bodies and passions. The conceptual dematerialization of the legal is fundamental to its original mythology. While much of the legal happens without the immediate infliction of pain, were there no particular corporeal effects at all “the legal” would not, and could not, happen in the world.”⁹³

The following passage by Igor Stramignoni eloquently evokes the ‘materiality of the legal’, and conveys a strong sense of not only, the dense network of people, places, and things, but also the physical, technological, and cognitive infrastructures, that constitute that materiality. The passage also, crucially highlights, how the materiality

⁹¹ *Ibid*, 19 (emphasis in original)

⁹² Reviel Netz, ‘*Barbed Wire: An Ecology of Modernity*’, (2004 Wesleyan University Press), xi. Cited in Delaney, *supra* note 7, 21

⁹³ Delaney, *supra* note 7, 22

of the legal is immanently intertwined with the discursive, performative, and even the ideological, aspects of the *nomosphere*.

Take, for example, law's many material locations - the guarded precincts where what law there is, is everyday announced and imparted, reminded-of and applied, dutifully taught and dutifully learned, keenly catalogued and attentively researched or, else, professionally illustrated and then dearly made available. Take, in other words, our tribunals, courts, prisons, police stations, universities, law schools, law libraries, archives, law firms, etc. These precincts are seen to rise (as physical constructions) or develop (as institutional places) *in* Space - a linear, measurable, calculable space that they are thus seen to express or to protect. Consider, too, law's innumerable people - the people by whom the law is said to be represented and, each time, given a name, a face and a voice - the name, face and voice of the thousand legal practitioners, judges, law professors, law students, inmates, etc. who live, breathe and work in the West. They too are usually seen to occupy or be surrounded by, each time, this or that particular fraction of linear, measurable, calculable Space - this or that building, this or that subjective place (the place of a subject "like them"), or this or that office or bench (the place generated by a particular institutional context) - a space, moreover, with which we may or may not come across one day during our own everyday activities. Take, finally, law's almost infinite web of legal instructions (rules, regulations, offices, judgments, procedures, principles, concepts, etc.), which, they too, are to be found (or so it appears) *in* linear, measurable, calculable Space - in the physicality, subjectivity, powerfulness or powerlessness of this or that act of parliament, code, judgment, witness statement, jury's verdict, judicial procedure, consultation process, law-book, etc. Accordingly, *in* space *as* legal places law's many material locations, people and instructions invoke and evoke the (legal) evidence of a neutral, universal equivalence (the equivalence between Space and the places that they are), as well as contextually suggesting what, from now on, the *essence* of each (legal) place should be dutifully taken to be.⁹⁴

4.2: The Nomosphere

This chapter will briefly summarise Delaney's *Nomospheric* project, with a focus on the set of neologisms that form the backbone of the work, and which will be adopted

⁹⁴ Stramignoni, *supra* note 59, 182 (emphasis in original)

in the spatial analysis – the nomospheric investigation - of international criminal law later in this thesis. The first, and key neologism, of which the following are satellite concepts, is the notion of *the nomosphere*. The debt that Delaney’s project owes to the work of Lefebvre, and in particular his conception of a spatial unity between physical, mental and social space, is a constant theme in the text and is explicit in the following definition of *the nomosphere*:

The nomosphere, conceived as a singularity (*the nomosphere*) or in terms of its more specific or localized components (this nomic setting or trace; that constellation or configuration of settings...), is irreducibly discursive, performative, *and* material. Indeed it exists in the ever-shifting interplay among legal signifiers, material locations or things, and embodied practices as these are *mediated by socio-spatial forms*. Among the most significant of these in our modern and thoroughly juridified world are the spatialities of public and private; property...; sovereignty, jurisdiction and governance (borders, checkpoints, prisons, colonies, empires, the international, camps, municipalities) and their complex (nested and layered) interpenetrations.⁹⁵

Running through *Nomospheric Investigations* is the idea, rooted in the Critical Legal Studies tradition to which Delaney subscribes, that the purpose of scholarly inquiry into the law is to further reveal the activity of power – indeed the pragmatics of world making. In order to better accomplish this intent, Delaney is convinced that study of the law must be merged with an understanding of space. The result of this merging is *the nomosphere*, which “... holds together the socio-spatial and the socio-legal while foregrounding the dynamic interplay of forms of social meaning and materiality; as these are implicated in the historical constitution of socio-relational power and situated, embodied experience.”⁹⁶

4.3: The Nomic

In order to fully grasp the extent of the nomosphere, it is crucial to understand the distinction between ‘the legal’ and ‘*the nomic*.’ While ‘the legal refers’ to formal law, *the nomic* is broader and “...is understood to be the dimension of social order and ordering implicated by normatively inflected, world-constituting rules (nomic traces)

⁹⁵ Delaney, *supra* note 7, 26 (emphasis in original)

⁹⁶ *Ibid*, 26

with reference to which social power is constellated or finds worldly expression. Such rules may be tacit or explicit, informal or formal.”⁹⁷ Thus, although “there is an enormous degree of overlap the legal and the nomic are not isomorphic,”⁹⁸ and the *nomic* includes everything from the “rules of politeness”⁹⁹ to “the social rules or norms governing gender, sexuality, or race.”¹⁰⁰ The *nomic* thus embraces *all rules* that order society, however minor or taken-for-granted they might be, and thus includes both ‘the legal’ and ‘the illegal,’ the ‘sub-legal’, the ‘extra-legal’, and even ‘counter legalities.’ What is important to grasp is that “...nomicity and legality are not opposed to each other. Rather, much of the legal is simply a more or less institutionalized expression of the nomic more generally. One might suggest that the trajectory of modernity has been towards the expansion of legality, through processes identified with “juridification,” at the expense of elements of extra-legal or sub-legal nomicities.”¹⁰¹

4.4: Nomospheric Situations

Delaney draws attention to the socio-spatial notion of *situations* as “... one point of entry from which to initiate nomospheric investigations.”¹⁰² Situations have an everyday, lived aspect to them, but can also imply a certain urgency, or problematic. They can refer to any scale of event or circumstance from the microscopic to the global. The meaning of situations can embrace location, as well as both a mundane or critical set of circumstances. Crucially a situation “...implies an active *involvement* of being and world. It implies a dynamic of co-constitutivity through which being (experience) and world are jointly made up or *happen*.”¹⁰³

Situations are thus useful tools through which to spatially frame actions and events, to analysis them in such a way that the spatial aspect is foregrounded. In one sense situations act as a crucible or theatre in which combinations of social actors come together to engage with each other, with the space they occupy, and the socio-spatial

⁹⁷ *Ibid*, 27

⁹⁸ *Ibid*, 27

⁹⁹ *Ibid*, 27

¹⁰⁰ *Ibid*, 27

¹⁰¹ *Ibid*, 28

¹⁰² *Ibid*, 36

¹⁰³ *Ibid*, 37 (emphasis in original)

and legal – *the nomic* – meaning of the situation. As Delaney highlights, situations are the moments through which power and law flow:

Situations are moments in which aspects of the social are reproduced or altered. Situations are moments in and through which power, meaning, and forms of knowledge circulate, crystallize, are dispersed, or disintegrate. Forms of social power are variously exercised, confirmed, evaded; social meanings are confirmed, disconfirmed, interpreted, and variously enacted in and through situations. Many of these social meanings are broadly nomic or distinctively legal.¹⁰⁴

It follows that we can never be other than in a situation, we always occupy a location, a space, and that space is conditioned by a particular set of circumstances. Among those set of circumstances will be *nomospheric traces* - we are thus always interacting with some form of *nomicity*. It may simply be not letting the water run while we brush our teeth, waiting for the green man to flash before crossing the road, or paying our taxes. It may be the most everyday situation – or “tacit nomospheric situation”¹⁰⁵ - in which our interaction is entirely habitual, subconscious, or simply compliant, or it may be an extraordinary set of circumstances - “nomospheric disturbances”¹⁰⁶ - in which we find ourselves in direct conflict with the *nomic situation* and we are forced to actively comply or transgress.

If, then, we are never *not* in a situation, and if situations are *always* socially constituted and generative, nomosphericity entails that situations are always enmeshed within socio-spatial and socio-legal (nomic) constellations. Our situations are *never not* conditioned by the workings of nomosphericity as (variously) imagined, materialized, and lived. You are always either “home” or “not home”, “in public” or not. You are always in some state or subject to some jurisdiction. Are you ever outside of the international?¹⁰⁷

4.5: Nomospheric Traces

¹⁰⁴ *Ibid*, 40

¹⁰⁵ *Ibid*, 42

¹⁰⁶ *Ibid*, 42

¹⁰⁷ *Ibid*, 40 (emphasis in original)

While *the nomic* refers to the broad agglomeration of ordering rules and practices, *nomic traces* are the individual ‘normatively inflected’ rules or ‘fragments’ that are used to articulate and express *nomic* or legal relations. However, Delaney’s definition of *nomic traces* makes clear that they must be understood as much more than formal legal provisions:

A nomic trace is a discursive (linguistic, cognitive) fragment through which nomicity (and, more narrowly, legality) is expressed and made available to be taken up in situations. There are an infinite number of such traces. Our concern is with those that are more or less directly implicated in the production, constitution, and performance of social spatialities or of nomospheric figures or settings. Traces as discursive aspects of settings, are, of course, artefacts. They are the work of human creativity and inventiveness. At the same time they are tools. They are available for pragmatic purposes and they are used. They may be used to justify claims about power, or as reasons for acting in particular ways in situations.¹⁰⁸

It is at the level of individual *nomic traces* that the extent of the intertwining between space and law is revealed. Every *nomic trace*, every fragment of law, inscribes meaning onto social space by a cartographic process of ordering; the result is the production of a spatio-legal or *nomic space*.

Traces can be said to be “inscribed” or “projected” onto spaces (nomic settings): this rule is operable *here*, in this space, but not *here* on the outside; this right is available *here*, on this side of the line, but not there on the other side. A nomic space is, thereby, produced... *by virtue of* the inscription of constitutive traces. Simultaneously, it is through the very act of inscription that the constituting traces are themselves “spaced” and given worldly expression. It is by virtue of spacing that traces are (potentially) realized or anchored in the material world of lived experience. They become felt “presences” that are available to be taken up in the immediacy of situations. Traces don’t merely make spaces meaningful in particular ways. Spaces and lines, how these are imagined, performed, and materialized, *also make traces meaningful in particular ways*... It is by virtue of such spacing operations that nomic signifiers and ruling distinctions are “worlded”.¹⁰⁹

¹⁰⁸ *Ibid*, 71

¹⁰⁹ *Ibid*, 73 (emphasis in original)

4.6: *Nomospheric Figures*

A spatial perspective transforms the commonly understood ‘legal subject’ into the *nomospheric figure*. Rather than being merely a plaintiff or defendant, a prosecutor or a judge, a *nomospheric figure* “...is an abstract, categorical social entity which is defined with reference to spatiality and nomicity (or legality)”¹¹⁰ There are thus a number of important distinctions between the ‘legal subject’ and the ‘nomospheric figure’. Firstly, the ‘legal subject’ is defined narrowly by specific reference to the contents of the legal proceedings – the defendant is defined solely by the allegation of theft. In contrast the *nomospheric figure* is defined broadly by a set of relationships, primarily to the social spaces being inhabited, but also to the wide range of *nomospheric traces* and *settings* that constitute those spaces.

The *nomospheric figure* of the lawyer, be it a judge, prosecutor or defence counsel is thus defined not only by their juridical status; their qualifications, their level of expertise or experience, but by *where* they practice, *how* they practice – how they *perform* the law, and *why* they practice. Moreover a jurist is *nomosphericly figured* by their interaction with each of the specific spaces in which they practice and the spatial materialisation of power that constitutes each of those adjudicative spaces. As Delaney makes clear all *nomospheric figures* “...are what they are (and have the capacities and vulnerabilities that they have) *by virtue of* a posited relationship to a social space or a generic nomic setting... Each is constituted as the kind of figure it is through the social (legal) assignment of traces.”¹¹¹

The second important distinction relates to the temporality and fluidity of each status. In general, the status of ‘legal subject’ only arises when legal proceedings are initiated and each of the participants takes on the role allocated to them by the particular proceedings. In turn the status of ‘legal subject’ ceases when the legal proceedings come to an end. During distinct legal proceedings each person, in general, assumes the status of a single legal subject – be it the plaintiff, prosecutor, or judge – and that status is generally unchanging through the entirety of the legal proceedings. In contrast the *nomospheric figure* is a permanent state - just as everyone always inhabits

¹¹⁰ *Ibid*, 74

¹¹¹ *Ibid*, 74 (emphasis in original)

the *nomosphere*, so everyone is always constituted as a *nomospheric figure* by the particular *nomic space* they happen to inhabit at the time; be it the home, the workplace, the battlefield, or the Oval Office. It follows that each individual can assume multiple and potentially conflicting *nomospheric figurations* simultaneously depending on the complexity of the particular *nomic space*.

We, each of us are always multiply figured (positively and negatively), but the pragmatic significance of any given figuration may be contingent on our position in the nomosphere, or on our location vis-à-vis the lines of meaning and lines of force that constitute our life-worlds. Sometimes, in difficult or disturbing situations, different figurations of a given living person may be in conflict or contradiction with each other. Different bundles of traces may be available according to which figure is given primacy over others.¹¹²

This potential for multiple figurations also applies to jurists. Judges, in particular, are routinely imagined as unimpeachable figures of authority, as embodying an unambiguous legal status – they are the neutral adjudicators of the law. Indeed, it goes against the grain to imagine that a lawyer, a judge or a defence counsel, might find themselves practising in a particular court or tribunal – an adjudicative space – in which their legal status - their nomospheric figuration – is *ambiguous*. Yet to conceive of jurists as nomospheric figures opens up that very possibility; depending on the adjudicative space in which they practice, judicial performance can be ambiguously constituted by contradictory bundles of nomospheric traces.

As Delaney reiterates throughout his work, one of the significant aspects of a spatial perspective - what allows a *nomospheric* conception of legal relations to do critical work where a conventional legal analysis would not – is in the inherent recognition, incorporation, and explication of legal ambiguity and uncertainty. Conventional legal theory posits the attainment of certainty as a central feature of a stable legal order, and dismisses the abiding uncertainty of legal practice as merely an aberration in an otherwise functioning legal order. In stark contrast, a *nomospheric* conception engages with that abiding uncertainty and provides a coherent explanation for it.

¹¹² *Ibid*, 75

Recognition of the multiplicity of figurations and the indeterminacy of their prioritization set in relief the play of nomospheric ambiguity. In some situations this indeterminacy may be a trap, a device for the erasure of rights; in other situations it may be an opportunity. Pragmatic engagement with this ambiguity may present occasions for refiguring, and thereby reconstituting, fields of power and available lines of force.¹¹³

4.7: Nomospheric Settings

If we all inhabit the *nomosphere*, and are thus *nomosphericly figured* through our ongoing interaction with *nomospheric situations*, and the *nomospheric traces* that inscribe those situations with meaning, then how are these spatio-legal concepts applicable to a critical analysis of legal orders or regimes, like the regime of international criminal law. The starting point is to understand how these concepts come together to comprise *nomospheric settings* and, in turn *nomoscapes*.

Nomospheric settings “...are determinable segments of the material world that are socially fabricated by way of the inscription or assignment of traces of legal meanings. They are invested with significance and they, in turn, signify. They confer significance *onto* actions, events, relationships, and situations. They are *lived*.”¹¹⁴ In other words *nomospheric settings* are a way of describing legal regimes from a spatial perspective. They describe the constellation of legal rules and practices that constitute a particular regime, as a conventional legal analysis might do, but they go further. They specifically recognise that the legal regime being described is *worlded* – it produces its own space and is in turn constituted by that space. Legal regimes are made up of individual fragments of law, but as we have seen those individual fragments – or *nomospheric traces* – operate through a process of cartographic ordering – of spacing. *Nomospheric settings* do not only describe recognised legal regimes, they also embrace *nomic* regimes, which might not be readily recognised as being legal. *Nomospheric settings* all have a spatial referent, however the relevant space may be tiny or global, fixed or mobile; ‘physical, mental or social.’

¹¹³ *Ibid*, 75

¹¹⁴ *Ibid*, 59 (emphasis in original)

Nomic settings, then may be large (the international), or small (the womb). They may be relatively enduring (nation-states) or short-lived (a seat on the train). Most are fixed to a determinable physical location, often given architectural form (the prison, the school), but some may be mobile. Some may be only lightly materialized – as with cordoning off a space by police tape. Some may be materialized only insofar as they are embodied and performed.... nomic settings are not isolated from each other. Their signifying effects are always relational and differential vis-à-vis other settings.¹¹⁵

Delaney goes on to draw out a number of characteristics of *nomospheric settings*, which will be productive for the spatial analysis of international criminal law. Firstly, in line with the broader explication of spatiality, *nomospheric settings* are never fixed. The relationship between *nomic figures*, *traces* and *settings* is always shifting – no two *nomic situations* are the same. This lack of fixity – this abiding uncertainty - is both manifested and contained within the *performative* character of *nomospheric settings*.

Because we are mobile, *embodied* beings who inhabit inherited, heterogeneous worlds of signification we are continuously performing social spatialities, enacting social spatializations. Social space is continuously reproduced and transformed through *how* it is performed. In our worlds we do this through, among other ways, the routine exercise and recognition of spatialized rights and duties. We cross some thresholds but not others. We assume and exercise a “right to exclude” or “right to privacy”, and generally comport ourselves in accordance with the recognition of others’ like rights. Some of us are empowered to expel, confine, segregate, or sequester others; to grant or withhold permission to enter or exit; to govern conduct within or outside particular spaces; to “govern through space”... Some of us are empowered to partition space, to create new spaces and obliterate inherited spaces. On the other hand, some of us trespass, burglarize, escape, invade, or engage in civil disobedience. Some of us deliberately miss-perform social space...some social actors perform space in distinctive and disturbing ways. Such activities are better seen as enactments *of* space rather than behaviours *in* space.¹¹⁶

¹¹⁵ *Ibid*, 63

¹¹⁶ *Ibid*, 15 (emphasis in original)

Rather than always striving for certainty, for presuming that the outcomes of a particular legal regime are predictable and somehow pre-determined, and treating any deviation as an aberration, as positivist legal theory suggests, a *nomospheric* analysis incorporates this ambiguity through an acknowledgment of the unceasing *performance* through which the law *happens*. Thus each *nomospheric setting*, each enactment of a legal regime, involves the remaking of that *setting* through an act of improvisation, of balancing the ambiguity of space with the doctrine of law. As Delaney indicates, "...the details of how they are performed may be open to improvisation, or subject to a degree of spontaneity and inventiveness, but their nomic constitution does constrain and condition the ways in which they are performed."¹¹⁷ The tension between the inherent multiplicity of space, the impossibility of restraining the openness of the spatial, and the ordering logics of the legal is played out in the "fusion of discursivity and materiality,"¹¹⁸ that constitutes each *nomospheric setting*.

The second important characteristic of nomospheric settings is the acknowledgment that they are "...historical political artefacts and devices."¹¹⁹ Just as all social space is produced through social interaction that includes the political, legal space – and in particular the *nomospheric settings* that materialise legal regimes like international criminal law – are "...historical, cultural, political artefacts. They are made (imagined, invented, instantiated, materialized) and continuously remade."¹²⁰ It is important to bear in mind "...the artificiality and fabricated character of nomic settings... [as] many of the most important ones (...the international) may easily appear to be naturally occurring entities."¹²¹

The final critically productive characteristic of nomospheric settings, is revealed in their manifestation as *generic* or *specific*, *normal* or *exceptional*. To borrow Delaney's example, 'the workplace' is a *generic* nomospheric setting. Employment laws apply to every 'workplace,' they are the nomospheric traces that constitute all 'workplaces'. Yet there are an innumerable number of workplaces, from the 'migrant work-camp to the corporate boardroom,' each and every one of which is a *specific*

¹¹⁷ *Ibid*, 63

¹¹⁸ *Ibid*, 15

¹¹⁹ *Ibid*, 67

¹²⁰ *Ibid*, 67

¹²¹ *Ibid*, 67

instantiation of the generic nomospheric setting. As Delaney makes clear, the relationship between the *generic* nomospheric setting and its myriad *specific* instantiations opens up a space of power and ideology that results in the categorisation of some specific settings as *normal*, while others are deemed *exceptional*.

Nearly every generic nomic setting has a range (large or small) of *specific* instantiations.... The different *generic* settings crystallize nomospheric traces and associated constraints and affordances in distinctive ways. *Specific* nomic settings are where life happens, where situations take place. Generic nomic settings are historical-cultural abstractions. Because they necessarily implicate the operations of power, *generic* settings can be regarded as *ideological* representations. Their specific instantiations exist as concretizations of nomospheric imaginaries. A given generic setting may admit a wide range of particular specifications. At the same time, a specific setting may be regarded as more or less archetypal, exemplary, or anomalous. It may be regarded as normal insofar as it conforms with – or more accurately, is regularly performed in accordance with – some operative notion of what such a setting is *for*. Or a specific setting may be regarded as in some important sense “exceptional”... it may be determined that with respect to the situational play of power in a given setting “normal” rules are determined to be inapplicable, suspended or qualified... Or it may be determined that exceptions to the normal rules need to be crafted or should predominate. Two points need emphasizing... First it is in the interplay of generic and specific settings that aspects of nomospheric imaginaries can shape the character of concrete practices and lived experiences; second that “normalization” and “exceptionalization” are important nomospheric operations or projects with significant ramifications for the *politics and pragmatics* of world making.”¹²²

4.8: Nomoscapes

The final element of Delaney’s conception of the ‘indivisible realm of the legal *and* the spatial,’ is the *nomoscape*. Just as legal regimes, particularly those that regulate international or transnational affairs, are increasingly fragmented, so *nomospheric settings* are “...always assembled into complex, dynamic, constellations or *nomoscapes*. Nomospheric settings also overlap, interpenetrate, and co-condition

¹²² *Ibid*, 66 (emphasis in original)

each other. They are nested or embedded within each other.”¹²³ Where a conventional legal analysis would seek to preserve a sharp distinction between the legal and the political – insisting, for example by reference to the doctrine of the separation of powers, that the two realms are structurally, and thus ideologically distinct - a *nomospheric* perspective incorporates the immanent ideological aspect of the legal through a recognition of its spatial origin. It is at the scale of the *nomoscape* that this inherent ideological aspect is revealed. Whereby individual *nomie traces, situations* and *settings* may not immediately betray any political or ideological aspect – in the same way that particular legal provisions, cases, or regimes will generally appear apolitical and neutral – the agglomeration of *nomospheric settings* into *nomoscapes* precisely concerns the space at which the legal and the political merge into each other.

... nomic settings... are not isolated from each other. They are constellated into dense, extensive, dynamic, differentiating ensembles or assemblages that form wider, recognizable worlds. These nomic worlds are the contingent products of pervasive cultural processes and forces associated with ideological projects. All human collectivities “do” space-power in a variety of ways and these doings are carried out through the creation, modification, and abolition of nomic settings, through the invention, inscription, and interpretation of nomic traces, and through the routine performances of nomosphericity.¹²⁴

In asserting the immanent ideological aspect of space, and thus of any *nomoscape*, Delaney is again drawing on the work of Lefebvre who first posed the question; “What is an ideology without a space to which it refers, a space which it describes, whose vocabulary and links it makes use of, and whose code it embodies?... what we call ideology only achieves consistency by intervening in social space and in its production, and thus taking on body therein. Ideology *per se* might well be said to consist primarily in a discourse on social space.”¹²⁵ In other words ideology is concerned with the construction of an ‘ideal’ society that adheres to a normative set of values and principles, which are inscribed in space through the multiple processes of *nomosphericity*. At the end then, we find ourselves back at the beginning, with a set of questions that might guide our nomospheric investigations.

¹²³ *Ibid*, 63

¹²⁴ *Ibid*, 100

¹²⁵ Lefebvre, *supra* note 21, 44

When investigating nomoscapes as cultural artifacts some general questions arise: how are dominant visions of order and disorder spatialized? How is social space produced in accordance with – or in the service of – dominant social interests and visions of order and disorder? How are such spatializations accomplished through the invention, inscription, and performance of nomic traces (such as the enforcement of rules, the exercise of rights)? And how do these processes unfold in contention with alternative conceptions of order? These lines of inquiry open up other paths of investigation into the political construction and reconstruction of nomoscapes.¹²⁶

One last aspect of Delaney’s project should be highlighted before we move on to consider *international legal space*. Despite the prevalent conception that legal orders are ‘naturally occurring entities,’ any scrutiny of the historical record will reveal that legal orders are as reflective of the historical, social, and political space in which they arose as any other aspect of social mores, political systems, or religious beliefs. What is significant about referring to the temporal aspect of legal space is precisely that it betrays the fact that different legal orders – different *nomoscapes* – have had sometimes very different conceptions of *order* and *disorder*.

The history of human world-making has seen the emergence and disappearance of innumerable nomoscapes, each with its distinctive characteristics and effects; its diagnostic figures, settings, and traces; its particular modes of performance and revision; its dominant ideologies of order and disorder.¹²⁷

A final question, then, to guide our nomospheric investigation, might be “...how *dominant* visions of order, freedom, and justice are given spatial expression, or, more accurately, in terms of how order *and disorder*, freedom *and coercion*, justice *and injustice* are spatialized. It may be the case that some visions of order, freedom, or justice are sustained *here* by relegating a commensurate quantum of disorder, coercion, or injustice *elsewhere*. It may be that much of the pragmatics of... world-making is oriented toward producing or mitigating just these kinds of *displacement effects*.”¹²⁸

¹²⁶ Delaney, *supra* note 7, 102

¹²⁷ *Ibid*, 107

¹²⁸ *Ibid*, 119 (emphasis in original)

Chapter 5: International Legal Space

The spatial theorisation of international law is arguably in its infancy. As yet there has been no rigorous application of a spatial perspective to the study of international law. A useful starting point in such an endeavour may be to pose, as David Delaney suggests, a series of questions: “With respect to international space we can ask: what is “the international”? Where is the international? How does it work? How is it performed?”¹²⁹

Although a number of scholars have sought to answer some of these questions by drawing on particular insights from the spatial turn, or focusing on specific aspects of international law and global governance, or by tentatively mapping possible avenues for further research, there has not, as yet, been a comprehensive (re)examination of international law from a spatial perspective, and certainly few spatial readings of international criminal law. However the field of ‘law and space’ has arguably matured to the point where the initial contours of such a (re)examination can be mapped. This chapter will therefore set out three key themes through which the spatiality of international law, and subsequently the nomoscape of international criminal law can be brought into focus. The first theme is concerned with defining international legal space; how the spatial boundaries of international law are mapped and how international legal space is distinguished from other national or local legal spaces, through the perspective of *scale*. The second theme addresses how the apparent *space-lessness* of international law undergirds its purported universality and neutrality. Finally, the ‘project of seeing and concealing’ that constitutes the *visibility* of international legal space, is the third theme explored in this chapter.

5.1: The Space and Scale of International Law

The ambiguity that still predominates in any discussion of the ‘space of international law’ arguably originates in the lingering uncertainty over the status and legitimacy of international law itself. This ambiguity is anchored in notions of space, geography, and territory. The conventional view of law is that it is rooted in territory. Each

¹²⁹ *Ibid*, 60

nation-state has its own sovereign legal order, and the territorially defined borders of the state bound that legal order. Without a state, so the argument goes, there can be no sovereign legal order, no law; thus “... the very possibility of law is contained within the spaces defined by the nexus of territoriality and sovereignty.”¹³⁰

Doubts about the legitimacy of international law have been a part of the discipline since its inception. Indeed the nineteenth century argument of John Austin, that “...international law was not law properly so called because it did not emanate from a single, global sovereign,”¹³¹ have haunted the field to such an extent that the “...attempts to resolve the problem [of whether international law is law], have on the whole constituted the central theoretical debate of the discipline.”¹³² This chapter will seek to show that it is precisely the lack of an unambiguous spatial referent for international law that is at the root of this theoretical debate, and has in turn spawned a plethora of controversies over the practice, politics, and philosophy of international law.

One controversial element is the very definition of the ‘international’ in international law. What does the ‘international’ refer to? How should we distinguish the ‘international’ from other spaces and places? How should we recognise the boundaries between the ‘international’ and other legal spaces? How should the ‘international’ be imagined? The lack of an obvious response to these questions, and the possibility of a plurality of meanings and uses of the ‘international’ are made clear by David Delaney, in his reflections on the nebulous status of the nomoscape of international law:

One way of imagining “the international” is to think of “it” as no more than the aggregate of the “national” sovereign domestic spaces. But other ways of imagining posit the international as a global space that is “over and above,” or at least conceptually distinct from, the sum of domestic spaces. Or it may be the spatial referent for “international law,” “humanitarian law,” and “human rights” that is in tension with or *antithetical* to domestic law and sovereign prerogative. Sometimes it

¹³⁰ Delaney, *supra* note 2, 253

¹³¹ Anthony Anghie, *Imperialism, Sovereignty And The Making Of International Law* (2005 Cambridge University Press), 5

¹³² *Ibid*, 5

is the spatial referent for the “international community”.... Or “the international” as a nomic setting might exist as a condition of possibility that pre-existed most if not all, extant states. Or, it is a collection of anomalous or interstitial spaces such as the high seas or active war zones.¹³³

5.1.1: Mapping International Legal Space

Zoe Pearson has made critical use of the trope of cartography in order to suggest ways in which the space of the ‘international’ in international law can start to be defined through a process of *mapping*.¹³⁴ Like all maps, the map of international legal space, can only be a *representation* of reality. As such, someone must draw it, and it must, inevitably, be drawn to reflect a particular range of interests and priorities – most often the spatial form desired by power. As Pearson suggests, imagining “international legal scholars as cartographers”¹³⁵ highlights the “power dynamics, assumptions and identities that are implicit in the process of drawing such ‘maps’ or descriptions of international law.”¹³⁶ Pearson goes onto to suggest ways in which the spaces of international law are mapped to include certain ‘places’ or ‘sites’ - those located in the ‘global cities’ of the North - where international law is ‘made’, and exclude other spaces, or “blind spots,”¹³⁷ of international law which “...are not visible on traditional ‘maps’ of international law, partly because of the structuring practices of international lawyers ‘disciplinary cartography’.”¹³⁸

Doreen Buss has sought to highlight the *boundaries* around different legal spaces and the processes through which these boundaries come to be drawn.¹³⁹ From this perspective international law can be seen as “...a structuring process, a means by which particular relationships, subjects and interests are sited, positioned and prioritized.”¹⁴⁰ By focusing on the boundaries of international legal space, Buss hopes to “offer a closer reading of the political movements entailed in spatial allocation,”¹⁴¹

¹³³ Delaney, *supra* note 7, 61 (emphasis in original)

¹³⁴ Zoe Pearson, ‘Spaces of International Law’ [2008] 17(2) *Griffith Law Review* 489

¹³⁵ *Ibid*, 491

¹³⁶ *Ibid*, 491

¹³⁷ *Ibid*, 493

¹³⁸ *Ibid*, 491

¹³⁹ Buss, *supra* note 83

¹⁴⁰ *Ibid*, 89

¹⁴¹ *Ibid*, 89

and highlight the ways in which “the spaces of international law and the boundaries of the disciplinary fields are more than just metaphors denoting areas of inquiry.”¹⁴²

My particular focus here is on boundaries; between public and private spaces, between international and national, between the inside and outside of international law. Boundaries *mean*. They signify, they differentiate, they unify the insides of the spaces they mark.... I am primarily interested in the question of international law’s disciplinary boundaries, the ways in which the boundaries of international law regulate who and what is properly international.¹⁴³

What links the work of Pearson and Buss is their concern to analyse what constitutes the space of the ‘international’, how ‘international’ law is defined. Both scholars rightly recognise that it is only by elucidating the mechanisms of exclusion and inclusion that define international legal space that we can better understand the political function of international law.

The definition of the international governs what we see as international law, how we see its impact, and who we see as law’s subject. A focus on the boundaries of international law is one mechanism to understand better the acts of power through which we come to know the international.¹⁴⁴

Coupling Lefebvre’s schema with the concept of ‘disciplinary cartography,’ as set out by Pearson and Buss, will help us to fully flesh out the map of international legal space. Firstly, any such ‘map’ must be constituted by *representations of space* – the *conceived* representation of what international legal space *should* look like. As such it manifests as an abstract, objectified space constituted by the assemblage of international legality – the treaties, customs, conventions, rules, norms, and principles of international law. Although this *conceived* space of international law is dominant, the ‘map’ of international legal space must take *material* form – international law must be *perceived* in the world in order to generate effects. To adopt a broad simplification, the *spatial practices* of international legal space correspond to the myriad meanings that are inscribed onto the material world *whenever and wherever*

¹⁴² *Ibid*, 89

¹⁴³ *Ibid*, 88

¹⁴⁴ *Ibid*, 89

international law happens. While some of the *spatial practices* that constitute the adjudicative space of international criminal law are discussed at length later in this thesis, the *spatial practices* of international legal space are, needless to say, innumerable. Finally the ‘map’ of international legal space is continually being *used*, and perpetually being re-drawn by the *lived* space of international law. It is primarily legal experts - lawyers, judges, academics and others - who map the *representational space* of international law. However those who seek to *use* international law, from states, to multinational corporations, to victims of human rights violations also contribute to the mapping of international legal space whenever they invoke international law. It is through the myriad *performances* of international legality by these actors - through the negotiating, drafting, application, interpretation, adjudication, and execution of international law, and the invocation of its substantive and symbolic meanings - that the shifting boundaries of international legal space are mapped.

As Pearson and Buss make clear the mapping of international legal space involves determining which instances of legality are included within that space, and which are excluded. Defining the boundaries of international legal space can thus be imagined as the intertwining of *what* international law says, what it permits and what it prohibits; *where* international law happens, how it takes material form; and *how* international law happens, how it is performed.

5.1.2: The Perspective of Scale

By aligning our nomospheric investigation with what has been called the “symbolic cartography of law,”¹⁴⁵ we will be better placed to analyse one of the crucial mechanisms of exclusion and inclusion that define international legal space; the *perspective of scale*. Scale, like many of the key insights of the spatial turn, is a concept that originates in the field of geography, yet it has been productively deployed in a wide range of academic disciplines: “Geographic scale, referring to the nested hierarchy of bounded spaces of differing size, such as the local, regional, national and global, is a familiar and taken-for-granted concept for political

¹⁴⁵ Boaventura De Sousa Santos, ‘Law, A Map Of Misreading: Toward A Postmodern Conception Of Law’ [1987] 14(3) *Journal of Law and Society* 279, 286

geographers and political analysts.”¹⁴⁶ The legal academy, particularly those who work with international, transnational or global law, has increasingly come to rely on the perspective of scale as an analytical tool that promises to bring order to an increasingly complex and fragmented field.

Law is concerned with the ordering of relations between agents or persons (human, legal, unincorporated or otherwise) at a variety of levels, not just relations within a single state or society. One way of loosely characterizing these levels of relations is *geographical*. In terms of *space* they include the global, international, transnational, regional, inter-communal, municipal (nation-state and subsidiary jurisdictions), sub-state local and non-state local. These different levels are not nested simply in a single hierarchy of larger and smaller *spaces*. Rather, they co-exist, overlap and interact in complex ways.¹⁴⁷

When considering the deployment of scale to define the space of international law, it is vital to keep in mind that these different scales are not hermetically sealed tiers, that automatically sort and order legal relations into their appropriate levels; rather, they should be seen as “...constituted by shifting intersections of different and not necessarily coherently articulating legal orders associated with different scalar spaces.”¹⁴⁸ This lack of coherence arises not from a confusion or uncertainty over the identity of the various scalar spaces, but rather, as Boaventura De Sousa Santos makes clear, over the degree of legal scrutiny – the attention to detail – that each scalar space applies to the *same* object of regulation, and the resulting divergence in legal outcomes.

... three different legal spaces and their correspondent forms of law: local, national and world legality. It is rather unsatisfactory to distinguish these legal orders by their respective objects of regulation because often they regulate or seem to regulate the same kind of social action. Local law is a large-scale legality. Nation state law is a medium-scale legality. World law is a small-scale legality. This concept has broad implications. First, it means that, since scale creates the phenomenon, the different forms of law create different legal objects upon eventually the same social objects.

¹⁴⁶ David Delaney and Helga Leitneh, ‘The Political Construction Of Scale’ [1997] 16(2) *Political Geography* 93, 93

¹⁴⁷ William Twining, ‘*Globalization And Legal Theory*’ (2000 Cambridge University Press), 4

¹⁴⁸ Blomley, Delaney, and Ford, *supra* note 52, xxi

They use different criteria to determine the meaningful details and the relevant features of the activity to be regulated. They establish different networks of facts. In sum, they create different legal realities¹⁴⁹

One would be forgiven for presuming that the distinctions between a local bylaw regulating the use of a public woodland, a national statute defining rural planning regulations and an international environmental convention concerned with the protection of woodlands and forests were obvious - indeed natural – and were grounded in the distinct identities of the actors who might fall into legal dispute over the use of the woodland. Yet what the perspective of scale reveals is that each of these legal regimes could potentially regulate the use of the same woodland, and the determination of which regime should be applied is a *contingent* decision taken by legal experts who *actively* frame the object of regulation as occupying one *or* other of the available legal scales. What is important to grasp is that “Scale, then, is not simply an external fact awaiting discovery but a way of framing conceptions of reality.”¹⁵⁰

It is useful to recall that like all aspects of the spatial, the perspective of scale is a multiplicitous, unfixed product of social relations, and as such, the allocation of legal disputes to particular scalar spaces cannot be conceived as objective - as natural; “...geographic scale is conceptualized as socially constructed rather than ontologically pre-given, and... the geographic scales constructed are themselves implicated in the constitution of social, economic and political processes.”¹⁵¹ Yet the longstanding and uncritical acceptance of “...the assumption that law operates on a single scale, the scale of the state,”¹⁵² has historically dogged the study of international law and rendered as natural the presumption that international legal space is *essentially* different from national legal space and thus regulates an *essentially* different range of legal disputes. As Annelise Riles has observed:

It is difficult to talk about this notion of scale in international legal culture because it is an implicit, naturalized starting point, a base taken for granted by all sides upon

¹⁴⁹ De Sousa Santos, *supra* note 145, 287

¹⁵⁰ Delaney and Leitneh, *supra* note 146, 94

¹⁵¹ *Ibid*, 93

¹⁵² De Sousa Santos, *supra* note 145, 287

which the more important, contested issues are played out.¹⁵³

Far from being a naturalised, essential, distinction the determination of the boundary between national legal space and international legal space is a *politically* contingent one. The perspective of scale is a mechanism inherent to the ‘disciplinary cartography’ deployed by the ‘legal cartographers’ that guard the boundary of the space of international law through a case-by-case process of exclusion and inclusion. Whether a particular legal dispute is left to be adjudicated in national legal space or elevated to the international plane is not an inevitable result of some essential national or international characteristic or property of the particular dispute but rather a result of contingent social, legal, and political processes.

the adoption of one scale of (p)reference to others may often be a component of political strategies. Nearly any event or state of affairs can be made differentially meaningful by framing it primarily as occurring at one scale rather than another or by granting interpretive or normative primacy to one among a number of competing “levels”.¹⁵⁴

The work of Annelise Riles on colonial era legal disputes between great powers moves beyond the premise that scale is ‘socially constructed rather than ontologically given’ to explore *how* the “architecture of scale”¹⁵⁵ is used to define the boundaries of international legal space. Riles echoes Pearson’s notion of international lawyers as ‘disciplinary cartographers,’ in sketching out how international legal space must be actively maintained through the elevation of certain *nomospheric situations* to the international plane:

the international lawyer’s task is not simply to view the world in global or local terms but also to contribute to the architecture of this global space. The problem of enforcement of international law, for example, concerns the fact that violations of international law take place *simultaneously* in local, domestic spheres, within the purview of another legal system. International lawyers must train citizens and governments who see only local events, therefore, to conceptualize them as events

¹⁵³ Annelise Riles, ‘The View From The International Plane: Perspective And Scale In The Architecture Of Colonial International Law’ [1995] 6(1) *Law and Critique* 39, 41

¹⁵⁴ Blomley, Delaney, and Ford, *supra* note 52, xx

¹⁵⁵ Riles, *supra* note 153, 49

occurring also on an international plane. The lawyer's task becomes both to view the world in a way that makes possible a difference of dimension, and to maintain a boundary that delineates and defines the cosmopolitan space.¹⁵⁶

However the operation of scale is not restricted to the elevation of legal disputes to the international plane. The 'architecture of scale' can also be deployed in the opposite direction - to relegate nomospheric situations or settings from international legal space to national legal space. Riles highlights the politically contingent nature of the deployment of scale in labelling this process "...strategic shifts from one scale to another." Moreover Riles intriguingly suggests one possible mechanism - one strategy of disciplinary cartography - through which a nomospheric setting might be excluded from international legal space. By alluding to the idea of perspective as "...both scale or dimension and the particularity of a point of view,"¹⁵⁷ Riles hints at how the 'lack of an unambiguous spatial referent' for international law renders international legal space vulnerable to a "...different order of knowledge."¹⁵⁸ In other words, Riles exposes the malleability of international legal space when confronted with the 'material emplacement' of the local – when confronted with the *particularity* of the spatial.

The perspectival trick here is to produce an element of the local which collapses the architecture of scale that differentiates local and global in the first place. The difference of scale between global and local gives the international plane its sense of "realness". When scale is collapsed, the difference between global and local is made to look unnatural, synthetic, two-dimensional rather than three.¹⁵⁹

5.2: *The 'Space-lessness' of International Law*

It is impossible to coherently map international legal space without an acknowledgment of the conceptual dominance of state centric, national legal space.

That the space of the state is pre-eminent in international law is reflected in the structures and processes of international law, where states interactions are central to

¹⁵⁶ *Ibid*, 48

¹⁵⁷ *Ibid*, 48

¹⁵⁸ *Ibid*, 49

¹⁵⁹ *Ibid*, 49

both the sources of international law, as well as being the primary subjects of international law. States and the community of states, for international law, are where law is created, implemented and enforced — in short, where law happens.¹⁶⁰

What flows from this perceived relationship of dependence and from the lack of an unambiguous spatial referent for the international is the common conception of international law as somehow *space-less*. Underpinning this notion of *space-lessness* is the idea that international law's legitimacy does not stem from any geographic relation, that international law is not constituted by, or does not occupy, any particular space. International law is thus conceived as somehow floating above the mundane materiality of state centric national legal space. Because it lacks "...the nexus of territoriality and sovereignty,"¹⁶¹ that is commonly held to legitimate a legal order, international law is widely "...presented as more a product of imagination than it is a singular, unified space or place, a product of an assumed spatial claim and scale."¹⁶²

That international law might be conceived as the 'product of the imagination' merely highlights the dominance of the contrary notion that national legal orders somehow exist or originate somewhere else then the mental space of conception, that they are somehow a natural outgrowth of the national space itself, in a similar way to nativist ideas of language or ethnicity. Thus where national law is imagined to be immanently rooted in national territory, international law is imagined to be free floating - lacking a spatial referent.

International law, like international relations, is a discipline defined in terms of its (presumed) spatial location. It is law that is international; law that governs the relations between states. It is law that is not national and law that transcends the nation. Paradoxically, while international law may be defined at the outset by a specific spatial reference, there is also a space-lessness about international law. There is no real international territory, outside of a few narrow exceptions, and one would be at pains to *go to* the international. Indeed we understand international law more in terms of its spatial lack; it is that which is not national.¹⁶³

¹⁶⁰ Pearson, *supra* note 134, 494

¹⁶¹ Delaney, *supra* note 2, 253

¹⁶² Pearson, *supra* note 134, 503

¹⁶³ Buss, *supra* note 83, 87 (emphasis in original)

Immanently intertwined with international law's perceived *space-lessness* is its purported aspiration to both *universality* and *neutrality*. If international law is not tethered to a particular territorially bounded legal space then it is presumed that it must be neutrally and universally applicable everywhere. If international law is a legal order without a national space, then it follows that it must be free from political and ideological influence; if international law has no spatial referent then it must be applicable in all spaces; if international law is *space-less* then it must not originate from any space or place in particular.

Because international law is often assumed to be universal and neutral, it is seen as both applicable everywhere and a view from nowhere in particular. In this way, the spaces of international law seem at once hyper-visible ('global', 'international') and at the same time invisible, in the sense of the presumed limited connection of the international with any particular physical space, structure, ideology or tradition.¹⁶⁴

The perceived absence of the political from international legal space evoked by the *space-lessness* of international law has a paradoxical result. On the one hand international legal space is imagined as the realm in which the noblest aspirations of mankind are enshrined, where the petty self-interest of inter-state rivalries can be forgotten and humanity can come together to forge a cosmopolitan utopia. On the other hand it is precisely the lack of a spatial referent that undermines international law's utopian ambition. Without the virtue of legitimacy, the attribute of certainty, and the capacity for enforcement that flow from national sovereign space – without the power that undergirds state sovereignty – international legal space is vulnerable to accusations of lawlessness, susceptible to manipulation and partiality, and liable to be considered irrelevant and redundant.

5.2.1: The Question of Universality

Yet the normative universality of international law has long been doubted, particularly by those on the "margins of modernity,"¹⁶⁵ who see international law not as enshrining some essential human value – as contemporary discourses of human

¹⁶⁴ Pearson, *supra* note 134, 493

¹⁶⁵ Dianne Otto, 'Rethinking The "Universality" Of Human Rights Law' [1997] 29 *Columbia Human Rights Law Review* 1, 19

rights and international criminal law purport to do – but as being reflective of a set of European norms that were historically imposed on their societies through the violence of colonialism, and which continue to marginalise those societies today.

International law's self-purported universalist aspirations, its claim to a higher moral purpose and its promises of order, stability, and prosperity provide hope... however the converse may be true – that international law is not universal, but has been and continues to be an instrumental tool for advancing the interests of particular peoples, nations and regions at the expense of others.¹⁶⁶

The scepticism of those on the receiving end of international law's universalizing ideal - "...the geographically entangled "civilising mission" of international law"¹⁶⁷ - is commonly dismissed within the legal academy as being the product of a particular historical moment - an aberration that has been ameliorated by the balming processes of de-colonisation and self-determination. Yet its abiding resonance today – as manifested in the multiple modes of resistance to 'globalisation' in its myriad forms – speaks, not only to the persistence of neo-colonial presumptions within the practice of international law, but to a fundamental problematic at the root of any continuing assertion of the universal.

...to assume from the start a procedural or substantive notion of the universal is of necessity to impose a culturally hegemonic notion on the social field. To herald that notion then as the philosophical instrument that will negotiate between conflicts of power is precisely to safeguard and reproduce a position of hegemonic power by installing it in the metapolitical site of ultimate normativity.¹⁶⁸

This thesis is not the forum in which to engage with the complex debate over the trope of universality in international law. Instead the intent is to draw out some of the ways in which a spatial perspective can assist in unmasking the Eurocentric particularity of international law. On one level this is a rather simple matter of

¹⁶⁶ Aoki, *supra* note 79, 915

¹⁶⁷ Pearson, *supra* note 134, 493

¹⁶⁸ Judith Butler, 'Contingent Foundations: Feminism and the Question of Postmodernism' in Judith Butler J and Joan W. Scott (eds) '*Feminists Theorize The Political*' (1992 Routledge), 7. Cited in Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' [1997] 18 *Australian Yearbook of International Law* 1, 7

asserting the endless heterogeneity of geography - the ways in which geography's immanent concern with the specificities of place challenge the dominant perception of international law's omnitude.

... unlike geography international law aspires to the universal. It aspires to establish a law for all states. It is not context sensitive: it is a law for all of us, for every state.... In that sense international law is indifferent to the identity of the parties – to place. This is at least its aspiration – the aspiration of the universal. A geographic approach, as I understand it, would suggest much more attention to the particular, to the context. This would require us to comprehend exactly the situations of the various persons and their role in the context. Thus the international project and the geographic project would seem to be at odds – at least at first glance.¹⁶⁹

On another level, the critique provided by a spatial perspective – the requirement to engage with the socially co-constitutive, dynamically multiplicitous, unfixed, and open-ended nature of space – arguably makes any assertion of universality untenable. Any legal claim to universality that seeks to erase its spatial referent – to deny its materiality by presuming to speak from nowhere – should, in the view of Andreas Philippopoulos-Mihalopoulos, be considered ethically unsustainable.

To put it plainly, space forces law to question its ethics. Nowhere than in space is law's internal conflict between the universal (or, across geographical boundaries) and the particular (or, the material emplacement) more forcefully tested... This is what space brings to law. Space is not just the question 'how would this judgment/legal text/legal act be formed over there?', but significantly, 'why is the judgment/legal text/legal act expected to be formed in this way here?' The result is a law that keeps on questioning itself, not in eternal undecidability but in continuous acknowledgement of its own limitations: the law can only do that much, and even that is not certain. Space is law's mirror on which the irresolvable paradox between its universality and particularity is thrown into relief. Spatiality is an ethical position.¹⁷⁰

5.2.2: The Question of Neutrality

¹⁶⁹ Anupam Chander, 'Panel: Law And Geography' [2007] 5 *Santa Clara Journal of International Law* 510, 518

¹⁷⁰ Philippopoulos-Mihalopoulos, *supra*, note 81, 209

The extensive abuses of international law by powerful states merely serve to highlight the extent of the paradox engendered by international law's *space-lessness* - the extent to which the *lived space* of international law is grounded in the very antithesis of neutrality. One might excuse this characteristic of the current legal-political order as a series of aberrant deviations from the norm, or explain it as the intrusions of *real politik* into an otherwise orderly system, or indeed the birth pangs of a new cosmopolitan legal order struggling against the reactionary interests of states, but a spatial analysis uncovers fundamental problems with the legal concept of neutrality within global politics, and subverts the presumption that neutrality is an inherent characteristic of the international.

Part of international law's space-lessness comes through its portrayal in terms of this spatial lack, that is, through the very process of assuming rather than interrogating its spatial claim. Within the international legal academy in particular, there is a sense that we know what we mean by *international* and it is otherwise a trouble-free, neutral space within which the business of legal relations takes place.¹⁷¹

The characteristic of neutrality that international space is presumed to possess – its view from nowhere in particular - is reflected in the formal neutrality of international law, which in turn, is a significant pillar of its legitimacy. As Zoe Pearson makes clear, "...the assumptions of 'neutrality' carried within the notion of the international space, and the corresponding powerful ideas of perspective, purpose and worth of this space, are reflected in beliefs of the role, the substance and processes of international law."¹⁷² Yet this assumption about the neutrality of international space and its effect on the nature of international law is largely an unquestioned, 'taken-for-granted' aspect of the international legal order.

The myth of neutral international spaces filled with neutral observers removed from the external conditions of everyday life hides how the spatiality of law produces and reproduces the material abstraction of the lawscape. Constituted as hyper-reality, international law assumes the 'God's eye view' of the global as the vanguard of specific understandings of rights and justice....Such a legitimising myth assumes that

¹⁷¹ Buss, *supra* note 83, 87 (emphasis in original)

¹⁷² Pearson, *supra* note 134, 502

international law remains beyond the influence of culture and politics, occupying a neutral spatiality.¹⁷³

To imagine that international law is *space-less* is to imagine that space is a pre-given, empty, backdrop, over which law is laid - it is to deny that space, society and law are co-constitutive. If, on the contrary, one accepts that space is constitutive of *all* legal meaning, and *all* legal realms, then instead of maintaining that international law is universal and neutral as a result of its supposed *space-lessness*, one must instead acknowledge the particularity and predisposition of international law that is the ontological consequence of its spatiality.

5.3: The Visibility of International Legal Space

The trope of *visibility* is productive for a spatial analysis of law because it presumes a certain materiality. For something to be seen - to be visible – it must be discernable to the eye. Those who imagine international criminal law, or any legal regime, as being primarily immaterial - as being comprised merely by the intangible authority of the law to determine legal relations, as articulated solely “...by the domain of words, representations, rhetoric, meaning, discourse, or ideology”¹⁷⁴ - would struggle to conceive of the law as being constitutive of space; as being materially manifest and thus discernable to the eye. Irus Braverman, however, has explored at length¹⁷⁵ the ways in which a focus on the visibility, and invisibility, of legal space – *the manifold ways in which law is manifested or concealed in the material world* – is productive for a critical analysis of law.

Law, with a capital “L” at least, is not particularly fond of hiding itself. In order to be effective, law must be asserted in the world; it must be acknowledged; and, most importantly, it must be visually seen. Why, then, would law hide itself in space? How would it do so? And why are such hidden places of law important to us? This paper explores the dual project of seeing and concealing within the context of legal geography. It examines how law sees and how it is seen from a spatial perspective. It

¹⁷³ Philippopoulos-Mihalopoulos and FitzGerald, *supra* note 84, 449

¹⁷⁴ Delaney, *supra* note 7, 13

¹⁷⁵ Irus Braverman, ‘Hidden In Plain View: Legal Geography From A Visual Perspective’ [2010] 7(2) *Law, Culture and the Humanities* 173

also asks who does the legal seeing, who and what are being seen by law, and then who and what are rendered invisible in these geolegal sites. In addition, it considers how law's particular way of seeing translates into the making of this space. Finally, and interrelated to all the above, it shows how both the visibility and, perhaps more importantly, the invisibility of law in space are strongly aligned with arrangements of power.¹⁷⁶

The deployment of the trope of 'visibility' thus brings into focus the ontological relationship between the materiality of the legal and the law's *effectiveness* – in order for the law to 'generate effects in the world' it must take material form. As David Delaney has also argued, at its root this materiality is related to the ultimate coercive sanction that undergirds the law; without the ability to inflict violence, the law can have no effect. As a starting point then, all manifestations of the 'materiality of the legal' must be discernable to the eye – they must be visible – whether they are the grand courthouses of the law or the fence marking the dividing line between your property and your neighbour's garden. Yet, as Braverman suggests, the trope of visibility implicates a far broader horizon than the materiality of the legal, revealing how the law's panoptical gaze is constitutive of legal space. In other words the questions of what the law sees and does not see, who does the seeing and who is precluded from seeing all 'translate into the making of legal space.'

The 'project of seeing and concealing,' that is revealed by a spatial analysis of the law is reflective of the broader modernist project of 'taming space.' Rather than conceiving space as a constituent part of society, knowledge and the law, 'the complexity, the profundity, the multiplicity of space was suppressed; space was stripped of all generative meaning, it was conceived as flat, inert, an empty container, a surface to be traversed, to be measured, and to be ordered.' Drawing on this knowing misconception of the material world, of space, place and landscape – the presumption of its immanent dormancy, its "taken-for-grantedness"¹⁷⁷ and thus its abstraction from the machinations of power – Braverman highlights what underpins the apparent neutrality of legal space, and the law.

¹⁷⁶ *Ibid*, 173

¹⁷⁷ *Ibid*, 178

By utilizing the manifest innocence of nature and the seemingly a-temporal properties of landscapes, legal enterprises embody themselves in space, thereby appearing neutral, fixed, and external. In effect, natural landscapes are convenient ways for making power dynamics seem inevitable and immutable.¹⁷⁸

Just as there can be no process of inclusion without a simultaneous process of exclusion, nothing can be rendered visible without a parallel concealment. Just as every process of exclusion is politically contingent, every act of concealment must also be politically motivated. Far from being the neutral, "...empty and static terrains upon which power is exercised,"¹⁷⁹ legal space is constitutive of the ideological aspirations of the law, the 'project of seeing', "...is simultaneously also a project of obscuring and, in this context, of rendering hidden the ideological places of law in [the] landscape."¹⁸⁰ These insights are particularly productive when coupled with the notion that the space(s) of international law in particular, are rendered *both hyper-visible and invisible*. This obscuring – this concealment - of 'the ideological places' of international law is aligned with the perceived *space-lessness* of the international, which in turn, is a consequence of the unique vantage point of international law - "...from the supposed neutrality/law from nowhere in particular perspective."¹⁸¹

Braverman's conceptualisation of the 'project of seeing and concealing' therefore encompasses both the material *and* immaterial aspects of legal space. The 'ideological places' of the 'space of adjudication' describes both the material manifestations of the legal, the ideologically and politically problematic instances of adjudication that are rendered invisible *and* the actually existing power relations that animate international criminal law, and are concealed by the ideological presumptions of universality and neutrality.

If the purported vantage point of international law is 'from nowhere in particular' then what does this reveal about the ideological places of international law that are being rendered invisible by such a point of view? Moreover what does the assumption of the

¹⁷⁸ *Ibid*, 178

¹⁷⁹ *Ibid*, 175

¹⁸⁰ *Ibid*, 184

¹⁸¹ Pearson, *supra* note 134, 496

vantage point of the 'international' as "...a way of looking that eclipses all others,"¹⁸² tell us about the how international legal space is constituted, about how the global panoptical gaze – a neutral 'God's eye view' - that purports to *see all* without distinction, is simultaneously able to *fail to see* certain spaces of international law, to render certain spaces invisible.

Philippopoulos-Mihalopoulos has suggested a way to conceptualise this seemingly inexplicable *failure to see* in the relation between each particular vantage point of the law and the corresponding legal spaces – or *blind spots* – that are concealed or rendered invisible. Intriguingly, Philippopoulos-Mihalopoulos hints at how this process of exclusion from legal space – this *failure to see* – is rooted in the location of such blind spots in a different spatial frame, akin to the hereafter.

Blind spots are spaces *au-delà*, beyond the frame of a topical description, but at the same time, the companion of every description, the space left outside the description by virtue of being the space from which the description is performed. They are always there, just invisible to the one describing, since they are to be found, as it were, behind one's back. A blind spot can be revealed if one positions oneself at a different angle; but the revelation of one always produces another, like a dog chasing its tail.¹⁸³

Philippopoulos-Mihalopoulos' elucidation of the blind spots of legal space also serves to highlight how the trope of *visibility* – the *failure to see* - is immanently connected to the process of *mapping* legal space, and the *architecture of scale* in particular. Thus the trope of visibility – the way the legal gaze 'translates into the making of legal space' – can be interpolated into the notion of the 'disciplinary cartography' of international law; "... the ways in which international lawyers inhabit and describe the international legal landscapes and the spaces within the landscapes... in developing descriptions and explanations of the international legal landscape, our disciplinary cartography tends to construct borders around the spaces recognised as law, privileging particular spaces and excluding, or rendering invisible, other spaces

¹⁸² Pearson, *supra* note 134, 503

¹⁸³ Andreas Philippopoulos-Mihalopoulos, 'Introduction: In the Lawscape', in Andreas Philippopoulos-Mihalopoulos (ed) '*Law and the City*' (2007 Routledge-Cavendish) 4

and the interactions within these spaces from the ambit of ‘international law’.”¹⁸⁴ In a prescient echo of the *nomospheric* operation of contemporary international criminal law, Annelise Riles’ description of the cartographic role of colonial-era international lawyers draws the threads of *visibility* and *scale* together to show how they cooperate in the production of international legal space. Indeed Riles’ pithy summation of the function of scale; “...the architecture that sustains the universalizing gaze,”¹⁸⁵ exemplifies the extent to which international legal space is buttressed by the scaffolding provided by the hierarchy of scale, which in turn provides an elevated and omniscient vantage point for the international legal cartographer.

For the late nineteenth century international lawyer, too, scale was a fundamental, if unremarked, aspect of the disciplinary project. The international lawyer's task, I argue, was to transform "local" disputes into matters of global importance... What differentiated the local and the global for the late nineteenth century international lawyer was precisely a notion of size or scale. What was international and global, in other words, was understood as larger than what was local or national. From the vantage point of the international lawyer's globalizing gaze, distant events "on the ground" were "spotted" as international issues, and the adjudication of international disputes was understood to take place on an "international plane" different in scale from these events themselves.¹⁸⁶

An acknowledgement of *the visibility of legal space* is thus critically productive for what it reveals not only about the fundamental materiality of the legal, but also how the ‘double use of vision’ is deployed to define the boundaries of international legal space. The ways in which international law not only *sees* legal subjects – the means, for example, by which international criminal law renders *visible* certain objects appropriate for *international* legal adjudication – but the ways in which international law *conceals* its ideological places beneath the perceived neutrality of space. The material ways in which international criminal law manifests itself *conspicuously* in *international* legal space in order to prevent its blind spots being revealed, and in order to render its actual existing power relations invisible.

¹⁸⁴ Pearson, *supra* note 134, 490

¹⁸⁵ Riles, *supra* note 153, 53

¹⁸⁶ *Ibid*, 40

This, then, is law's double use of vision: first, law governs through the *visibility* of physical spaces; then, it uses this same conspicuous visibility to make its own ideological presence *invisible*.¹⁸⁷

¹⁸⁷ Braverman, *supra* note 175, 186 (emphasis in original)

PART III: THE SPACE OF INTERNATIONAL CRIMINAL LAW

For all those who confuse history with the old schemas of evolution, living continuity, organic development, the progress of consciousness or the project of existence, the use of spatial terms seems to have an air of anti-history. If one started to talk in terms of space that meant one was hostile to time. It meant, as the fools say, that one 'denied history', that one was a 'technocrat'. They didn't understand that to trace the forms of implantation, delimitation and demarcation of objects, the modes of tabulation, the organization of domains meant the throwing into relief of processes – historical ones, needless to say – of power. The spatialising description of discursive realities gives on to the analysis of related effects of power.

Michel Foucault, 'Questions on Geography', in Power\Knowledge: Selected Interviews and Other Writings 1972-1977

Chapter 6: The Space of Adjudication

6.1: The 'Worldly Presence' of International Criminal Law

If one were asked to think about international criminal law, the first image that would almost certainly come to mind is of a courtroom. The form and function of the space would be instantly recognizable. It would be a large, airy, distinctively modern, yet somehow sterile chamber, occupied by a comfortably predictable cast of characters. There would be the judges, recognizable by their solemn robes, and their elevated position at the head of the chamber – marked, not by a national flag or coat of arms, but by an institutional insignia or other totem of authority and gravitas. There would be the opposing teams of lawyers, positioned with scrupulous equality of arms, behind banks of high tech screens; clearly identifiable by their modest, yet learned, black gowns. The lawyers would be forensically examining witnesses, who would be carefully ushered to and from the courtroom from locations around the globe. There would be legal clerks and other administrative staff of the court, who would be diligently, yet almost invisibly, going about their work of transcribing, collating, scheduling, and ordering the business of the court. There would be the security personnel, in their generic uniforms, which on closer inspection betray no national

allegiance, and whose armed presence lends the chamber an added sense of safekeeping. The security personnel, would, of course, be watching over the defendant, symbolically seated ‘in the dock’, who will be following proceedings as they are simultaneously translated through his earphones. The chamber would have the feel of a grand theatre, with the cast of characters occupying the stage set apart from the audience. Somewhat unusually for a courtroom, there would be television cameras documenting proceedings, and the press box would be amply supplied. Everyone would be formally encouraged to view the show, so long as they remained in the spacious public gallery behind the architectural panels of security glass.

The adjudicative space described above is the most nomosphericly visible manifestation of the materiality of international criminal law, an instance of the “the materiality of the legal...the often contentious spatializations and performances through which it assumes a worldly presence.”¹⁸⁸ The detail of the description is not mere verbiage, but reveals how the myriad objects, both mundane and symbolic, the material *things* that are brought together *in and with* this space, reify the ‘worldly presence’ of international criminal law. What is less visible in the scene described above is the way in which the adjudicative space itself allows the bundle of nomospheric traces that comprise international criminal law to be given worldly expression – *to be spaced*. In other words it is the international criminal tribunal, the adjudicative space of international criminal law, and how it is ‘imagined, performed, and materialised’ that makes that bundle of traces – makes international criminal law – *meaningful*.

The immanence of the relationship between the legal regime of international criminal law and its materialisation in the form of the international criminal tribunal is arguably more intrinsic than any other legal regime. Lacking the spatio-legal assemblages that buttress national legal regimes, including everything from the legitimacy of a territorially bounded sovereign legal space, to a police and prison service, international criminal law is uniquely dependant on its adjudicative spaces. One might go as far as to suggest that the adjudicative space of the international criminal tribunal acts as surrogate ‘national space’ for international criminal law, with

¹⁸⁸ Delaney, *supra* note 7, 20

the space of each of the tribunals constituting ‘the territory of international legal space.’ In any event, without the nomospheric setting of the international criminal tribunal, international criminal law would have no materiality, it would not be able to generate effects in the world, and it would have no ‘worldly presence.’ In short the story of international criminal law is the story of its adjudicative spaces.

Yet the intent of this thesis is not merely to make the, somewhat obvious, point that the ‘worldly presence’ of international criminal law is most commonly visualised in the form of a courtroom scene. The purpose is rather to use the notion of the ‘materiality of the legal’ as a jumping off point for a spatial reimagining of international criminal law. The goal of this thesis is to begin mapping *the nomoscape of international criminal law*. This critical (re)conceptualisation focuses on the adjudicative space(s) that are produced by the materialisation of international criminal law. The proposed epithet for these spatio-legal assemblages is *the space of adjudication*.

The template for the space of adjudication is Lefebvre’s conceptualisation of space as a triad, a schema that seeks “...a unity between physical, mental and social space,”¹⁸⁹ through an elucidation of “...its physical, symbolic and lived dimensions.”¹⁹⁰ The space of adjudication is therefore materialised through the intertwining of its constituent *spatial practices, representations of space, and representational spaces*. Firstly the space of adjudication is constituted by its *spatial practices*; the “physical practices, everyday routines, networks and pathways through which”¹⁹¹ the adjudicative space of international criminal law is reproduced. But Lefebvre’s notion of spatial practices as the *perceived* space of the world - “space as physical form, space that is generated and used”¹⁹² - must be coupled with the *representations of space*, the “...forms of abstract knowledge generated by formal and institutional apparatuses of power engaged in the organization of space.”¹⁹³ Thus the space of adjudication is further constituted by the ‘abstract knowledge’- the laws, rules, and conventions, - of international criminal law. The space of adjudication is thus

¹⁸⁹ Elden, *supra* note 29, 816

¹⁹⁰ Butler, *supra* note 30, 327

¹⁹¹ *Ibid*, 320

¹⁹² Elden, *supra* note 29, 816

¹⁹³ Butler, *supra* note 30, 320

conceived by the ‘formal and institutional apparatuses of power’ – the ‘international community’ and the UN – which are engaged in the organisation of the adjudicative space(s) of international criminal law. This idealised conception is grounded in both the symbolic meanings and ordering logics of international criminal law; pre-eminently the meta-normative presumptions of universality and neutrality that underpin the ideological representation of what the space of adjudication is *for*. Finally the space of adjudication is constituted by its *representational spaces* – the *lived* space of international criminal law. The dynamic, open-ended, and performative nature of space entails a constant remaking – a reinterpretation - of the space of adjudication. Multiple actors, including the international community, states, transnational advocacy groups, victims, and jurists all contribute to the *performance* of the adjudicative space of international criminal law. It is through a constant interaction between the *perceived* ‘space as physical form’ – the assemblage of spatial practices that constitute the material courtrooms and other concrete spaces of international criminal law – and the *conceived* space of the ‘abstract knowledge’ and ‘ordering logics’ of international criminal law that the *lived*, or social space of international criminal law is performed and so produced.

However, Lefebvre’s philosophical notions of the social production of space must be interpolated with the insights from the field of ‘law and space,’ in particular Delaney’s concept of the *nomosphere*. The *space of adjudication* is thus produced by the spatio-legal assemblage of spatial practices, representations of space, and representational spaces set out above, yet it takes material form as a *nomospheric setting of international criminal law*. Each specific instantiation of the space of adjudication is constituted by the particular *nomospheric traces, figures, situations* and *settings* that comprise that specific adjudicative space of international criminal law. The shifting constellation of these various *nomospheric settings*, together constitute the *nomoscape* of international criminal law.

6.2: Mapping the Space of Adjudication

The elucidation of the *space of adjudication* will draw on the spatial concepts of *visibility* and *scale* as mechanisms to define – to map – *the nomoscape of international criminal law*, and more precisely the process of inclusion and exclusion

– the ‘project of seeing and concealing’ – through which the *international* space of adjudication is distinguished from the *non-international*, or even the *non-legal*. Through a historically grounded analysis of “...the correlation between visibility, fixity, and law,”¹⁹⁴ that undergirds the deterritorialised, ‘moveable feast’ that is the space of adjudication, four *nomospheric factors of visibility* will be traced. These *nomospheric factors of visibility* determine whether or not every instance of adjudication of international criminal law *attains the requisite visibility* to amount to an *international* adjudicative act, or whether such an act constitutes a *blind spot* and thus remains *non-international* - invisible to and excluded from the space of adjudication. The analysis of the *nomospheric factors of visibility* allows the space of adjudication to be mapped along a *spectrum of visibility*. The greater the visibility of each act of adjudication, the greater the likelihood that it will be *recognised* as part of and *included* within the space of adjudication.

The contours of this process of recognition and repudiation – of inclusion and exclusion – will be further clarified by drawing on Delaney’s twinned notion of ‘normalization’ and ‘exceptionalization.’ This is the cataloguing process through which each adjudicative space of international criminal law is measured against and compared with the *generic nomospheric setting*. The process of ‘normalization’ and ‘exceptionalization’ maps very closely with the nomospheric spectrum of visibility. In fact, it is the same broad factors of visibility that determine whether a specific adjudicative space will be classified as *exemplary*, *exceptional* or *anomalous*.

A specific nomospheric setting will be considered ‘normal’ or *exemplary* if “...it conforms with – or more accurately, is regularly performed in accordance with – some operative notion of what such a setting is *for*.”¹⁹⁵ It follows that those adjudicative spaces of international criminal law that disturb, or contest, or undermine that operative notion will be deemed *exceptional*. As Delaney makes clear, a specific nomospheric setting will be judged to be *exceptional*, if in the particular spatial circumstances the interests of power demand such a determination. Thus “...a specific setting may be regarded as in some important sense “exceptional”... it may be

¹⁹⁴ Braverman, *supra* note 175, 181

¹⁹⁵ Delaney, *supra* note 7, 66 (emphasis in original)

determined that with respect to the situational play of power in a given setting “normal” rules are determined to be inapplicable, suspended or qualified.”¹⁹⁶

However Delaney’s schema is not simply black and white, there is no coarse binary between those adjudicative spaces that are deemed to be *exemplary* – that are visible – and those that are judged to be *exceptional* and thus invisible. Delaney’s schema also introduces the possibility that a specific nomospheric setting may be neither exemplary nor exceptional, but rather be judged to be more or less *anomalous*. The designation of exceptionality implies that this category of adjudicative spaces ‘form an exception to the norm’, while to be judged anomalous implies that the specific adjudicative space merely ‘deviates from the norm.’ Implicit in this distinction is the concept of *scale*. To form an exception to the norm is to constitute an alternative, an adjudicative space that does not seek to emulate the archetype, but is posited as a surrogate. In contrast an anomalous nomospheric setting is merely a ‘deviation from the norm,’ it is constituted in such a way that it falls short of the standard of the norm, it thus occupies a different or lower scale. It is important to bear in mind that if a specific adjudicative space of international criminal law is constituted as *either* exceptional *or* anomalous it will result in that adjudicative space being deemed *abnormal* and thus excluded from international legal space. Crucially, however, for a critical understanding of the ‘pragmatics of world making’ that articulates international criminal law, *the rationale for that exclusion differs*. If a specific adjudicative space of international criminal law ‘forms an exception to the norm’ by disturbing or contesting or undermining the operative notion of what the space of adjudication is *for*, it will be excluded for this failure to materialise the normative presumption of the space of adjudication. If, however, a specific adjudicative space, only ‘deviates from the norm’ then it will not disturb or contest or undermine what the operative notion of what the space of adjudication is *for*. Its exclusion from international legal space will be grounded in its failure to emulate the international standards of the space of adjudication. In other words it will simply fail to attain the requisite visibility to be included in *international* legal space.

6.3: ‘The Correlation Between Visibility, Fixity, and Law’

¹⁹⁶ *Ibid*, 66

So how are the boundaries of international legal space regulated? How do we go about recognising the *nomospheric setting* of the space of adjudication? One starting point is to acknowledge that the space of adjudication is materially and conceptually separate from any single court or tribunal, or any collection of courts and tribunals – that is to say that the space of adjudication can not be defined by merely amalgamating all the individual courtrooms and tribunals in which international criminal law is adjudicated. If that were the case then the space of adjudication would be *fixed* to those specific physical spaces. To illustrate the point, imagine if it were decided that the International Criminal Court was to be the *only* court in which international criminal law cases were to be adjudicated. If the space of adjudication was indistinguishable from the amalgamation of specific courts and tribunals adjudicating on international criminal law then *the space of adjudication would be fixed to the ICC* – they would be one and the same thing.

A further illustration of the concept of fixity in legal space is to contrast the adjudicative space of a Magistrates Court in England and Wales, with that of the International Court of Arbitration¹⁹⁷. Every Magistrates Court sits within a territorially bounded petty sessional area, normally a small rural or urban district. The local magistrates can only lawfully sit at one of the, say, three courthouses within that petty sessional area. The adjudicative space of that particular Magistrates Court is thus *fixed* to those three courthouses. If the magistrates were to transfer the ‘court’ to the local pub they could not lawfully decide cases – they would not be in the adjudicative space of the Magistrates Court. In contrast the International Court of Arbitration can lawfully sit anywhere in the world. In fact the ICA specifically promotes its flexibility – its *lack of fixity*. It may regularly occupy specific hearing centres, normally in major cities, but the choice of location - be it a hearing centre or a private yacht - is up to the parties involved. It follows that the adjudicative space of the ICA is *unfixed* – it is un-tethered from any specific physical space. All that is required to constitute the adjudicative space of the ICA is the presence of the parties and the arbitrator.

¹⁹⁷ Details available at <http://www.iccwbo.org/court/arbitration/>. Accessed on April 25, 2012.

In order to understand the importance of ‘the correlation between visibility, fixity, and law,’ it is useful to trace out the historical trajectory of adjudicative space. In the pre-modern era there was very little fixity between the material space of the courtroom and adjudicative space. Indeed almost any physical space could act as adjudicative space – as a ‘court’ - so long as the appropriate symbolic objects and authoritative personnel were assembled together; so long as the requisite spatial assemblage of things, people and power – *the spatial practices* – were present.

From early on in its history, the court was not geographically limited to the courtroom. It was a "place" and it was to be protected as such: that is to say, in its other offices, in its chambers, in the Inns of Court, in the chancelleries, the libraries and all the other sacred hiding places (*sacramentorum latibula*) and treasure chests in which the records and the writs of the law were either forged or kept.¹⁹⁸

With the onset of modernity, adjudicative space became increasingly fixed to the physical courtroom, as the state-centric, territorially bounded, legal orders of which the ‘court’ is the archetypal adjudicative space, solidified. Today, the adjudicative space of stable national legal orders is almost entirely fixed to the physical courts of the state and pre-eminently the central or superior court.

Thus at the beginning of modernity law's recently formed, many domains - the new legal places of a unifying and increasingly unified Western legal machinery - had come to be, inside the national boundaries, the ever more organized central courts.¹⁹⁹

It is difficult to underestimate the degree to which the adjudicative space of a contemporary national legal order is fixed to the materiality of the ubiquitously grand and imposing buildings of the superior court. Consider the ways in which superior courts are historically located in the heart of a nation’s capital, often very carefully situated adjacent to the equally imposing buildings that house parliament and government, as if the very principle of the separation of powers was given spatial form. The adjudicative space of the national legal order thus attains its *visibility* - its power and legitimacy – through its permanent physical location in the grand buildings

¹⁹⁸ Peter Goodrich, ‘*Languages Of Law: From Logics Of Memory To Nomadic Masks*’ (1990 Fred B Rothman & Co). Cited in Stramignoni, *supra* note 59, 229

¹⁹⁹ Stramignoni, *supra* note 59, 229

of the superior court. These buildings are *where* law happens. The national adjudicative space has never entirely discarded the spatial practices – the assemblage of symbolic objects, sacred texts, and authoritative personnel – that constituted the adjudicative space in pre-modern times, but these have become peripheral to ‘the correlation between visibility, fixity, and law’ that constitutes the adjudicative space in the built materiality - the space - of the superior courts.

6.4: The Space of Adjudication as a ‘Moveable Feast’

In stark contrast to the national legal space, the adjudicative space of international criminal law – the space of adjudication – is, by necessity, *a moveable feast*. The space of adjudication is constituted by a set of spatial practices that are not fixed to any individual court or tribunal. Indeed this lack of fixity is rooted in the idea of the international criminal tribunal as an adjudicative space that, by the very reason of its international status, is, in principle, able to be established anywhere. The ICC is arguably the only international criminal tribunal that will be permanently located in material space, while the principle of universal jurisdiction allows any national court to adjudicate on international criminal law – to reify the space of adjudication. One defining characteristic of the space of adjudication is thus a lack of spatial fixity.

Moreover, the very nature of its status as ‘international’ has disrupted the legitimating ‘correlation between visibility, fixity, and law,’ that underpins national legal space, and presented the space of adjudication with a dilemma. It is precisely the *spacelessness* of international law that has both denied the space of adjudication the authoritative fixity of a permanent, material location, and simultaneously opened up the politically alarming possibility that the space of adjudication might be actualized anywhere in the world. The response to this dilemma has been to engage in the ‘project of seeing and concealing’ – a process of ‘disciplinary cartography’ that maps the space of adjudication on a spectrum from the hyper-visible to the invisible.

Chapter 7: The Nomospheric Visibility of the Space of Adjudication

7.1: Four Nomospheric Factors of Visibility

What then is the spatio-legal assemblage being deployed that enables a particular instantiation of the space of adjudication – either a specific international criminal tribunal or merely an instance of adjudication on international criminal law - to attain the requisite visibility to be included within the space of adjudication. There are arguably four key spatio-legal assemblages - or *nomospheric factors of visibility* - whose combined impact determines the location of a particular instantiation of the space of adjudication on the *spectrum of visibility*. The first factor is location in, or conceptual proximity to, the generic *global city* of international criminal law; the second is the extent to which each instantiation of the space of adjudication occupies the ‘*guarded precincts*’ of international criminal law; the third is the extent to which international criminal law is *exclusively applied* in the particular adjudicative space; and the fourth factor is the participation of members of the *class* of international criminal law experts. These four *nomospheric factors of visibility* are conceived as an analytical tool, a heuristic device, through which to begin to make sense of the spatial distribution of legitimacy and power - the visibility – that results in some spaces of adjudication being held to have the force of international law, and others being deemed to be either outside the international or even outside the law.

7.2: The ‘Global City’ of International Criminal Law

Although the *space-lessness* of international criminal law opens up the possibility for the space of adjudication to be reified anywhere – on a universal basis - it is predominantly actualized in particular kinds of locations; so that “in spite of its apparent universality and remoteness from local specificities international criminal justice, like human rights, is actualized at particular places ranging from boardrooms in New York, Washington, London and Berlin to the tribunals in The Hague, Arusha and Freetown.”²⁰⁰ Zoe Pearson has highlighted how the production of nomospheric visibility is aligned with the ‘global cities’ of international law. The concept of the

²⁰⁰ Gerhard Anders, ‘Follow The Trial: Some Notes On The Ethnography Of International Criminal Justice’ [2007] 23(3) *Anthropology Today* 23, 24

‘global city’ is particularly relevant for a nomospheric investigation of international legal space as it provides a spatial referent for international law while simultaneously bypassing “...the nexus of territoriality and sovereignty,”²⁰¹ that legitimates national legal space. However, as Pearson suggests, the ‘global city’ may provide a certain fixity for the institutions of international law, that renders them visible on a global scale, or *hyper-visible*, but it simultaneously renders *invisible* those spaces of international law that are excluded from the ‘global city.’

The ‘global cities’ of international law, while presenting as diverse and dynamic, are spaces in which historically entrenched exclusions remain and are visible, both at the local level... and at the level of the global, where the diversity implied by a global city obscures and perpetuates the homogeneities of the global elite... Perhaps the most interesting feature of international law in these ‘global cities’ is the way in which international law is at once hyper-visible *and* invisible. It is hyper-visible in terms of the grandeur, the history and physicality of the UN buildings, and in terms of the powerful rhetoric of the ‘international’ and its relationship with domestic legal systems. It is invisible because the UN buildings make up an ‘international zone,’ with their own security force, fire department and postal system, and therefore in theory constitute a neutral, inert, international space within those global cities.²⁰²

Although Pearson’s empirical focus is on the legal processes that comprise international trade agreements, her insights into the spatiality of ‘the city of international lawmaking’ are crucial to the theorisation of the space of adjudication. Of particular relevance is Pearson’s suggestion that the inherent lack of *spatial* fixity associated with the *space-lessness* of international law – the ‘movable feast’ of international criminal law - has led to the emergence of ‘homogenous and portable spaces of power.’ Thus the ‘global city’ serves as a template for a spatio-legal assemblage that is peripatetic, but which maintains a certain *conceptual* fixity, or homogeneity.

This conceptual space of the “city of international law-making” is not bounded by physical, geographic space. Consider what happens when the geographical place of decision-making in international law moves. When international negotiations move...

²⁰¹ Delaney, *supra* note 2, 253

²⁰² Pearson, *supra* note 134, 501 (emphasis in original)

pre-existing spaces are sanitised and made “neutral”. Borders are established, policed and made welcoming and accessible only to those “legitimate” actors recognised in that space of international law-making... This homogeneity and portability of spaces of power in international decision-making, despite the diversity of the physical cities involved, is interesting. It seems that an international law-making “city” can occasionally relocate, but its characteristics remain the same - power, exclusion, detachment, expense, for example, indicating a certain fixity in conceptual terms about these spaces of international law-making.”²⁰³

The pre-eminent global city of international criminal law is The Hague. Not only does The Hague play permanent host to the ICC, but also the ICTY, and the Special Tribunal for the Lebanon. Moreover, all the international criminal tribunals located elsewhere maintain offices in The Hague, which is also the location for a significant number of international criminal law institutions and centres of expertise. The Hague, then, acts as a sort of ‘home-base’ for international criminal law, it stands ready to host trials, hearings and other international criminal law events that are deemed too important to be held elsewhere, require additional visibility, or are simply in need of a temporary space.

An example of the role played by The Hague as the ‘global city’ of international criminal law is the “...somewhat nomadic existence”²⁰⁴ of the Special Court for Sierra Leone in Freetown. The Hague has acted as an alternative site for the SCSL, both hosting plenary meetings while the Freetown site was being established and, significantly, hosting the trial of Charles Taylor. The decision to transfer the Taylor trial to The Hague was ostensibly taken for security reasons but was arguably an example of the need to assure maximum international visibility for the trial of the most important defendant to come before the SCSL.

The status of The Hague as the ‘global city’ of international criminal law is also significantly enhanced by its location in Holland - the most cosmopolitan of states. The ‘internationalism’ of Holland reflects the key symbolic aspects of international

²⁰³ Pearson, *supra* note 134, 503

²⁰⁴ Gerhard Anders, ‘The New Global Legal Order As Local Phenomenon: The Special Court For Sierra Leone’ in Franz von Benda-Beckmann, Keebert von Benda-Beckmann and Anne Griffiths (eds) *Spatializing Law*, (2009 Ashgate Publishing), 141

criminal law - universality and neutrality. Holland is an almost entirely demilitarised state that has managed to shed all vestiges of its colonial past, to be reborn as the prototype of the neutral and universal 'international state'. If any national space in the world mirrors the *space-lessness* of the international it is Holland.

Yet, despite its status as the global city of international criminal law, the space of adjudication is not fixed to The Hague. The conceptual importance of 'The Hague' for the demarcation of international legal space is precisely in the model – *the template* – that it provides for the space of adjudication. 'The Hague', then, to apply Delaney's schema, serves as the *generic instance of the nomospheric setting of the space of adjudication*. As the *generic* space of adjudication, 'The Hague', (as distinct from the ICC, which is merely a *specific* instantiation of the space of adjudication) is a 'historical-cultural abstraction', that carries the 'ideological representations' of international criminal law – in particular an operative notion of what the space of adjudication is *for*. The extent to which 'The Hague' has come to represent the *generic* instance of the space of adjudication is readily apparent from its deployment as linguistic shorthand for the space of adjudication – for example, when discussing whether or not the latest high profile suspect will be 'brought to The Hague'. It is the template of 'The Hague' as a 'homogenous and portable space of power' – as the generic nomospheric setting of the space of adjudication – that comprises the first nomospheric factor of visibility. The extent to which all *specific* instantiations of the space of adjudication achieve *proximity* to the *generic* template of 'The Hague,' including its ideological representations, will therefore, be a contributing factor in determining the visibility of the specific nomospheric setting, and whether it will be deemed to more or less exemplary, anomalous or exceptional.

7.3: The 'Guarded Precincts' of International Criminal Law

One of the key aspects of the generic nomospheric setting of 'The Hague' is the construction of an archetypal spatial form - the materialisation of the legal in a particular style of '*guarded precinct*'. At first glance the archetypal international criminal law tribunal might resemble any other criminal court, complete with judges, lawyers, and defendants. However as the detailed description at the outset of chapter six hinted at, a very particular spatio-legal assemblage constitutes the nomospheric

setting of the space of adjudication. That spatio-legal assemblage takes material form in both the ‘courtroom,’ the ‘courthouse,’ and the wider ‘guarded precincts’ in which international criminal law is adjudicated. The ‘worldly presence’ of the ‘guarded precincts’ of international criminal law is thus comprised of an amalgamation of three elements. Firstly the ‘interior’ of the building, the ‘courtroom,’ with its homogenous and portable spatial practices. Secondly the ‘exterior’ of the building – the architectural form – that embodies, to a greater or lesser extent, the ideological presumptions of international criminal law, and thirdly, the nomospheric ‘context’ of the building; the agreements on privileges and immunities - *the nomospheric traces* - that constitute the ‘guarded precincts’ as *international* space.

7.3.1: The ‘Courtroom’ of International Criminal Law

The ‘homogeneity and portability’ of the assemblage of spatial practices that constitute the ‘courtroom’ of international criminal law are the defining aspects of the archetypal adjudicative space. The ability to completely control the design - the quality and form - of interior space has led to the emergence and reproduction of a conspicuously uniform ‘courtroom’ space. Some of the elements may be mundane, while others are highly symbolic. Many may be indistinguishable from those deployed in other non-international nomospheric settings, while others will be uniquely ‘international.’ Yet, as the description at the start of chapter six suggests, it is a carefully compiled assemblage of spatial practices – of people, places and things - that is calibrated to reify international criminal law.

Gerhard Anders has worked extensively on the ‘anthropology of international criminal law.’ His research has involved a detailed ‘ethnographic’ examination of the practices of international criminal law, primarily associated with the Special Court for Sierra Leone. Although only obliquely concerned with a spatial perspective, Anders has never the less suggested a number of productive ways of ‘seeing’ the space of the international criminal law ‘courtroom’. Most significantly Anders draws our attention to the overall *quality* of the space of adjudication – to the way in which the courtrooms of international criminal law resemble the sanitised, sterile, de-contextualised, *non-spaces* of ‘super-modernity’. Moreover, this resemblance is not without ideological content. Anders reminds us that the disorienting excess and

bewildering anonymity of ‘non-space’, the sense of dislocation from a familiar sense of space and place, has profound implications for the purported universality of international criminal law.

The image of international criminal law as universal and far removed from the entanglements of national politics is reinforced by television broadcasts of trials...[that] customarily take place in sterile high-tech courtrooms that remind one of the non-descript conference rooms to be found in multifunctional office buildings around the world. Because of their anonymity these courtrooms evoke associations with Augé’s ‘non-places’, airport lounges and shopping malls. Such a representation of international criminal justice, however, would be oblivious to the fact that the international criminal tribunals constitute places with their own myths of origin, internal order and social relationships. The nondescript courtrooms in The Hague and elsewhere are merely a façade designed to project an image of international criminal justice as being aloof and universal, without being rooted in particular places and environments.²⁰⁵

7.3.2: The ‘Courthouse’ of International Criminal Law

The uniform *non-space* that constitutes the generic ‘courtroom’ of the space of adjudication is obviously much harder to reproduce in the spatially contingent, ‘exterior.’ Every ‘courtroom’ must be housed in a particular building or ‘courthouse,’ sited in a particular location. The space produced will thus be the inevitable result of the relationship between the ‘courthouse’ and its specific location. Yet the architectural form that such ‘courthouses’ take is a spatial assemblage redolent with ideological connotation.

Currently, all but one of the buildings that house international criminal tribunals are, to some extent, temporary and ad-hoc, which is hardly surprising given the ad-hoc and temporary status of the majority of those tribunals. The ICTY is sited in a converted insurance building in The Hague, while the ICTR occupies space in the Arusha International Conference Center. The Extraordinary Chambers in the Courts of Cambodia has taken over two converted buildings at the Royal Cambodian Armed Forces High Command headquarters in Kandal province, on the outskirts of Phnom

²⁰⁵ Anders, *supra* note 204, 137

Penh. The Special Tribunal for the Lebanon is located in an anonymous office building in Leidschendam, a suburb of The Hague, while even the ICC occupies a temporary site in expectation that it will move into specially designed premises in the near future. The purpose built ‘courthouse’ that hosts the Special Court for Sierra Leone was speedily constructed on a prominent site overlooking Freetown that had been previously occupied by government buildings, and had been destroyed during the conflict.

The extent to which the ‘courthouses’ of international criminal law currently embody the ideological representation of what international legal space is *for* is minimized by the ad-hoc nature of the buildings that currently house international criminal tribunals. However, a fascinating insight into the ideal spatial form of the ‘courthouse’ of international criminal law is revealed by the plans for the new permanent site of the ICC. The new headquarters of the ICC is to be located in the ‘international zone’ in The Hague, an area of the city that hosts a large number of international legal institutions, and is centred around the Peace Palace; the imposingly grand building that was purpose-built to house the International Court of Justice. In a telling echo of the significance of architectural form for the conveying of ideological presumptions, the Peace Palace, somewhat ironically completed in 1913, was constructed to ‘embody an idea.’

Due to its location, size and architectural quality, the Peace Palace is by Dutch standards a building of uncommon grandeur and that was precisely the intention. This project was not just about housing a judicial organisation; it was about the embodiment of an idea. What the Court lacked in authority as an international judicial institution in the early years, was more than compensated for by the formidable character, the artistic furnishings and exuberant symbolism of its housing. The Peace Palace fitted perfectly with the dream of world peace as cherished by the First Hague Peace Conference. After its completion, it was hailed as a true dream palace for world peace, "just as powerful and grand as the idea of world peace itself", to quote a Dutch writer of the time.²⁰⁶

²⁰⁶ Description of the Peace Palace from the website ‘Peace Palace: The Heart of International Law’. Available at http://www.vredespaleis.nl/default.asp?pid=57&page=The_building. Accessed on 01/05/2012.

Doreen Buss has suggested how the spatial form that buildings take, particularly buildings designed to radiate the authority of the law, come to materially reflect the ideology of the particular legal order, and thus how we must pay attention to "...the form of space; the shape of buildings not as determinant of usage, but as reflecting the pre-occupations and obsessions of a particular world view."²⁰⁷ If the 'world view' embodied by the 'uncommon grandeur,' 'artistic furnishings,' and 'exuberant symbolism' of the Peace Palace was reflective of an emergent, utopian, internationalism, then the 'world view' of the regime of international criminal law may also be discerned in the spatial form of the new ICC headquarters.

When designing the new permanent premises of the International Criminal Court, the point of departure was to communicate trust, hope and – most importantly – faith in justice and fairness. The building should have the courage to be an ambassador for the credibility of the ICC. The project and its architecture should be impressive and grandiose but should always relate to humans and the human scale. It is important that a formal institution like the ICC does not constitute barriers for people. On the contrary, it must express the very essence of democratic architecture.²⁰⁸

While the grandeur of the Peace Palace was intended to symbolize that the new international order was regal enough to encompass the sovereignty of nation states, the 'democratic architecture' of the new ICC headquarters is intended to embody the operative notion of the universality and neutrality of international criminal law. Indeed the central motif of the design is explicit in its ideological intent: "Through the lightness and simplicity in the architectural design, the values of openness and transparency are communicated."²⁰⁹

Yet, even here, in the confident pronouncements of international architects, there is a nagging nomospheric ambiguity. The designers are keen to highlight the spatial 'meaning' of the new ICC headquarters, and even go as far as to say that: "This building *cannot be anonymous*; it must have the courage to express the values and the

²⁰⁷ Buss, *supra* note 83, 90

²⁰⁸ Description of the project to design the new ICC headquarters from the website of schmidt hammer lassen. Available at <http://shl.dk/eng/#/home/about-architecture/library-culture/den-internationale-krigsforbryderdomstol/description>. Accessed on 01/05/2012

²⁰⁹ *Ibid*

credibility of the ICC.”²¹⁰ In other words the designers assert that the nomospheric visibility of the ICC will be enhanced by the values of openness and transparency expressed by the spatial form of the new building. However, the designers also assert that the building itself serves no ideological function – has no nomospheric meaning: “The building is designed as an abstract and informal sculpture *in the landscape*. This way, it becomes *a backdrop* for the ICC to communicate trust, hope, and most importantly, faith in justice and fairness.”²¹¹

The contours of the ‘project of seeing and concealing’ at work in the space of adjudication are thus partly revealed. On the one hand, the ‘democratic architecture’ of the new ICC headquarters will ‘courageously’ ensure the hyper-visibility of the ICC as the preeminent instantiation of the space of adjudication. On the other hand, by designing a building that embodies the ideological representation of international legal space, that ‘abstractly’, and ‘transparently’ merges with the landscape, and meshes with the dunes and gardens that surround and envelope it, the new ‘courthouse’ of the ICC will serve as a neutral ‘backdrop’ for international legal space. International criminal law, reified in its new archetypal headquarters, will thereby appear “...neutral, fixed, and external,”²¹² while at the same time contributing to the concealment of the actual existing power relations of international legal space that maintain impunity for the powerful; by rendering them “...inevitable and immutable.”²¹³

7.3.3: The ‘Guarded Precincts’ as International Space.

Not only do the uniform ‘courtrooms’ and ideologically redolent ‘courthouses’ of international criminal law lend the space of adjudication nomospheric visibility, but so too does the materialisation of the wider ‘guarded precincts’ as *international space*. The location of the new ICC headquarters in the ‘international zone’ of The Hague implies an *international* space set aside from the *domestic* legal space of the Netherlands. That implication is given actual material form through the collection of

²¹⁰ *Ibid* (emphasis added)

²¹¹ Schmidt Hammer Lassen Newsletter announcing their success in the competition to design the new ICC Headquarters. Available at <http://shl.dk/newsletter/public/archive.php?id=13&view=html>. Accessed on 01/05/2012, (emphasis added)

²¹² Braverman, *supra* note 175, 178

²¹³ *Ibid*, 178

nomospheric traces that establish the privileges and immunities of both the space itself and the people who operate within it.

Each of the ‘guarded precincts’ of the international criminal tribunals occupies *international space* to a greater or lesser degree. All of the state’s hosting the tribunals have entered into legally binding bilateral agreements with the United Nations that confirm the ‘international status’ of the tribunals. These agreements are modelled on those used to establish international legal personality for a wide range of international organisations. Apart from the range of privileges and immunities that these agreements establish for the legal professionals, administrative staff, witnesses, and others who contribute to the work of the tribunals, the premises of the tribunals – the very space they occupy – *is produced as international space through the granting of legal inviolability*. Although the writ of domestic law still runs in the ‘guarded precincts’ of the space of adjudication, the exercise and enforcement of that law is significantly curtailed. The domestic authorities “...shall not enter the premises to perform any official duty, except with the express consent, or at the request of the Registrar.”²¹⁴

7.4: The Exclusive Application of International Criminal Law

The third factor of nomospheric visibility is the extent to which each adjudicative space of international criminal law is produced as international nomic space *by virtue* of the inscription of *international* nomic traces. In other words, nomospheric visibility is determined by the extent to which international law is exclusively applied, both in the initial constitution of the adjudicative space – the Statute or Regulations establishing the tribunal – but also, crucially, in the daily judicial practice of the adjudicative space. As a consequence of the open-ended, unfixed nature of spatiality, this process of inscription is never closed. The nomospheric visibility of a specific adjudicative space may shift if the balance between domestic and international nomic traces alters, or if predominantly domestic rather than international traces are ‘taken up’. If the adjudicative space is produced by virtue of the inscription of a mix of

²¹⁴ Article 6(2) of the Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon. Available at <http://www.stl-tsl.org/en/documents/cooperation/stl-headquarters-agreement>. Accessed on 1/05/2012

international and domestic traces then it will be less nomosphericly visible. If the traces inscribed are predominantly or exclusively domestic then the adjudicative space is likely to be rendered invisible, and thus excluded from international legal space.

Each of the international criminal tribunals has its own Statute, setting out, *inter alia*, the legal basis for the tribunal, the rules that govern the operation of the tribunal, the procedural law that will be applied and the subject-matter jurisdiction of the tribunal. The ICC, ICTY, and ICTR are all ‘fully international tribunals’ in this respect. The nomospheric traces that were inscribed in the initial production of these adjudicative spaces, and the bundle of traces that are ‘taken up’ in the daily judicial practice of these tribunals are exclusively international. They apply international procedural law derived from the ICCPR, and their subject-matter jurisdiction is exclusively over ‘international crimes.’ In contrast the Statutes of the ‘hybrid tribunals’ – the SCSL, ECCC, STL, and the SPSC – all provide for a unique subject-matter jurisdiction. Their bundles of nomic traces are a mixture of international and domestic. All but one of the tribunals has jurisdiction over a combination of international crimes and domestic crimes. In the case of the STL the available nomic traces are exclusively domestic – the subject-matter jurisdiction is exclusively over domestic crimes, most controversially, the crime of terrorism.

What is of most significance from a nomospheric perspective is that, along with the ICC, ICTY, and ICTR, the Statutes of *all* of the hybrid tribunals provide for the application of *international* procedural law, derived from the ICCPR. Thus, without exception, the bundle of nomic traces available to be taken up for procedural matters is international. The spatially revealing shorthand for this set of procedural rules is *international standards of due process*. Implicit in the use of the term ‘standards’ is a conception of hierarchy, or scale – some legal procedures are deemed to reach the required standard while others fall short. Some legal procedures are deemed to be compliant with the higher *international* standards that reflect best practice while others fail to meet that exacting standard, and are deemed to be reflective of some lesser *national* standard.

The spatial importance of this hierarchy cannot be overstated. It is one of the building blocks of the ideological representation of international criminal law, and is grounded in the “...*soi-distant* objectivity”²¹⁵ of international justice. What underpins the normative presumption – the universality and neutrality - of international criminal law, is the idea that ‘international’ justice is somehow superior. That the amalgamation of accumulated *Western* ideas about what amounts to a fair judicial process are the best way – the only way – to ensure that justice is done. This privileging of procedure as the marker of fairness and justice is rooted in the civilizing mission of the colonial encounter, which Anthony Anghie argues, “...shaped the very foundations of international law.”²¹⁶ In a sense then, what matters about *international* legal space is not whether the crimes being prosecuted are so heinous that they ‘engage the conscience’ of the whole international community, or whether what is being tried is a mere domestic allegation of murder. What matters is whether the procedure followed meets international, meaning Western, standards of due process. That is what really distinguishes an *international* tribunal from a merely *national* court. Therefore in order for international justice to be *seen* to be done, in order for a nomospheric setting to attain the visibility to be recognised as constituting international legal space, it must be *seen* to apply ‘international standards of due process’.

7.5: The Participation of the Class of International Criminal Law Experts

The business of international criminal law is an exclusive vocation; there are only a relatively small number of courts and tribunals that adjudicate on international criminal law, and a correspondingly limited range of opportunities for judges and lawyers to work in these tribunals. International criminal law is a complex and highly specialised field. Its jurisprudence appropriately reflects its internationalism, by blending elements of the common law adversarial model with elements of the civil law inquisitorial model. The standard of qualifications and expertise required of international criminal law jurists is thus, in principle, very high.

²¹⁵ Nicholas Blomley, ‘*Law, Space and the Geographies of Power*’. (1994 Guilford Press), cited in Buss, *supra* note 83, 88

²¹⁶ Anghie, *supra* note 131, 8

Membership of the *class of international criminal law experts* is defined, firstly, by the requisite level of expertise – the capacity to *perform* international criminal law - and secondly by *mobility*. What really sets this class of jurists apart is the roaming, footloose nature of their work, the way in which they personify the ‘moveable feast’ that is the space of adjudication, by being able to travel ceaselessly to wherever the space of adjudication materialises next. Yet, as Gerhard Anders suggests, the very internationalism of the work, the inherent portability of the adjudicative spaces of international criminal law, lends this professional mobility a certain itinerant, nomadic, quality - a *part-timeness* - that has significant consequences for the *nomospheric figuration* of these international jurists.

Jurists and other experts working in this fast-growing field are highly mobile, typically working for one or two years for one tribunal before they move on to work for another, or for some international organization. They are busy and hard to pin down for interviews. For example, most defence lawyers in trials heard by international tribunals often prefer to meet at their professional practice in Europe or the US rather than in Freetown, where they only spend a few weeks or even days at a time. It is not only individuals who are highly mobile: the trials also take place simultaneously at different locations.²¹⁷

The nomospheric visibility that members of this class of international criminal law experts lend to a specific adjudicative space does not arise from their mere presence. The parachuting in of high flying international jurists, while it may be reflective of the legitimating support of the international community, does not automatically ensure that a particular tribunal will be recognised as constituting international legal space. Rather, the nomospheric visibility of a specific adjudicative space will depend on how the jurists who participate are *nomosphericly figured*, and crucially the extent of *nomospheric ambiguity* involved in that figuration. If the jurists are capable of, and are provided with the means to perform international legal space, they will be nomicly figured as members of the class of international criminal law experts; and the nomospheric visibility of the adjudicative space will be enhanced. If, on the other hand, the jurists fail, for whatever reason, to perform international legal space, then they will be nomicly figured as other than members of the mobile class of

²¹⁷ Anders, *supra* note 200, 24

international criminal law experts, and the nomospheric visibility of the adjudicative space will be reduced.

This process of nomospheric figuration will depend on a combination of three interrelated factors. Firstly, the extent to which the adjudicative space is already constituted as international legal space. Secondly, the bundle of nomic traces available to be taken up by the jurists – the availability of a nomic trace is determined by both its inscription in an adjudicative space *and* the capacity of the nomic figure to take it up. Thirdly, how those jurists *perform* the legality of the adjudicative space. The performance of legality involves the “...fusion of discursivity and materiality,”²¹⁸ the improvisational melding of what law is available and what the space allows. Legality is “...continuously and creatively done and redone,”²¹⁹ and its inherent performativity requires a jurist to enact the *representational space* of international criminal law. The *lived* space of each specific tribunal is thus reiterated over time through an ongoing interaction between the available *spatial practices* of the adjudicative space, the *perceived*, material space of the specific tribunal; and the *representations of space*, the available nomic traces, be they international or domestic, that betray how the specific tribunal is *conceived* as an instrumental space of the law.

In addition, the process of nomic figuration indicates the extent to which international jurists act as standard bearers for the ‘ideological representations’ of international criminal law. Gerhard Anders suggests that “...abstract ideas about international justice are closely tied to the activities of individuals and groups, who thereby give concrete meaning to the abstraction.”²²⁰ ‘Abstract ideas about international justice’ most obviously refers to the normative presumption of universality and neutrality, and members of the class of mobile international criminal law experts will have thoroughly internalised those presumptions. In contrast, any failure to embody the operative notion of universality and neutrality will constitute nomospheric ambiguity and potentially lead to the jurists nomic figuration as other than members of the class of international criminal law experts.

²¹⁸ Delaney, *supra* note 7, 15

²¹⁹ *Ibid*, 19

²²⁰ Anders, *supra* note 200, 24

Some hypothetical examples will illustrate this open-ended process of nomic figuration. An archetypal adjudicative space of international criminal law will already be hyper-visible as a consequence of the other nomospheric factors of visibility. All of the jurists working in the adjudicative space will have the capacity – the expertise – to take up the available nomic traces, which, in an archetypal example, will be exclusively international. Moreover all the jurists will perform the legality of the adjudicative space in such a way as to ensure that both international standards of due process are met, and the ideological representation of the space of adjudication is adhered to. As a result the nomospheric figuration of the jurists will be unambiguous, and they will be nomicly figured as members of the class of international criminal law experts. In other words all the jurists selected to work in an established international criminal tribunal like the ICC should be competent to apply the complex international law to the exclusively international crimes; they will be provided with adequate material, technical, and infrastructural support to be able to conduct proceedings in accordance with international standards of due process; and their professionalism will ensure they adhere to the ideological representation of the space of adjudication.

Many adjudicative spaces, however, are not archetypal. A jurist may often find him or herself working in a hybrid tribunal, an ‘internationalised’ domestic tribunal, a national court presiding over a universal jurisdiction case, or even an autonomous tribunal. They, or the other jurists working in the tribunal, may have limited expertise of international criminal law, or their legal expertise may be exclusively in other fields. They may have limited legal experience, and perhaps no trial experience at all. They may find themselves working in insufficiently resourced adjudicative spaces, or spaces that are not provided with the assemblage of spatial practices that constitute international legal space. Any lack of professionalism, expertise and experience will further hinder their ability to perform international legal space.

These ambiguities are heightened by the itinerant, part-time nature of the job. The majority of international jurists only moonlight as members of the class of international criminal law experts. All will have other legal practices, which may not be in the international or even criminal field. Some will be largely full time international jurists but many will not be. Some will work exclusively in a particular

tribunal, or even on a particular case for years at a time, while others will move rapidly from one tribunal to the next. Crucially the process of selection of international jurists is far more politicised than in domestic legal space. The political necessity to have an appropriate mix of nationalities, particularly amongst the judges, either from the host state or to ensure an appropriately ‘international’ bench, increases the likelihood that unqualified or inexperienced jurists will be selected. As a result the nomic figuration of international jurists is particularly fluid, there is a significant possibility that conflicting or contradictory figurations will be simultaneously available, and the potential for *nomospheric ambiguity* is consequently high.

7.6: Media Coverage as a Barometer of Nomospheric Visibility

It is appropriate to end this chapter on nomospheric visibility with a brief word about the role of media coverage and other forms of cultural dissemination. In the contemporary social world, with its mass global media, the deployment of the trope of visibility is thoroughly entangled with media in the broadest sense. Although this thesis is not concerned with an analysis of the complex relationship between the media and international criminal law, what is of critical interest is the nature of the relationship between nomospheric visibility and media coverage.

Media coverage in this context refers to the cultural dissemination of information about the space of adjudication in the broadest sense, and includes everything from traditional news, including television, print and internet, through to broader cultural dissemination, including documentary, literature, and artistic media, and finally academic commentary and analysis. It is not suggested that media coverage is a nomospheric factor of visibility in and of itself. Rather media coverage, in its broadest sense, is an accurate *barometer* of the nomospheric visibility of the space of adjudication. In short the more nomosphericly visible a specific instantiation of the space of adjudication, the more media coverage it will receive.

PART IV: THE NOMOSCAPE OF INTERNATIONAL CRIMINAL LAW

A whole history remains to be written of spaces – which would at the same time be the history of powers – from the great strategies of geopolitics to the little tactics of the habitat.

Michel Foucault, 'Of Other Spaces'

Chapter 8: The Exemplary Nomospheric Setting of the Space of Adjudication

How then shall we begin to map the various instantiations of the space of adjudication on the nomospheric spectrum of visibility? Which adjudicative spaces are visible enough to be recognised as exemplary nomospheric settings, which are exceptional and which anomalous? Which nomospheric settings will be deemed to embody the authority of international criminal law, and which are deemed to materialise either outside the international or even outside the law? How shall we begin to map the spatial distribution of legitimacy and power - the visibility – of the space of adjudication? What constitutes the nomoscape of international criminal law?

8.1: The Inaugural Nomospheric Setting of the Space of Adjudication

If the story of international criminal law is the story of its adjudicative spaces then that story must start with Court Room 600 of the Regional Court of Nürnberg Fürth. The origins of both international criminal law, and its materialisation as a nomoscape lie in the adjudicative space of the Nürnberg International Military Tribunal. Between 1945 and 1949 Court Room 600 was the location for both the trials of the Main War Criminals before the IMT, and the 'follow up trials' before US Military Tribunals.

Although there are earlier precedents for the establishment of international criminal law, most significantly the unsuccessful initiative by the allied powers at Versailles to try Kaiser Wilhelm II, the genesis of international criminal law is the London Charter of the 8th August 1945. What is striking from a spatial perspective is that the founding document of international criminal law not only codified the core international crimes for the first time, it simultaneously established an adjudicative space – the only

possible adjudicative space - in which those crimes could be tried. When the IMT began proceedings in 1945 it was the first time that international criminal law had been applied. In a very tangible way then, the establishment of the IMT allowed the bundle of nomospheric traces that comprise international criminal law to be given worldly expression – *to be spaced*. And concurrently, it was by virtue of the bundle of nomic traces set out in the London Charter being inscribed onto the nomic setting of the Nürenberg Tribunal, that Court Room 600 was produced as the first ever adjudicative space of international criminal law.

To a large extent the adjudicative space of the IMT established the template for all subsequent nomospheric settings of international criminal law. Although not situated in a ‘global city,’ there were nevertheless a number of reasons why the choice of Nürenberg was spatially symbolic. Most importantly, as the city that had hosted the Nazi Party Rallies, Nürenberg was at the very centre of the symbolic space of the Third Reich, and the insertion of the IMT into that space was a particularly powerful symbol of the transference of sovereignty. Moreover the Regional Court of Nürenberg Fürth was the closest approximation to a ‘guarded precinct’ of international law that was available in war-torn 1945 Germany. It was largely undamaged from the bombing, it was adjacent to a prison that would house the detainees, it was sufficiently grand and adequately spacious, and most importantly it was in the US zone of control. Although all the Allied powers were involved in the IMT, it was very much a US-led project. The US was keen to establish a new international legal order and no expense was spared in ensuring the success of the IMT as a crucial aspect of that project of world making. Locating the IMT in Nürenberg ensured the nascent regime of international criminal law was safely in ‘US space.’

Prior to the IMT starting proceedings, Court Room 600 had been significantly renovated to accommodate the new international tribunal. The ‘courtroom’ was expanded and fully refurbished, the absence of a jury in the new legal dispensation, allowed the judges take centre stage, and the judicial bench was shifted through ninety degrees and elevated to take up the symbolically imposing position under the windows along the outside wall. In a clear foreshadowing of the assemblage of spatial practices that would come to constitute the generic nomospheric setting of international criminal law, Court Room 600 was equipped with the latest new

technology, including a ground-breaking interpreting system designed by IBM to simultaneously translate the four official languages of the IMT. Finally, in line with the need to ensure the visibility of the IMT as the embodiment of a new international legal order, the public and press galleries were significantly expanded.

The nomospheric figures that worked in the new adjudicative space of international criminal law were all, obviously, novices when it came to legal practice in the field. However their nomic figuration as international legal jurists was ensured through the selection of some of the finest legal talent available, many of whom had, crucially, been closely involved in the design and drafting of the London Charter. Sir Geoffrey Lawrence, the UK judge and President of the IMT, had been a Lord Justice of Appeal and went on to become a Law Lord after Nürenberg, while the US judge Francis Biddle had been US Attorney General during the war. The French judge, Henri Donnedieu de Vabres, was a leading proponent for the new regime of international criminal law, and an early advocate for an international criminal court. Although the Russian judge, Iona Nikitchenko, had presided over some of the most infamous of Stalin's show trials he was nevertheless one of the main drafters of the London Charter. Those jurists selected as prosecutors were arguably even more qualified than the judges. In particular, Robert Jackson, the US prosecutor, took a leave of absence from his position as Supreme Court Justice in order to be a lead architect of the IMT, and David Maxwell Fyfe, the UK deputy prosecutor, was a prodigious talent who went onto become Solicitor General, Attorney General, Home Secretary and Lord High Chancellor of Great Britain.

Intriguingly, Court Room 600 remained a part of 'US legal space' long after sovereignty over the Regional Court of Nürenberg Fürth had been returned to the Federal Republic of German. In fact it was not until 1961 that the US finally relinquished its hold over the international legal space of Court Room 600, when it returned to hosting domestic proceedings and shifted back to national legal space. The symbolic importance of Court Room 600 as the inaugural adjudicative space of international criminal law has arguably only increased as other nomospheric settings of the space of adjudication have proliferated. This is reflected in the fact that the space itself has now been memorialised, with a permanent exhibition documenting the work of the IMT having opened in November 2010. Court Room 600 has now been

rendered permanently hyper-visible as the sanctified genesis of the space of adjudication.

8.2: The Exemplary Nomospheric Setting of the Space of Adjudication

If Court Room 600 is the inaugural adjudicative space of international criminal law, then the ICC is its exemplary successor. The extent to which the ICC adheres to the generic nomic setting of ‘The Hague’ is clear from a consideration of the four factors of nomospheric visibility. The ICC satisfies the first factor of visibility, by not only being located in the global city of international criminal law, but by being as proximate as possible to ‘The Hague’ – the space of adjudication’s generic nomospheric setting. In particular, the work of the ICC matches very closely with the ‘ideological representation’ of ‘The Hague’. The close political control and supervision of the work of the ICC, in particular its prosecutorial decisions, exercised by the UN Security Council ensures that the ICC adheres to the ideological representation of what the space of adjudication is *for*. Secondly the ICC occupies an archetypal ‘guarded precinct’ of international criminal law. The assemblage of spatial practices that constitute the many ‘courtrooms’ of the ICC arguably provide the template for the uniform non-spaces of the space of adjudication – there is no doubt that you are in a truly ‘international’ legal space. Although still awaiting the completion of its new premises, the ICC will soon occupy the only truly purpose built ‘courthouse’ of the space of adjudication. It is a building, which arguably embodies ‘the idea’ of international criminal law. Needless to say the ICC occupies the ‘international space’ of the ‘guarded precinct,’ constituted by the nomospheric traces of the Headquarters Agreement. The ICC is also the archetypal instance of the third nomospheric factor of visibility. It is not only constituted by a bundle of nomic traces that are exclusively international, but it applies international criminal law at all times. Finally the jurists who work at the ICC are drawn exclusively from the class of highly mobile international criminal law experts, ensuring that the ICC attains maximum recognition from the fourth nomospheric factor of visibility. The media coverage of the work of the ICC is a measure of its hyper-visibility. Not only is that coverage extensive, it is also comprehensive, with trials receiving full coverage and also prosecutorial decisions and other non-judicial work being reported.

The other ‘fully international’ international criminal tribunals – the ICTY and the ICTR - are also both hyper-visible specific instantiations of the space of adjudication. The ICTY largely matches the ICC in all significant respects, the only difference being that its ad-hoc status is reflected in the occupancy of an ad-hoc ‘courthouse’. Although undoubtedly recognised as being within the space of adjudication, the ICTR is noticeably less visible than the ICC or ICTY as it is not located in The Hague.

8.3: The Hybrid Tribunals

The next tier on the spectrum of visibility is occupied by what are commonly referred to as the hybrid tribunals – The Special Court for Sierra Leone, The Extraordinary Chambers in the Courts of Cambodia, and The Special Tribunal for the Lebanon. The nomospheric visibility of all the UN sponsored tribunals, from the ICC to the STL, may be somewhat obvious; they are all exemplary instances of the space of adjudication. There are, however, important differences and idiosyncrasies that draw attention to the differing impact of distinct nomospheric factors of visibility. While the mapping of these exemplary instantiations of the space of adjudication enriches our understanding of the heuristic device of nomospheric visibility, the concept’s critical utility is revealed when examining the adjudicative spaces of international criminal law that are undeniably *nomisic*, but which are commonly dismissed as not being truly ‘international’ or truly ‘legal’ - in other words the instantiations of the space of adjudication that, for one reason or another, are politically and ideologically problematic.

8.3.1: The Special Court for Sierra Leone

The ethnographic work of Anders provides a particularly illuminating empirical example of the nature and function of nomospheric visibility. Without explicitly engaging with the ‘legal space’ of the Special Court for Sierra Leone, Anders has, nevertheless, examined the *visibility* of the tribunal. By tracing out the historical and spatial development of the SCSL, Anders draws our attention to the nomospheric relationship between the “... the physical place, the buildings in Freetown, and the

quality of a ‘functioning judicial institution’.”²²¹ In the following passage Anders usefully illuminates the relationship between the spatial form of the guarded precinct of the SCSL and its nomospheric visibility as an *international* criminal tribunal:

Looking down on the city centre of Freetown from the surrounding hills one cannot fail to notice a collection of blue-roofed buildings on a large area south of the high-rise buildings of the city centre and the national stadium. These buildings are laid out like an army barracks easily identifiable from the air. Seen from above the large compound with its symmetric layout dominates this part of the city bordering a crowded residential area and various government buildings. The complex resembles a fortress, surrounded by a high wall with watchtowers commanding the adjacent neighborhoods and streets. As everybody in Freetown knows, these buildings house the Special Court for Sierra Leone. Alongside the Mammy Yoko Hotel at the tip of the Freetown peninsula, where the headquarters of the UN is located together with the offices of the various international organizations, it is one of the visible signs of the interest the group of mainly Western states usually referred to as the ‘international community’ takes in a country still haunted by the specters of civil war.²²²

Anders goes on to cite the Annual Report of the SCSL to highlight the marked increase in the nomospheric visibility of the SCSL as a *judicial institution* when it moved to its new purpose built site, located in a prominent location in the city:

In January 2003, the New England site near central Freetown was occupied by the Registry. As the Registry became operational in a densely populated, central area of the city, *the reality of the court, both physically and psychologically, became apparent* to the surrounding community.²²³

Importantly, Anders is careful to emphasize the cumulative impact of different spatial practices on the nomospheric visibility of the SCSL. He begins by suggesting that both the construction of the material buildings of the SCSL; “...the completion of the detention facility,”²²⁴ and also the international security arrangements; “...the

²²¹ Anders, *supra* note 204, 141

²²² *Ibid*, 140

²²³ *Ibid*, 141 (emphasis added)

²²⁴ *Ibid*, 141

stationing of UN troops guarding the compound,”²²⁵ contributed to raising “the visibility of the court.”²²⁶ Anders goes on to highlight that the tribunal’s “... *visibility further increased* when the first hearings were conducted at the site in Freetown.”²²⁷ Indeed the Annual Report of the SCSL is explicit in making the link between the commencement of hearings at the new site and the recognition of that specific adjudicative space as an instantiation of the space of adjudication.

Although hearings on motions had been conducted by the Trial Chamber previously, in November 2003 the Appeals Chamber conducted the first hearings in the temporary courthouse within the New England site. *These hearings focused both national and international attention on the Court and marked the Court as a functioning judicial institution.*²²⁸

Finally Anders hints at the importance of the symbolic meaning attached to specific spaces, in particular how the previous spatial composition of the site of the SCSL in Freetown impacts on its current nomospheric visibility. Before the war a prison and other government buildings occupied the site of the SCSL. In their first major attack on Freetown, the compound was deliberately targeted and destroyed by the rebel alliance, “...who saw itself fighting against a corrupt regime, and [sought to] destroy the symbols of state power.”²²⁹ As Anders argues, the choice of this specific site for the SCSL reveals a symbolic aspect to the space of adjudication that enriches the ideological meaning of the ‘guarded precincts’ of international criminal law.

It is significant that the Court occupies a site of government buildings destroyed in the attack on Freetown in January 1999. This attack on the capital finally succeeded in attracting the attention of the international community and the international media, which had ignored the conflict as long as it ‘only’ affected Sierra Leone’s hinterland. The location of the court on a site previously occupied by government buildings symbolizes the transformation of sovereignty in Sierra Leone. The destruction of the government buildings at the hands of the rebels made the international intervention

²²⁵ *Ibid*, 141

²²⁶ *Ibid*, 141

²²⁷ *Ibid*, 141 (emphasis added)

²²⁸ *Ibid*, 141 (emphasis added)

²²⁹ *Ibid*, 142

necessary and created the conditions for the insertion of international agencies in Sierra Leone's national space.²³⁰

It is possible to interpolate the four nomospheric factors of visibility into Anders' ethnographic description of the visibility of the SCSL. Although not based primarily in The Hague, the status of the Special Court for Sierra Leone, as a UN sponsored tribunal, assures it adheres to the ideological representations of the generic nomospheric setting of international criminal law. In particular the transfer of the Charles Taylor trial to The Hague, has insured that the SCSL has maintained a proximate relationship with the global city of international criminal law. The SCSL occupies the only completed, purpose built, 'courthouse' of international criminal law, containing the requisite uniform 'courtrooms' and situated in 'international space' through the nomospheric trace of the bilateral agreement between the UN and the government of Sierra Leone. Although the SCSL is a hybrid tribunal, in that there is a requirement for a minority of domestic judges and the application of some domestic law, the balance is very much in favour of the international element. The majority of jurists working at the SCSL are drawn from the mobile class of international law experts, and the 'domestic crimes' being adjudicated on were drafted specifically for the SCSL and are delinked from the domestic legal system proper.

8.3.2: The Special Tribunal for the Lebanon

The Special Tribunal for the Lebanon is located in The Hague, although it maintains an office in Beirut. Its recently converted 'courtroom' is arguably the preeminent example of the uniform non-space of international criminal law,²³¹ so much so that it was selected to host the recent Charles Taylor trial. Moreover, the 'headquarters agreement' between the Netherlands and the STL insures that the tribunal occupies the 'guarded precincts' of 'international space'. What distinguishes the STL from the archetypal instantiation of the space of adjudication is that it does not exclusively apply international law, and the class of international criminal law experts does not

²³⁰ *Ibid*, 142

²³¹ See the video describing the recent renovation of the 'courtroom'. Complete with a useful summary of how to go about constructing the elements of non-space. Available at <http://www.stl-tsl.org/en/about-the-stl/visiting-the-stl/transforming-the-stl-building>. Accessed on 01/05/2012

exclusively staff it. It is yet to be seen to what extent the latter point will affect the visibility of the STL. The question of judicial composition is settled - the statute of the STL mandates that a majority of international judges sit with a minority of national, Lebanese judges – but whether all the lawyers who appear before the court will be members of the recognized class of international criminal law experts is uncertain. Due to the unparalleled politicization of the Hariri trial, and its novel incorporation of trials in absentia, the recently indicted defendants are unlikely to attend and may not even be represented.

However the impact of not exclusively applying international criminal law is widely suggested to be much more significant. As Heather Noel Doherty and others have argued, the novel statute of the STL calls into question “the validity of this judicial body as an “international” tribunal... specifically because in contrast to other international U.N. created tribunals before it, the Special Tribunal for Lebanon (STL) (1) will only try cases of terrorism and terrorism-related offenses; (2) has a subject matter jurisdiction framed only with reference to domestic law; and (3) has a statute that does not explicitly eliminate state official immunity.”²³² However, by relying on an *aspatial* conception of the ‘international,’ this argument fails to recognize not only the relevance of the other nomospheric factors of visibility, but crucially the centrality of international standards of due process in rendering adjudicative space as internationally visible. Moreover Doherty’s questioning of the ‘international’ status of the STL entirely fails to recognize the constitutive role played by the STL in establishing – in giving worldly presence - to terrorism as an *international* crime. The deployment of the ‘domestic’ nomospheric trace of the crime of terrorism, within an adjudicative space that is already rendered highly visible as an exemplary instantiation of the space of adjudication by the other nomospheric factors of visibility, allows that nomic trace – the crime of terrorism – to be *spaced* as an international crime. In a replaying of the inaugural spacing of international criminal law in the IMT at Nürenberg, the inscription of the nominally domestic trace of terrorism onto the international adjudicative space of the STL results in terrorism having a worldly presence as an *international* crime. Indeed, some might argue that

²³² Heather Noel Doherty, ‘Tipping The Scale: Is The Special Tribunal For Lebanon International Enough To Override State Official Immunity’ [2010] 43 *Case Western Reserve Journal of International Law* 831, 832

the recognition of terrorism as a matter of concern for the international community, and as a crime serious enough to be elevated for adjudication in international legal space, was the primary political and ideological motivation behind the establishment of the STL.

8.3.3: The Extraordinary Chambers in the Courts of Cambodia

As the hybrid tribunal with the most domestic elements The Extraordinary Chambers in the Courts of Cambodia, might at first glance appear to be less nomospherically visible. The factors that render the ECCC less visible are, firstly that it is located far from the global city of international criminal law, in Phnom Penh. Secondly, it occupies a building that draws on domestic architectural motifs and symbolic meanings rather than the architectural ‘super-modernity’ of the ICC. Finally, predominantly Cambodian jurists work at the ECCC, with a majority of domestic judges and lawyers drawn from the local bar rather than the globe trotting elite of international criminal law.

The factors that render the ECCC nomospherically visible are, firstly, that its ‘courtrooms’ are modelled on the archetypal non-spaces of ‘The Hague’, secondly, it has a sufficient minority of international jurists, and thirdly, although it applies a mix of international and domestic law, its focus is predominantly on the international core crimes. Crucially, however, the hyper-visibility and exemplary status of the ECCC is assured through its proximity to the generic nomospheric setting of ‘The Hague.’ Like all of the UN sanctioned international criminal tribunals, the ECCC adheres to the ideological representation of what the space of adjudication is *for*. Indeed the subject matter of the ECCC - the acts of genocide and other crimes against humanity committed by the Khmer Rouge regime – stand as one of the archetypal instances of mass atrocity that international criminal law is intended to punish.

Chapter 9: The Anomalous Nomospheric Setting of the Space of Adjudication

At first glance the Special Panel for Serious Crimes of the District Court of Dili would appear to be an archetypal example of a ‘hybrid’ international criminal tribunal - another exemplary instantiation of the space of adjudication, like the SCSL or the ECCC. However, despite being created by the UN and applying international criminal law, the SPSC is regularly omitted from the lists of *international* criminal tribunals. The widely held view that the SPSC failed to deliver on its mandate and fell short of the high standards to be expected of an international criminal tribunal evidences the *anomalous* status of the SPSC as a nomospheric setting of the space of adjudication. The explanation for this exclusion from international legal space is, it is argued, rooted in the political decision to systematically starve the SPSC of any and all of the human and material resources required to function as an international judicial institution. Or to put it in spatial terms – to establish the nomospheric setting of the SPSC without providing the spatio-legal assemblage that constitute the space of adjudication. An analysis of the anomalous nomospheric setting of the SPSC thus serves as a uniquely revealing case study of *the production of legal space*.

9.1: The Establishment of The SPSC

The humanitarian crisis that engulfed East Timor in 1999 was certainly deserving of an international response. Indeed it marked the culmination of one of the most brutal military occupations of modern times.²³³ The fall of the Suharto regime in Indonesia had led to a window of opportunity for East Timor and a UN sponsored referendum on independence. However, “...the announcement of the pro-independence results less than a week later incited immediate and widespread violence. As the Indonesian

²³³ “Indonesian occupation of East Timor lasted until August 1999, and is characterized by three periods. During the first period, 1975 to 1979, an estimated 200,000 East Timorese, approximately one-third of the population, were killed either directly or indirectly by the Indonesian invasion. The second period, 1980 to 1989, was marked by continued large-scale military operations and a strengthening of East Timorese resistance to Indonesian rule. The government resettled close to eighty percent of the population during these first two periods and prohibited media and other outsiders from entering the region. The final period, 1989 to 1999, saw a relaxation of certain restrictions. Outsiders, including the media, were allowed into the region. However, government intimidation and repression of East Timorese persisted even in the 1990s. For example, nearly 200 peaceful demonstrators were killed in the 1991 Santa Cruz massacre, an event widely reported in the international media” Suzanne Katzenstein, ‘Hybrid Tribunals: Searching for Justice in East Timor’ [2003] 16 *Harvard Human Rights Journal* 245, 248

military and its East Timorese militias withdrew, they conducted a scorched-earth campaign in which an estimated seventy percent of all East Timorese infrastructure was destroyed. Around 600,000 East Timorese, at least three-fourths of the population, were uprooted from their homes. They fled to the hills or were forced across the Indonesian border. Over 1,000 civilians were killed.”²³⁴

The initial response of the international community was appropriately robust. The UN dispatched a War Crimes Commission of Investigation, amid widespread calls to establish an international criminal tribunal to prosecute not only the atrocities committed following the 1999 referendum, but also those perpetrated since the Indonesian invasion in December 1975. Yet despite many detailed reports of massive violations of human rights by the UN Special Rapporteur and others, the UN Security Council decided to ignore the recommendation of its own Commission and refused to establish an international criminal tribunal. This crucial action of the Security Council, not to fully internationalize the legal response to the crisis, was widely attributed “...to the UN's decision to defer to promises by the government of Indonesia to prosecute its own military officials.”²³⁵

It is impossible to fully grasp the spatial dimension of the task faced by The United Nations Transitional Administration in East Timor, without an understanding of the extent to which ‘the state space’ of East Timor had been reduced to a vacuum. The destruction wrought by the withdrawing Indonesian military had left the vast majority of material infrastructure in ruins, reducing East Timor to what has been described as ‘ground zero.’²³⁶ The destruction had not spared the legal space of East Timor, and as the following passage illustrates, the resulting absence of ‘the rule of law’, was immanently connected to the destruction of the assemblage of spatial practices – the people, places, and things – that had previously constituted the legal space of East Timor.

In addition to the striking absence of any rule of law, the UN staff arrived in East Timor to confront demolished court buildings whose interiors had been reduced to

²³⁴ Katzenstein, *supra* note 233, 249

²³⁵ *Ibid*, 247

²³⁶ Jeffrey Kingston, ‘Balancing Justice And Reconciliation In East Timor’ [2006] 38(3) *Critical Asian Studies* 271, 272

ashes. Libraries, court equipment, and case records had been looted or destroyed. After the referendum, most East Timorese who had acquired legal, political, and administrative experience working as support staff for the Indonesian government fled to Indonesia to avoid possible retributive violence. Essentially, the UN administration confronted a judicial vacuum.²³⁷

The UNTAET was thus uniquely tasked with reconstructing not only the East Timorese justice system, but also the entire state infrastructure. Indeed the absence of any East Timorese ‘state space’ to speak off, and the resulting necessity for the UNTAET to exercise full sovereignty over East Timor, meant that any judicial institution established to prosecute the Indonesian atrocities was inevitably going to be predominantly ‘international.’ With a few exceptions the SPSC was to be designed, funded, managed, and staffed by the ‘international community.’ On paper the SPSC thus closely resembled the other hybrid tribunals. As the name implies the tribunal was established as a special panel within the newly reconstituted East Timorese justice system, mandated to prosecute ‘serious crimes’ – both the core crimes of international criminal law, and domestic crimes such as murder. Its jurists were to be a mix of international and domestic, it was to apply international criminal law alongside domestic law, and it was, at least in principle, to apply international standards of due process.

9.2: The Production of the Nomospheric Setting of the SPSC

So how was the new legal order for East Timor materialized? What sort of nomospheric setting of the space of adjudication did the UN constitute in East Timor? What spatio-legal assemblage did the international community deploy in order to produce the adjudicative space of the SPSC? What sort of ‘guarded precinct’ of international criminal law was constructed? The answer to these questions lies in an analysis of the relationship between the financial, material, and human assets committed to establishing and maintaining the SPSC as an adjudicative space, and the resulting nomospheric visibility of that space. It is widely acknowledged that the SPSC was plagued by a lack of resources. As David Cohen makes clear, every material and human element of the new legal space was lacking: “From the

²³⁷ Katzenstein, *supra* note 233, 250

beginning, the Special Panels were understaffed and under-resourced in every significant respect, from electricity and security to research tools, case filings systems, case calendars and legal staff.”²³⁸

9.2.1: The ‘Guarded Precinct’ of the SPSC

This lack of sufficient resourcing included the provision of inadequate buildings to house the various elements of the nomospheric setting of the SPSC. The destruction of all significant infrastructure by the Indonesians meant that a new courthouse needed to be built, yet despite being completed by the Portuguese in March 2000,²³⁹ the new building was woefully inadequate to house an adjudicative space of international criminal law. Indeed, the “...tiny court house in Dili,”²⁴⁰ with its “...hot and over crowded rooms,”²⁴¹ was not even provided with a functioning generator. It was not until “...July 2004, 10 months before it closed, [that the courthouse] had reliable electricity.”²⁴² But it was not just the courthouse that was spatially inadequate, there was complete lack of accommodation for witnesses travelling from outside Dili²⁴³, and there was an almost total absence of detention facilities, with predictable results for the management of detainees: “At one point, UNTAET's own police stopped making any arrests of suspected criminals, including those involved in the 1999 violence, *because it had no place to put them*; the one detention center in the entire country, a former Ministry of Tourism building, had long since exceeded capacity.”²⁴⁴

But what of the assemblage of spatial practices that support and sustain the functioning of the space of adjudication; the administrative and technical support staff and the equipment, infrastructure, technology, and other resources they require to do

²³⁸ David Cohen, ‘Accountability In The Balance: Trials Before The Special Panels For Serious Crimes In East Timor 1999-2005’ [2009] 27(1) *Law in Context* 103, 116

²³⁹ Suzannah Linton, ‘Cambodia, East Timor And Sierra Leone: Experiments In International Justice’ [2001] 12 *Criminal Law Forum* 185, 214

²⁴⁰ Seth Mydans, ‘Modest Beginnings for East Timor's Justice System’, *New York Times*, 4 March 2001. Cited in Suzannah Linton, ‘Prosecuting Atrocities at the District Court of Dili’ [2001] 2 *Melbourne Journal of International Law* 414, 418

²⁴¹ Linton, *supra* note 239, 214

²⁴² Cohen, *supra* note 238, 117

²⁴³ Mydans, *supra* note 240

²⁴⁴ Human Rights Watch, ‘Unfinished Business: Justice for East Timor Press Backgrounder August 2000’. Available at <http://www.hrw.org/legacy/backgrounder/asia/timor/etimor-back0829.htm>. Accessed on 03/05/2012. (emphasis added)

their job? Considering the obvious security concerns in East Timor at the time, and the priority that is usually given to ensuring secure space for international missions, it is notable that “...there was virtually no security at all for the Special Panels, including for courtrooms themselves. This is, obviously, highly unusual in a potentially volatile post-conflict context.”²⁴⁵ Remarkably the SPSC was expected to function without a copy machine²⁴⁶, and with only “...a few second-hand computers donated by an Australian NGO.”²⁴⁷ The following passage highlights not only the shocking absence of any of these fundamental spatial practices, but the resulting impact on the *performance* of legal space - on how the law *happened* - at the SPSC.

Although insufficient funding has not been the central cause of the Special Panels' persistent judge shortage, it is responsible for, a complete absence of secretaries, court reporters, legal clerks, stenographers, and public liaisons, as well as an acute understaffing of translators. Without legal clerks, judges are expected to do their own research, writing, and editing. Without secretaries, they answer their own phones and often schedule their own meetings. Their facilities, moreover, are minimal, making research extremely difficult. The library consists of a few unused bookshelves, and access to the Internet became available only at the end of 2001. The judges sit three to an office. With the complete absence of support staff, they are left with responsibility for tasks that are necessary, but for which their time could be put to better use. As David Cohen noted, “When I first visited the Tribunal, [the judges] were engaged in moving their furniture.”²⁴⁸

9.2.2: The Nomic Figures of the SPSC

One of the distinguishing features of the nomospheric setting produced in East Timor was the extent of nomic ambiguity that characterized all aspects of the adjudicative space. In particular the jurists of the SPSC were predominantly figured as *not* being members of the class of international criminal law experts. This is not to say that the judicial chambers and prosecutors office of the SPSC were not filled with ‘international’ jurists, as mandated by the Regulations establishing the tribunal, but rather that the jurists that were selected either lacked the expertise or were precluded

²⁴⁵ Cohen, *supra* note 238, 118

²⁴⁶ Mydans, *supra* note 240

²⁴⁷ Linton, *supra* note 239, 214

²⁴⁸ Katzenstein, *supra* note 233, 259

from producing a body of jurisprudence that would be recognized as international criminal law. In other words the performance of the legal by the nomospheric figures of the SPSC failed to produce international legal space. A range of factors contributed to this non-international performance, including the total absence of key support staff and infrastructure - the spatial practices set out above - but also the inexplicable failure to establish basic judicial management structures.

...the Special Panels lacked leadership and judicial management. In the case of the SPSC this was a structural defect and likely not coincidental. It is customary for international criminal courts, like most domestic ones, to have a president or presiding judge who can speak for the court and who directs its administration. In the case of the SPSC no president or presiding judge was ever appointed. Given that the court also never had a Registrar or chief administrative officer, there was literally no one responsible for basic court functions like security, calendar, file management, etc. This also meant that for the first three years of its existence no individual had authority to officially represent the interests of the tribunal as an institution. Coupled with on the whole extremely weak international appointments during this period, even the most serious resource, management and administrative issues were not addressed.²⁴⁹

Moreover the SPSC was plagued by the selection of judges with no international criminal experience²⁵⁰, in an appointment process that was so overtaken by political considerations that it not only resulted in the judicial work of the SPSC grinding to a complete halt,²⁵¹ but was also arguably illegal.²⁵² Perhaps most significant from a spatial perspective was the decision that was taken early on in the process by UNTAET to transfer "...responsibility for constructing a judiciary from scratch to,"

²⁴⁹ Cohen, *supra* note 238, 117

²⁵⁰ The President of the Panel in two of the most discussed cases was the "...Italian employment law specialist Luca Ferrero." Cited in Linton, *supra* note 240, 419

²⁵¹ "Because of the insistence that the position of Chief Justice on the Court of Appeal had to be held by a particular Portuguese judge, Claudio Ximenes, there was a period of 19 months in 2002-03 when the Court of Appeal did not function at all because of prolonged, unexplained and unjustifiable difficulties in filling a vacant position" Cited in Cohen, *supra* note 238, 118

²⁵² "All of UNTAET's international judges have been appointed to office directly by the Transitional Administrator at the recommendation of the Ministry of Judicial Affairs, entirely bypassing the TJSC. This is a procedural flaw that goes to the validity of the appointment itself and must raise the possibility that the Special Panel's international judges and prosecutors may be unlawfully appointed." Cited in Linton, *supra* note 239, 228

East Timorese lawyers, “none of whom had previous judicial experience.”²⁵³ This decision to delegate “...complete control of the judiciary”²⁵⁴ to an exclusively domestic group of lawyers, who were blatantly unqualified to do the job, is a striking example of the production of *nomospheric ambiguity*. The point is not that only internationals were capable of managing such a task, indeed the decision to delegate responsibility within the UNTAET mission to domestic lawyers was ostensibly taken precisely to avoid such conclusions being drawn, but rather that it inscribed an already difficult and disturbing nomospheric situation with contradictory traces. Instead of clarifying the international spatiality of the SPSC such decisions led to primacy being increasingly given to available *domestic* nomic traces.

The striking result of these cumulative failures was a body of judicial practice in which “...judges neglected to apply international law or applied it incorrectly,”²⁵⁵ and where, “...the Court of Appeal manifested a seemingly complete lack of comprehension of the body of international law it was to apply and of basic tenets of appellate practice, fair trial standards and its own statute.”²⁵⁶ The extent to which the judiciary of the SPSC was incapable of operating in international legal space is chillingly revealed by the following critique of one particularly incoherent judgment.

...the court’s reasoning is itself confused, conceptually incoherent and completely at odds with all universally accepted and uncontroversial understandings of the jurisprudence of crimes against humanity. Yet this decision was written by the President of the Court of Appeal, an international judge, recruited and appointed by the UN. From this judgment it appears that the Court lacks even basic familiarity with this central doctrine of international criminal law embodied in its own Statute.²⁵⁷

It was not only the judiciary who were unqualified, the prosecutors of the SPSC, despite being by far the best resourced aspect of the whole enterprise, were by and large, *not* nomicly figured as members of the class of international criminal law experts, in fact, the majority “...have not had experience in the international crimes

²⁵³ Katzenstein, *supra* note 233, 254

²⁵⁴ *Ibid*, 254

²⁵⁵ *Ibid*, 253

²⁵⁶ Cohen, *supra* note 238, 123

²⁵⁷ *Ibid*, 124

arena.”²⁵⁸ However, the provision of defense counsel fell far below even the dismal standard set by the judiciary and prosecution. From the outset of the UN process the “...defence function appears to have been an afterthought;”²⁵⁹ there was zero funding allocated by the UN for the employment of international defense counsel, and all defendants were therefore allocated an entirely unqualified Timorese public defender. These young lawyers “...were very recent graduates and many had never appeared before a court. None had criminal trial experience.”²⁶⁰ All were handicapped by a “...complete lack of familiarity with the body of international law being applied.”²⁶¹ Moreover there were zero resources for a defense unit, forcing the public defenders to work out of a “...temporary and isolated back office in the Court of Appeals.”²⁶² These young, unqualified, Timorese law graduates were therefore expected to prepare a defense case in a complex international criminal law trial, virtually singlehanded. The results were entirely predictable:

This meant that Timorese public defenders and their one international adviser had literally no funds for investigation, to bring witnesses to Dili, or for interpreters, office supplies or virtually anything else. These resource deficits immediately impacted the ability to mount a defence: In not one of the first 14 trials before the SPSC (out of a total of 55 over five years) did the defence call even a single witness.²⁶³

What is particularly shocking, however, is that even after the UN was forced to acknowledge “...the complete inadequacy of such an arrangement in meeting minimum fair trial standards,”²⁶⁴ and reluctantly established an international Defence Lawyers Unit, “...it was staffed primarily by inexperienced trial lawyers.”²⁶⁵ So inexperienced were the new international defense counsel that one judge commented that; “It was hard to accept that many of the defence lawyers who appeared before us were trying *their first case ever* in front of the Special Panels.”²⁶⁶ It seems hard to

²⁵⁸ Linton, *supra* note 239, 229

²⁵⁹ Cohen, *supra* note 238, 119

²⁶⁰ *Ibid*, 119

²⁶¹ *Ibid*, 119

²⁶² Katzenstein, *supra* note 233, 256

²⁶³ Cohen, *supra* note 238, 119

²⁶⁴ *Ibid*, 119

²⁶⁵ *Ibid*, 121

²⁶⁶ *Ibid*, 121 (emphasis in original)

avoid the conclusion that the defence counsel of the SPSC were nomospherically figured in such a way that they were incapable of taking up any of the international nomic traces inscribed in the adjudicative space of the SPSC.

The systematic failure to provide competent defense counsel at the SPSC inevitably led to the same legal outcome that a failure to ensure equality of arms always produces – a disproportionately high percentage of convictions and the flagrant breach of defendants fair trial rights. David Cohen sums up the shameful record of the SPSC with diplomatic understatement.

The Special Panels for Serious Crimes tried 87 defendants. According to UN statistics, of these, 83 were convicted at trial. One of these acquittals was reversed by the Court of Appeal, and in the end only three defendants were thus acquitted of all charges. This represents a 97.7% conviction rate, a matter for some concern... It should be noted, however, that all of the trials at the SPSC were vastly shorter than their counterparts in Cambodia, Sierra Leone, or the ICTY or ICTR. In its early days a typical trial for murder at the SPSC lasted approximately three to four days. Later in its process this increased to a typical duration of 4-10 trial days, with the exception of the two major crimes against humanity cases. Even these, however, only took up 20-30 trial days, despite the fact that because of incompetent trial management they were each spread out over more than a year.²⁶⁷

9.3: The Nomospheric Visibility of the SPSC

On reading such a litany of juridical incompetence, one may be forgiven for imagining a somewhat farcical scene in which hopelessly unqualified and under resourced lawyers, working in an inhospitable, inadequate, and insecure environment, nevertheless work night and day to uphold the law. Indeed such an image of the beleaguered yet honorable lawyer struggling against the odds to secure justice is a familiar cultural trope. However, to adopt such a view is to deny the darker reality of the practice of the SPSC and the legal outcomes it produced. The adjudicative space of the SPSC can more accurately be characterized by a consistent and knowing failure to apply international standards of due process. Or to put it in spatial terms, the SPSC may have been *conceived* as international legal space, in conformity with the generic

²⁶⁷ *Ibid*, 118

nomospheric setting, but the *performance* of the legal failed to produce international legal space.

The most egregious example of this non-international performance is the lack of equality of arms between the defense and prosecution. Despite the relative inexperience of the prosecutors the situation still resembled a "... 'David and Goliath' confrontation, [in which] Goliath always won and 'equality of arms' was nonexistent."²⁶⁸ Yet the failure to perform international standards of due process can also be directly linked to the failure to produce some of the material spatial practices that constitute adjudicative space; in particular the failure to produce transcripts of proceedings²⁶⁹, the lack of administrative support²⁷⁰, and the absence of adequate translation, in what was a highly complex linguistic space with four official court languages.²⁷¹ Not only was there a chronic lack of translators, but when translation did occur it was of such poor quality that the fairness of the proceedings has been called into question.²⁷² If one spatial practice stands as the emblem of *international* criminal due process it is surely the production of an adjudicative space in which all participants are able to understand proceedings regardless of national or linguistic origin.

²⁶⁸ *Ibid*, 121

²⁶⁹ "The lack of a court stenographer or transcriber is more problematic. The first thirteen trials were conducted without a transcript or audio recording... Without written transcripts available to either the counsels or the judges, the Special Panels continue to be in violation of UNTAET Regulations 2000/11 and 2000/30, which establish the right of the accused to an official transcript of the proceeding on which an appeal may be based... The public defenders have been waiting for an official court transcript of the proceedings on which they plan to base their appeal. Court orders to the registry to make such a transcript available have not been implemented." Cited in Katzenstein, *supra* note 233, 260

²⁷⁰ "Until July 2002, the Special Panels lacked a court administrator. The Special Panels now have one court administrator and two court clerks. Among other tasks, the Administrative Section is in charge of receiving and organizing case files, tracking the status of cases, and keeping an updated calendar on hearings scheduled. The administrators are responsible for tracking and filing case documents that are primarily in English and Portuguese, despite their unfamiliarity with both languages. Due to the difficulty and volume of administrative work, judges are often left to take care of unaddressed administrative matters." Cited in Katzenstein, *supra* note 233, 262

²⁷¹ "Because the tribunal operates in four languages (Portuguese, Indonesian, Tetum, and English), proper translation is of critical importance." Cited in Katzenstein, *supra* note 233, 260

²⁷² "Even when interpreters are available and used, the quality of translation is dubious. In one detention review hearing, translation was provided only erratically. The judge, prosecutor, and defender spoke in English. An interpreter would translate what they said into Indonesian, and a second would translate the Indonesian into Tetum. Even for this minor and straightforward review hearing, the translation significantly slowed the proceedings. For certain periods of the proceeding, it simply did not occur. Only when the counsel or judge reminded the first interpreter were statements translated. The defendant, it seemed, missed most of what was said in the proceeding." Cited in Katzenstein, *supra* note 233, 261

One way to explain such a performance is to assign individual blame, and there were undoubtedly numerous jurists working at the SPSC who knowingly disregarded those international standards. Another response is to analyse the failings of the system in which those individuals worked. David Cohen's interviews with a number of judges who worked at the SPSC reflects both these approaches:

“He concluded: ‘We did not come here just to rubberstamp a machine that produces guilty verdicts!’ Another judge stated that some SPSC judges were not willing ‘to hear both sides’. These judges, he continued, ‘ignore the presumption of innocence’ and use their power in an arbitrary manner.”²⁷³

Yet what both these approaches share is a conventional image of the law, and international criminal law in particular, as immaterial, as *spaceless* – as somehow untethered to the space in which it is adjudicated. Both these approaches - that the fault lies with corrupt and incompetent jurists, or that the failure to meet international standards of due process was the unfortunate result of the systematic failure to provide adequate resources - *perpetuate the denial of the law's spatiality*.

This point can be helpfully illustrated by a brief comparison between the SPSC and another adjudicative space that was simultaneously established to prosecute those responsible for the atrocities in East Timor. We can recall that the initial decision of the UN not to establish a fully international criminal tribunal was in large part justified as a reasonable response to the assurances of the new Indonesian regime that it would prosecute those members of its armed forces who had been responsible for ordering and directing the atrocities: “To fulfill this promise, Indonesia created an Ad-Hoc Human Rights Court in Jakarta...While this body did succeed initially in convicting a number of high-ranking officers of the Indonesian Armed Forces, these convictions were all eventually overturned on appeal.”²⁷⁴ The failure of the Indonesian Ad-Hoc Court to conclusively convict a single suspect was rightly pilloried as a “sham,”²⁷⁵ and led to the process being described as one in which “...not only did the big fish get away, even the designated scapegoats have

²⁷³ Cohen, *supra* note 238, 123

²⁷⁴ *Ibid*, 108

²⁷⁵ Katzenstein, *supra* note 233, 274

walked.”²⁷⁶

The dire implications for justice in East Timor revealed by the contrast between one adjudicative space that *convicts* 97.7% of exclusively low level Timorese defendants that come before it, and another that *acquits* each and every high ranking Indonesian defendant indicted before it, while worthy of analysis, are not the focus of this comparison. What is spatially significant is the ways in which those contrasting legal outcomes are interpreted and what those interpretations reveal about the adjudicative space of international criminal law.

The UN helped establish the Ad Hoc Human Rights Court on Timor-Leste in Jakarta and the Special Panels for Serious Crimes in Dili, but the JSMP, echoing the consensus view among participants, scholars, and civil society organizations, states, “Both these two institutions have unequivocally failed to fulfill their mandates. The processes of the Ad Hoc Tribunal were highly irregular and critically flawed. The SPSC [Special Panels for Serious Crimes] has been under-resourced and starved of international political support and cooperation.”²⁷⁷

The consensus view is therefore, that while both adjudicative spaces failed in their mandate, the failure of one is blamed on the overt and direct political interference by Indonesia *in the adjudicative process*. Such interference rendered the legal outcomes ‘highly irregular and critically flawed.’ In other words it is the *law* that is at fault in the Indonesian Ad-Hoc Court – the law itself has been corrupted, the legal outcomes have been predetermined by direct political interference – and thus the legal outcomes from the process are *all* ‘highly irregular.’ To put it bluntly, in this assessment, the legal outcomes of the Ad-Hoc Court are not recognized as law.

In contrast, the failures of the SPSC are blamed on the, equally political, lack of sufficient resources and the absence of ‘international political support and cooperation.’ Yet despite failing in its mandate because of a political decision to systematically starve it of resources, *the adjudicative process* of the SPSC is deemed to be free from political interference. As such, the legal outcomes of the SPSC cannot be derided as ‘highly irregular,’ they are still recognized as law. Yet this conclusion is

²⁷⁶ Kingston, *supra* note 236, 274

²⁷⁷ *Ibid*, 273

sustainable only if one maintains the premise that the law is immaterial, that it is *spaceless* – that it is “... a series of abstract propositions, a structure of norms in search of an application”²⁷⁸ – and that *the adjudicative process* can somehow function independently of the material scaffolding provided by secure, sterile, spacious courtrooms, adequate administrative and technical support, and highly qualified and motivated jurists. In other words, in order to argue that the legal outcomes of the SPSC were not as politically predetermined as those of the Indonesian Ad-Hoc Court one must maintain that the law is not immanently intertwined with the spatio-legal assemblage that constitute adjudicative space. In short the conclusion that the legal outcomes of the SPSC should be recognized as ‘regular’ is only sustainable if one continues to deny the spatiality of the law.

9.4: The Exclusion of the SPSC from International Legal Space.

But why was the decision taken to hobble the SPSC? What are the spatial implications of the political decision to systematically starve the SPSC of resources? What is revealed about the spatiality of international criminal law by the failure to produce the spatio-legal assemblage that constitutes the space of adjudication? What does it disclose about the pragmatics of world making that articulates the nomoscape of international criminal law? It is widely recognized that the SPSC was not denuded of resources because of a lack of UN funds,²⁷⁹ but the political motivation for withholding those funds remains unclear. A number of reasons have been suggested including a desire either not to offend²⁸⁰ or to maintain political leverage²⁸¹ with Indonesia, a powerful regional ally of the Western powers. Some have suggested that the decision was motivated by a desire to prevent revelations about the extent of US complicity in the commission of atrocities in East Timor from coming to light.²⁸² All of these factors may or may not have been in play, but a wider ranging spatial motivation is implied by the following passage:

The commentary of one local expert suggests that for decision makers at some

²⁷⁸ Manderson, *supra* note 55, 1

²⁷⁹ Katzenstein, *supra* note 233, 264

²⁸⁰ *Ibid*, 272

²⁸¹ Linton, *supra* note 239, 217

²⁸² Katzenstein, *supra* note 233, 274

distance in New York, the tribunal is less about the specific impacts that convictions can have in the lives of victims, *and more about calling attention to the visibility of the UN's presence and power*. In this account, the hybrid tribunal is a trophy to be put on UN bookshelves. The UN is "happy to say we gave the tribunal a good shot. It is not necessarily interested in justice for victims"²⁸³

What this explanation brings into focus is the possibility that the decision to withhold the spatio-legal assemblage was taken precisely to prevent the nomospheric setting of the SPSC from attaining the requisite visibility to be recognized as an *exemplary* instantiation of international legal space. In other words the decision was an example of the 'disciplinary cartography' through which the boundaries of international legal space are defined; *it was taken in order to constitute the SPSC as an anomalous nomospheric setting*, and thus exclude the SPSC from the space of adjudication.

This argument is supported, not only by the sheer extent of the deliberate, and seemingly inexplicable, failure to provide each and every element of the spatio-legal assemblage that are normally produced as a matter of course, but by the direct link between that failure and the operation of *the perspective of scale*. The point here is that the adjudicative space of the SPSC was deliberately constituted to occupy *national* legal space and not *international* legal space. By denuding the SPSC of the constituent elements of *international* legal space, the international community insured that it *could only be* recognized as constituting *national* legal space.

The shift in the scalar space occupied by the SPSC, the shift from being recognized – being nomosphericly visible - as an *exemplary international* criminal tribunal, to being merely an instantiation of *anomalous* and thus *non-international* legal space, is evidenced by a combination of both procedural and substantive elements. Perhaps more than anything else it is the performance of international standards of due process that defines the space of adjudication. Each of the hybrid tribunals applies a unique bundle of international and domestic nomic traces with regard to the substantive crimes to be tried, but *every* instantiation of the space of adjudication should, in principle, apply international standards of due process derived from the International Covenant on Civil and Political Rights. The myriad ways in which the performance of

²⁸³ *Ibid*, 272 (emphasis added)

the legal that constituted the SPSC failed to produce an adjudicative space in which these standards were met have been catalogued above, what remains to be noted is the way in which the resulting shift in scale between an *international* legal space and a *non-international* legal space was so apparent to those working in the SPSC.

DLU lawyer Alan Gutman stated that when he, or others, raised questions about low levels of practice in the Serious Crimes process, members of a personnel review committee would sometimes respond by saying: ‘We are not the ICTY’.... Another concluded that there was ‘a pervasive sense in the system that here it is East Timor, we don’t have enough resources, so international standards are either not possible or don’t apply’.²⁸⁴

There were two defining aspects of the performance of the legal that constituted the SPSC that reflect the shift in scale from international to non-international legal space. The first is the fact that the majority of prosecutions at the SPSC were initiated under domestic law, rather than international criminal law. Despite the significant local and international expectations that the scale of the atrocities committed would be matched by the corresponding scale of legal response, “...the vast majority have controversially been pursued as violations of domestic law.”²⁸⁵ There are a number of factors that underlie this prosecutorial policy – this performance of *domestic* legal space. From the outset of the international mission in East Timor there was a distinct lack of investigatory zeal:

The UN went into Kosovo with human rights lawyers and pathologists accompanying the first troops, determined to find evidence of human rights violations and to prosecute. In East Timor neither INTERFET nor subsequent UN forces have assisted in any meaningful way in finding the evidence. It is clear that the UN and various powerful forces still regard not embarrassing Indonesia as far more important than attaining justice for East Timorese.²⁸⁶

Indeed, as Suzannah Linton makes clear, there is, firstly, a direct link between the failure to produce the requisite spatio-legal assemblage - the necessary things,

²⁸⁴ Cohen, *supra* note 238, 122

²⁸⁵ Linton, *supra* note 240, 414

²⁸⁶ Katzenstein, *supra* note 233, 272

adequate places, and qualified people – and the failure to perform the challenging task of investigating and prosecuting a complex case of crimes against humanity or even genocide, under *international* criminal law. And, secondly, the failure, or inability, to perform international legal space results in the failure to recognize that the atrocities committed are serious enough to engage *international* concern. In other words the ‘truth telling’ function of international criminal law, the process whereby the perpetration of mass atrocities is recognized as being just that, as being of equal gravity to other instances of such internationally recognized atrocities, is stymied – the crimes themselves are denied international visibility.

It has also seriously impacted the effectiveness of the enterprise in addressing the true extent of the criminality that was committed in East Timor: most crimes are being charged under the less demanding Indonesian Criminal Code, rather than as international crimes. Funding, or rather the lack of it, has therefore determined prosecutorial strategy.²⁸⁷

The second aspect of how the legal *happened* at the SPSC is the clear intent to hinder and frustrate the investigation and prosecution of Indonesian suspects, particularly high-ranking ones. This restriction on the international ambit of the SPSC was clear from the outset, and, as Suzanne Katzenstein reveals, was clearly enforced with strict discipline:

... investigations may have been structured in such a way as to prevent the possibility that senior Indonesian officials would be indicted. For instance, rather than adopt investigative techniques commonly used to probe chains of command, such as tracking money trails, investigations were dispersed and targeted at lower-ranking perpetrators. When one investigator did begin to follow a money trail, the UN official states, "he was told to immediately stop his investigation." The UN official notes that SCU management ignored offers made by militia leaders to cooperate with the SCU and provide information regarding the responsibility of "higher ranking" Indonesian government officials.²⁸⁸

This obstruction of international justice can, at one level, be explained by the political

²⁸⁷ Linton, *supra* note 239, 215

²⁸⁸ Katzenstein, *supra* note 233, 273

contingencies of the situation and the desire not to offend Indonesia. However a spatial reading of the prosecutorial policy of the SPSC reveals a clear intention to limit what was in principal an *international* subject-matter jurisdiction to only domestic crimes and domestic perpetrators. In other words to shift the scalar space of the nomospheric setting of the SPSC from *international* legal space – the space of adjudication - to *national* legal space.

9.5: The SPSC as an Instance of ‘The Project of Seeing and Concealing’

But in what ways does this shift in scale from international to national legal space enhance the prestige and power of the international community? How does the decision to exclude the SPSC from international legal space ‘call attention to the visibility of the UN’s presence and power’? It would seem counter intuitive to assert that in seeking to further its international visibility the UN would deliberately undermine one of its own tribunals. The answer to this paradox lies in an acknowledgment of the ‘project of seeing and concealing’ that undergirds the space of adjudication, and in particular the ideological representation of what that space is *for*. International criminal law is predicated on the idea that the core international crimes are *always* the concern of the international community. The preeminent normative presumption of the space of adjudication is, therefore, its purported universality and neutrality. The UN is committed to furthering this operative notion; it is committed to ensuring that international criminal law is *seen* to be compliant with the principles of universality and neutrality. In so doing it enhances its own presence and power, it increases its visibility as the neutral guardian of international legal space. Yet simultaneously the actual existing power relations of ICL must be *concealed*; the maintenance of impunity for the powerful must be maintained.

So, when it was faced with the undeniable evidence of mass atrocities, and the widespread calls to prosecute the international crimes committed in East Timor under international criminal law, the UN had little choice but to respond robustly if it wanted to maintain the normative presumption of the space of adjudication. Yet, as the local expert suggests, the UN was seemingly ‘happy to say we gave the tribunal a good shot. It is not necessarily interested in justice for victims.’ The priority of the UN was to maintain the image of international criminal law as universally applicable,

and this was achieved by establishing another hybrid tribunal as ‘a trophy to be put on UN bookshelves.’ Yet, in the case of East Timor, the actual existing political reality, whether that was a desire not to implicate or offend a key regional ally, or prevent the disclosure of US complicity in crimes against humanity had to be concealed. This process of concealment required that the adjudicative space produced was rendered incapable of adjudicating in – of performing - *international* legal space, and instead was relegated to *national* legal space. In short the *spatialised exclusion* of the nomospheric setting of the SPSC from international legal space ensured that the ideological presumption of ICL were *seen* to be complied with while the actual exiting power relations were simultaneously *concealed*.

The success of this process of ideological concealment, of exclusion from the space of adjudication, through the deliberate deployment of a spatio-legal assemblage that were intended to shift both the practice and the perception of the SPSC from international to national legal space is exemplified by the UN’s retrospective justification of the failure of the SPSC to bring justice to the people of East Timor:

The experience of the hybrid tribunal cannot be understood apart from the troubled legal context in which it was established and continues to operate.... This point was made recently by the UNMISSET Special Representative of the Secretary-General Kamallesh Sharma. "The Serious Crimes Programme of UNMISSET ... *is part of the national justice system of Timor-Leste*, and its success therefore is dependent on the strength of the justice system as a whole. It is essential to identify strategies to strengthen the national justice system, even for better results of the Serious Crimes process."²⁸⁹

Thus despite reconstructing the entire East Timorese legal system from scratch as part of the first ever exercise in UN sovereignty over a failed state, despite establishing a hybrid tribunal that was designed, funded, managed and staffed by ‘internationals’, and despite envisaging and promoting the SPSC as an exercise in international criminal justice, applying international criminal law in the prosecution of international perpetrators of international crimes, the UN was able to blame the failure of the SPSC on its *occupation of national legal space*. Despite all this, when the inevitable, yet

²⁸⁹ *Ibid*, 273 (emphasis added)

predetermined and calculated failure to perform international legal space materialized, the UN was able to avoid the fault being ascribed *to the law itself*. The UN was to able to succeed in its primary objective of maintaining the visibility of the normative presumption of what the space of adjudication, and international criminal law is *for*, while at the same time ensuring that actual existing power relations were concealed.

A comparison with the Indonesian Ad-Hoc Court is again revealing. That tribunal was also established with UN sponsorship as an adjudicative space of international criminal law, yet its crass failure to adhere to the normative presumptions of international criminal law and the clumsy political meddling in the adjudicative process, meant that it could only be recognized as an *exceptional* nomospheric setting. It threatened the legitimacy – the prestige and power - of international criminal law as universal and neutral. It was excluded from international legal space because it so blatantly disturbed and undermined the normative presumption of what the space of adjudication is *for*. In contrast the SPSC was excluded from international legal space on the basis that the nomospheric setting that was produced was *anomalous*. The adjudicative space of the SPSC did not disturb or contest or undermine the normative presumption of what the space of adjudication is *for*, it did not threaten the operative notion of universality and neutrality that underpins international criminal law. On the contrary the SPSC is remembered as a badly executed but *good intentioned* early endeavor in ‘internationalized’ domestic prosecutions of international crimes. The hard-pressed day to day judicial practice of the SPSC merely failed to match the rigorous standards expected from an international criminal tribunal.

So despite the legal outcomes of the SPSC being as politically predetermined as those of the Indonesian Ad-Hoc Tribunal, despite the impunity of the western powers and their allies being maintained through a deliberate undermining of the purported universality and neutrality of international law, despite the constitution of the SPSC being a sophisticated exercise in the politicised production of legal space – of *spatialised exclusion* - it is deemed to have merely ‘deviated from the norm.’ The ideological representation of what the space of adjudication is *for* was successfully *concealed*. The exclusion of the SPSC from *international* legal space – from the space of adjudication – is explained by the ‘troubled legal context’, the unfortunate and trying *national legal space* in which the tribunal was forced to operate.

Chapter 10: The Exceptional Nomospheric Setting of the Space of Adjudication

10.1: The Autonomous Spaces of International Criminal Law

The aspiration for justice that infuses international criminal law is arguably in perpetual conflict with the political reality of international relations. The military actions of powerful states are increasingly being characterized as being in breach of the laws of war. Those who would seek international justice for these alleged breaches demand that the normative presumptions of international criminal law be actualized. They insist that the legal principles of universality and neutrality be given material form. Yet the political reality is such that the actual existing power relations that animate international criminal law and demand the maintenance of impunity for the leaders of Western states and their allies, have so far been concealed beneath the conspicuous hyper visibility of international legal space.

There are two principle means by which this autonomous project to materialize international justice has taken spatial form. The first is to bring legal cases against powerful suspects in national courts under the principle of universal jurisdiction. Or, to put it in spatial terms, to reify the space of adjudication within national legal space, through the deployment of the nomospheric trace of universal jurisdiction. The second strategy is to establish independent tribunals to prosecute powerful suspects, in other words to seek to constitute an autonomous nomospheric setting of the space of adjudication. There have been a number of examples of these autonomous nomospheric settings, but most draw their inspiration from the Russell Tribunal, established by the eminent philosophers Bertrand Russell and Jean-Paul Sartre to pass judgment on what were perceived to be the war crimes perpetrated by the US during its invasion and occupation of Vietnam. Contemporary examples of these autonomous nomospheric settings include the Russell Tribunal on Palestine, the World Tribunal on Iraq and The Kuala Lumpur War Crimes Commission & War Crimes Tribunal.

While they may be examples of ‘counter-legalities’, these initiatives are all undeniably *nomie* in that they seek to engage with and take up the nomospheric traces that constitute international criminal law, in particular the underlying norms of universality and neutrality. The conventional view is that these autonomous

nomospheric settings are not truly 'legal,' and they are commonly dismissed as lacking "...authority, impartiality and credibility."²⁹⁰ In other words these tribunals are deemed to disrupt, contest or undermine the normative presumption of the space of adjudication; they are judged to constitute *exceptional* nomospheric settings. A spatial analysis of the nomospheric setting of K LWCT therefore serves as an illuminating example of how the boundary of the space of adjudication is policed, and in particular how the various nomospheric factors of visibility function to spatially exclude exceptional nomospheric settings.

10.2: The Kuala Lumpur War Crimes Commission & War Crimes Tribunal

The ex-prime minister of Malaysia, Dr. Mahathir Mohamad, established The Kuala Lumpur War Crimes Commission & War Crimes Tribunal, as an independent international NGO. The stated intention of the K LWCT is to "...adjudicate prosecutions brought by the Kuala Lumpur War Crime Commission particularly those which involve: (a) Crimes against peace; (b) Crimes against of genocide; and (d) War crimes, account for their actions *especially when relevant international judicial organs fail to do so.*"²⁹¹ This focus on *nomospheric situations* that have been routinely ignored by the UN sponsored tribunals, in particular the ICC, is reflected in the subject-matter jurisdiction of the K LWCT which is specifically concerned with international crimes perpetrated in Iraq, Palestine, Afghanistan, and Lebanon.²⁹²

In line with its mandate the K LWCT has to date completed two trials. The first judgment, dated the 22nd November 2011, found George W. Bush and Tony Blair guilty of the crimes against peace, war crimes, and genocide for their roles in the invasion of Iraq.²⁹³ The second trial, completed on the 11th May 2012, recorded a guilty verdict against "...George W. Bush and his associates namely Richard Cheney, former U.S. Vice President, Donald Rumsfeld, former Defence Secretary, Alberto

²⁹⁰ Yap Swee Seng, executive director of Malaysian rights group Suaram. Available at <http://www.brussellstribunal.org/KL.htm>. Accessed on 11/05/2012.

²⁹¹ See 'Aim Of The Tribunal'. Available at http://criminalisewar.org/?page_id=65. Accessed on 11/05/2012. (emphasis added)

²⁹² See Article 2(2) of the Charter of the Kuala Lumpur War Crimes Commission. Available at http://criminalisewar.org/?page_id=61. Accessed on 11/05/2012.

²⁹³ See http://criminalisewar.org/?page_id=514. Accessed on 11/05/2012.

Gonzales, then Counsel to President Bush, David Addington, then General Counsel to the Vice-President, William Haynes II, then General Counsel to Secretary of Defence, Jay Bybee, then Assistant Attorney General, and John Choon Yoo, former Deputy Assistant Attorney-General,”²⁹⁴ for the crimes of Torture and War Crimes.

Needless to say Tony Blair, George Bush and the other convicted defendants are not currently languishing in a Malaysian jail, awaiting sentence for war crimes. The defendants did not surrender themselves to the custody of the KIWCT, nor did they instruct counsel to represent them at trial; in fact the defendants, safe in the knowledge that the KIWCT is nomosphericly invisible, have studiously ignored the entire proceedings.

10.3: The Nomospheric Visibility of the KIWCT

If the KIWCT was a Tribunal that purported to apply only Malaysian criminal law then it’s status as an adjudicative space of international criminal law would not even be at issue. It is precisely because the KIWCT takes up the available traces of international criminal law and constitutes itself as a nomospheric setting of the space of adjudication, that the question of its status – its visibility – as an adjudicative space of international criminal law is raised. However an assessment of the nomospheric visibility of the KIWCT reveals the absence of all but one of the nomospheric factors of visibility. The sole element of visibility – the application of international criminal law – is tellingly the focus of what very limited reported critique there has been of the KIWCT.

The KIWCT would appear to exclusively apply international criminal law. The subject-matter jurisdiction of the KIWCT is restricted to the core international crimes. The Charter of the KIWCT adopts the definition of these crimes provided by the Rome Statute of the ICC, including the definition of the crime of aggression, which largely mirrors that agreed by the Kampala Review Conference of the Rome Statute. Although it does not make explicit mention of the ICCPR, the Charter of the KIWCT largely reflects the fair trial provisions of that convention. Yet, despite this

²⁹⁴ See http://criminalisewar.org/?page_id=121. Accessed on 11/05/2012

apparent adherence to the archetype of ‘The Hague’, it is the issue of ‘international standards of due process’ that has been the focus of the limited criticism of the KIWCT. Indeed the former United Nations Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy, is reported to have labeled the KIWCT a “circus”²⁹⁵ and to have “...questioned how the tribunal would apply fair trial principles if accused war criminals did not appear before it.”²⁹⁶ What is nominally significant about this exercise in exclusion from international legal space is the focus on the apparent failure to perform international standards of due process, again reiterating the point that it is precisely these standards that exemplify the space of adjudication. Curiously, the specific focus of the critique – that the KIWCT permits trials in absentia – is arguably ill chosen, as the Statute of the STL, a UN sponsored tribunal, also provides for trials in the absence of both defendant and instructed counsel.

The adjudicative space of the KIWCT is denied further nominal visibility by virtue of its failure to constitute itself as a ‘guarded precinct’ of international criminal law. The KIWCT is housed on the second floor of the non-descript office block that is the headquarters of the Al-Bukhary Foundation in the Jalon Perdana district of Kuala Lumpur. Crucially, the KIWCT does not occupy international space, as there is no agreement with the Malaysian government extending inviolability to the site. Most significant however is the failure of the KIWCT to constitute the ‘courtroom’ of international criminal law. Far from resembling the sterile, high-tech, non-space of the courtrooms of ‘The Hague’ - far from appearing to embody the space-lessness of international law - the space occupied by the KIWCT is patently a product of its particular context.

The judges of the KIWCT are seated behind a simple bench, along one wall of a rather over crowded office space. Although wearing robes the judges are seated at the same level as the rest of the room and there is no obvious insignia of judicial authority. The lawyers, some of whom appear to be wearing court attire while others are more informally dressed, are arrayed in front of the judges. They sit behind a

²⁹⁵ ‘Mahathir's war crimes tribunal under fire’. Available at <http://www.brusselstribunal.org/KL.htm>. Accessed on 11/05/2012.

²⁹⁶ *Ibid*

similar bench, which is seemingly far too small to accommodate their papers, and which appears to be uncomfortably close to the judges opposite. There is a distinct lack of technology, aside from a few microphones, and support staff, in the space. The room is full of onlookers and spectators, who appear to come and go as they please. They are seated in banks of seats, tightly packed in close behind the lawyers. Indeed the prevailing sense is of a hot, overcrowded room, with little spatial order. Crucially there are no defendants present, and no security personnel. The overall impression is more akin to a local planning meeting than an international criminal tribunal.²⁹⁷

The nomospheric figuration of the jurists of the KIWCT is also predominantly non-international. Of the five judges of the KIWCT four are Malaysian. Although one of the Malaysian judges used to be a justice of the high-court of Malaysia, and another served as an *ad litem* judge of the ICTY, there is a striking absence of expertise in international criminal law on the judicial bench. The single non-Malaysian judge is Alfred Lambremont Webre, a graduate of Yale Law School who has had a somewhat unorthodox legal career, the highlights of which include hosting a radio show, and developing an abiding interest in intelligent extraterrestrial life forms. The preponderance of domestic jurists is replicated among the lawyers who work at the KIWCT, the exception being the US prosecutor, and international law professor Francis Boyle. Professor Boyle is better known as a peace activist than an international criminal law jurist, and his selection as a prosecutor at the KIWCT thus reflects the ways in which nomospheric figures embody the conflicting "... abstract ideas about international justice." His participation in the KIWCT arguably embodies the call that 'the normative presumption that underpins the ideological representation of international criminal law be actualized,' while the complete absence of any of the recognized class of international law experts, confirms the nomospheric invisibility of the KIWCT.

Finally the conceptual and ideological proximity of the KIWCT to the generic nomospheric setting of 'The Hague' must be assessed. The nomospheric setting of the KIWCT is not located in The Hague, but rather, as its name suggests it sits thousands

²⁹⁷ This description of the adjudicative space of the KIWCT is taken from the author's observation of video footage of the KIWCT. Available at http://criminalisewar.org/?page_id=978. Accessed on 11/05/2012.

of miles away, in Kuala Lumpur, the capital of Malaysia. More important however is the absence of any proximity to the global city of international criminal law - the generic nomospheric setting of 'The Hague' - and in particular the normative presumption of what the space of adjudication is *for*. Although it may not appear obvious at first glance, the practice of the KIWCT is deemed to disrupt, contest or undermine the normative presumptions of international criminal law. On its face the KIWCT is an adjudicative space committed to the normative principles of universality and neutrality in the prosecution of those who commit international crimes. Yet, its stated aim of prosecuting those whom other 'relevant international judicial organs' have failed to indict, lays it open to the charge of impartiality and thus to failing to adhere to those very normative principles. By claiming to define in advance the boundaries of international legal space, by seeking to elevate specific nomospheric situations to the international plane, the KIWCT is deemed to have assumed the role of cartographer of international legal space, and thus to have disrupted, contested or undermined the normative presumptions of international criminal law. Despite being an attempt to reify the very normative principles that underpin international criminal law, these autonomous initiatives are paradoxically seen as critically undermining the neutrality and impartiality of international criminal law; they are routinely excluded not only from international legal space but also from the space of the legal altogether.

10.4: The Nomospheric Exception that Proves the Ideological Rule

The point here is not to naively suggest that the KIWCT should be seen as a 'real court,' or that the international community should respect its judgments simply because the KIWCT applies international law and by and large complies with recognized standards of due process, or because the work of the KIWCT appears to address a widely held sense of injustice. Rather what is critically productive about a nomospheric investigation of the adjudicative space of the KIWCT is what it reveals about the project of seeing and concealing – the pragmatics of world making – that underpins international criminal justice.

International criminal law is avowedly universal and neutral; the principle of universal jurisdiction allows the space of adjudication to be reified anywhere, and

there is nothing in principle to prevent a state establishing a tribunal along the lines of the KIWCT. Moreover the momentous normative presumptions of international criminal law preclude any state or manifestation of the international community from explicitly asserting the right to define the boundaries of the space of adjudication – no state, however powerful, has the right to define the boundaries of a purportedly universal legal space. Yet the prospect of the adjudicative space of international criminal law materializing anywhere is politically untenable. The idea that a domestic court exercising universal jurisdiction or an autonomous tribunal like the KIWCT might actually enforce a prosecution against George Bush and Tony Blair is political fantasy. But the very fact that such a legal outcome is fantasy reveals the ideological nature of the normative presumptions of universality and neutrality that underpin international criminal justice. For to enforce a prosecution against a Western leader would go against the actual existing power relations that inform the space of adjudication - to maintain the impunity of the leaders of powerful states and their allies.

The UN is, however, committed to maintaining the ideological presumption of the universality and neutrality of international criminal law, so the actual existing power relations that inform the space of adjudication must be *concealed*. The international community, in the form of the UN, cannot simply dismiss any politically problematic attempt to reify the adjudicative space of international criminal law as illegitimate, because in so doing the very particularity of the space of adjudication would be revealed. If the UN were to explicitly define the boundaries of the space of adjudication by dismissing the KIWCT and other such autonomous nomospheric settings as illegitimate it would betray the political reality that the UN acts not as the neutral guardian, but as the disciplinary cartographer of international legal space.

Instead the strategy of the international community is to simply overlook such autonomous nomospheric settings and let the process of *spatialised exclusion* render such *exceptional* instantiations of the space of adjudication as invisible. The success of this strategy of conscious disavowal, of studiously ignoring the very existence of these autonomous nomospheric settings, is reflected in the almost total absence of any

cultural comment of any kind on these initiatives in global justice²⁹⁸. The strategy of the international community is not to explicitly deny the ‘legality’ or ‘legitimacy’ of these autonomous nomospheric settings, but simply to exclude them from *international* legal space, and thus render them as exceptional and thus invisible nomospheric settings.

What facilitates this ‘project of seeing and concealing,’ what allows for this process of exclusion from international legal space – what makes the *concealing* of these autonomous nomospheric settings effective and enduring – is precisely the ideological deployment of *space* as natural, dormant, and abstracted from the machinations of power. Conspicuously materializing ‘The Hague’ as the hyper visible *generic* adjudicative space of international criminal law and then inscribing that space with the ‘legitimacy’ of *international* law actualizes this process of disciplinary cartography. By constituting the *exemplary* space of adjudication through a particular, politically managed, Eurocentric, spatio-legal assemblage, and then *conspicuously* manifesting that space as hyper-visible and international, the adjudicative space of international criminal law, appears as ‘neutral, fixed, and external.’ Simultaneously the actual existing power relations that inform the space of adjudication, that ensure that *anomalous* and *exceptional* nomospheric settings are excluded from international legal space, are rendered invisible; instead they appear ‘inevitable and immutable.’

²⁹⁸ The author was unable to identify a single academic piece that referred to the KIWCT. The journalistic commentary was minimal and uniformly dismissive of the KIWCT as a genuine judicial exercise.

Conclusion: ‘The Space of Perpetration’

This thesis has sought to reveal the multiple ways in which the ‘materiality of the legal’ impacts on the practice of international criminal law through a spatial analysis. The ‘space of adjudication’ names far more than the concrete actuality of an ad-hoc collection of international criminal tribunals; it seeks to interrogate how the law makes space, and how that spatiality in turn conditions the practice of the legal. The ‘space of adjudication’ seeks, firstly, to describe the myriad ways in which both the ideology, and the actual existing political force field(s) of international criminal law take spatial and material form, and, in turn, to reveal how the boundaries of international legal space are managed. However, in the same way that the criminal trial marks the final phase of the lifecycle of a crime, the conceptualisation of the space of adjudication is only the first (or last) step in the proposed project of spatially re-imagining international law. By way of conclusion it may be useful to briefly situate the space of adjudication in a broader analysis of the exercise of military violence, and in so doing suggest how this project may be extended to reveal some of the spatial continuities between the praxis of such violence and its categorisation as lawful or unlawful.

The adjudication of potential breaches of International Humanitarian Law is only the final phase in the process by which the “...economy of violence is calculated and managed.”²⁹⁹ By the time the disciplinary cartography that defines the space of adjudication operates to include or exclude certain acts of adjudication from international legal space, the determination of the legality of the individual acts of military violence has arguably already occurred. The reason that it is political fantasy that George Bush or Tony Blair, or more tellingly any British or American military officer, might actually be prosecuted under international criminal law is not merely because no tribunal – no adjudicative space – which attempted to do so would be recognised as occupying international legal space, but that any exercise of military violence they may have ordered would be presumed to be compliant with IHL.

²⁹⁹ Eyal Weizman, *The Least Of All Possible Evils: Humanitarian Violence From Arendt To Gaza* (2011 Verso), 4

The designation of legality – of compliance with the requirements of IHL - that is routinely ascribed to the exercise of military violence by powerful states, occurs not as part of some neutral adjudication after the fact, but is, I suggest, immanent to the very exercise of such violence. The ability of powerful states to take advantage of the elasticity of IHL, to shift the boundary between what is permitted and what is prohibited through the very act of transgression, to demonstrate apparent adherence to the principle of proportionality and thus always and already to exercise the necessary quotient of restraint, allows for a permanent and *a priori* assertion of legality. The actual existing political imperative to maintain the impunity of the powerful that animates the space of adjudication is thus also what constitutes what might be termed the *space of perpetration*.

The ‘space of perpetration’ takes as its inspiration the recent, groundbreaking work of Eyal Weizman, who draws on the insight of Walter Benjamin that “... there is inherent in all such [military] violence a lawmaking character,”³⁰⁰ to propose a new material conceptualisation of the relationship between military violence and its regulation by IHL; which Weizman terms the ‘humanitarian present.’

This book engages with the problem of violence in its moderation and minimization, mostly with state violence that is managed according to a similar economy of calculations and justified as the least possible means. The fundamental point of this book is that the moderation of violence is part of the very logic of violence. Humanitarianism, human rights and international humanitarian law (IHL), when abused by state, supra-state and military action, have become the crucial means by which the economy of violence is calculated and managed. A close reading of a series of case studies will show how at present, spatial organisations and physical instruments, technical standards, procedures and systems of monitoring – the complex humanitarian assemblage that philosopher Adi Ophir called ‘moral technologies’ – have become the means of exercising contemporary violence and for governing the displaced, the enemy and the unwanted. The condition of collusion of these technologies of humanitarianism, human rights and humanitarian law with military and political powers is referred to in this book as the ‘humanitarian present.’

³⁰⁰ Walter Benjamin, ‘Critique of Violence’, in Peter Demetz (ed) *Reflections*, 1978, cited in Weizman, *supra* note 299, 90

Within this present condition, all political oppositions are replaced by the elasticity of degrees, negotiations, proportions and balances.³⁰¹

Weizman's critical insight is that the exercise of military violence is no longer conditioned by military imperatives alone but is shaped by an assemblage of "...technologies, spatial arrangements, artefacts and environments,"³⁰² of which the legal technologies of IHL play a central role. The coming together of this assemblage with the animating ideological notion of the humanitarian present - 'the least of all possible evils' – has led to a fundamental reversal in the relationship between military violence and its legal regulation. Weizman argues that the role of IHL is no longer to act as the neutral adjudicator on acts of violence through the application of a rigid set of rules after the fact, but to serve as the *facilitator* of that violence. Weizman asserts that "... the elasticity that military lawyers identify and mobilize in interpreting the laws of war,"³⁰³ means that, "...international law can thus not be thought of as a static body of rules but rather an arena in which the law is shaped by an endless series of diffused border conflicts."³⁰⁴ Far from acting to curtail the exercise of violence, Weizman suggests that the role of IHL may be just the opposite:

Might it be that these legal technologies contributed not to the containment of violence but to its proliferation? That the involvement of military lawyers did not in fact restrain the attack – but rather, that certain interpretations of international humanitarian law have enabled the inflicting of unprecedented levels of destruction? In other words, has the making of this chaos, death and destruction been facilitated by the terrible force of the law?³⁰⁵

If, as Weizman suggests, adherence to the principle of the lesser evil has encouraged "...legal scholars and legal advisers to states and militaries... to extend the inherent elasticity of the system of legal exception... into ways of rewriting the laws of armed conflict themselves,"³⁰⁶ then where does that leave the purported universality and neutrality of the law? If "...lesser evil arguments are now used to defend anything

³⁰¹ Weizman, *supra* note 299, 3

³⁰² *Ibid.*, 4

³⁰³ *Ibid.*, 91

³⁰⁴ *Ibid.*, 91

³⁰⁵ *Ibid.*, 90

³⁰⁶ *Ibid.*, 9

from targeted assassinations and mercy killings, house demolitions, deportation and torture... and even ‘the intentional targeting of some civilians if it could save more innocent lives than they cost’,³⁰⁷ then what becomes of the principle of equality before the law? If powerful states are able to stretch IHL to encompass and legitimate their every exercise of military violence, then do they not, in fact, enjoy impunity from the law?

At the core of Weizman’s conceptualisation of the ‘lesser evil principle’ is the utilisation of the malleable principle of proportionality by powerful states. At present the assemblage of “...technologies, spatial arrangements, artefacts and environments,”³⁰⁸ which constitute the ‘space of perpetration’ allow for the *calculations* that are inherent to the principle of proportionality to be integrated into the very exercise of military violence. What Weizman’s work reveals is that it is no longer the *results* of military violence – the death and destruction caused – that serve as the measure of the legality of that violence but rather whether or not the exercise – indeed the design - of that violence involves a *calculation* of its potential destruction.

Within the framework of international humanitarian law the clearest manifestation of the lesser evil principle is the principle of proportionality.... Proportionality thus demands the establishment of a ‘proper relation’ between ‘unavoidable means’ and ‘necessary ends’. While considering the choice of military means, the principle calls for a balance to be established between military objectives and anticipated damage to civilian life and property. Proportionality is thus not about clear lines of prohibition but rather about calculating and determining balances and degrees... *It is the very act of calculation – the very fact that calculation took place – that justifies their action.*³⁰⁹

Implicit in any act of calculating the proportionate military means is the exercise of *restraint*. As Weizman makes clear, the exercise of contemporary military violence is always marked by a *gap* between “...the possible destruction that an army is able to inflict and the actual destruction that it does inflict.”³¹⁰ The asymmetrical nature of

³⁰⁷ *Ibid*, 9

³⁰⁸ *Ibid*, 4

³⁰⁹ *Ibid*, 11/12 (emphasis added)

³¹⁰ *Ibid*, 19

contemporary conflict has to some extent naturalised this gap and we have become used to wars in which the myriad military technologies of the super-power are deployed against the rudimentary, homemade arsenals of the dispossessed. In such conflicts the latent potential to unleash total destruction upon the dispossessed ensures that any exercise of violence by the super-power can be characterised as an exercise of restraint. It is thus precisely the immanence of *calculation* and *restraint* to the exercise of military violence by powerful states that ensures their adherence to the principle of proportionality and thus the presumption of legality. As Weizman notes; “...this practical form of military restraint is now often presented as the adherence to the laws of war.”³¹¹

The extent to which the principle of proportionality has been spatially reordered by the lawmaking character of contemporary violence to ensure that the violence of the powerful is invariably classified as lawful is revealed when one considers its opposite – the habitual characterisation of the violence of the dispossessed as disproportionate, indiscriminate and in breach of the law. The abiding failure to calculate the potential destruction of an act of violence and exercise appropriate restraint ensures that the violence of the dispossessed is always and already characterised as disproportionate - as outside the law. Weizman again subtly traces the contours of this antipodal aspect of the ‘space of perpetration:’

Disproportionality – the breaking of the elastic economy that balances goods and evils – is violence in excess of the law, and one that is directed at the law. Disproportional violence is also the violence of the weak, the governed, those who cannot calculate and are outside the economy of calculations. This violence is disproportional because it cannot be measured and because ultimately, having its justice not reflected in existing law, comes to restructure its basis altogether.³¹²

If the space of adjudication reveals the ways in which powerful states utilise the ‘materiality of the legal’ to regulate the visibility of acts of adjudication of breaches of IHL, then the proposed nomoscape of the ‘space of perpetration’ is concerned with how the elasticity of IHL is exploited so that dominant, neo-imperial conceptions of

³¹¹ *Ibid*, 20
³¹² *Ibid*, 21

order and disorder may take spatial form. The ‘space of perpetration’ will map how the exercise of military violence by powerful states is encompassed by IHL to ensure that a dominant vision of justice and order is maintained in whatever space the militaries of powerful states operate, while “... a commensurate quantum of disorder,”³¹³ is displaced to whatever space those that resist may occupy. Although they may be operating in the same battle-space, the opposing parties in contemporary a-symmetrical conflict arguably occupy overlapping but distinct spatio-legal realms. The boundary between these regimes of order and disorder - legality and illegality - is both instantiated and enforced by the very elasticity of IHL. The space of perpetration thus echoes the ‘politics of verticality’³¹⁴ - the term coined by Weizman to describe the entangled and folded sovereignties that constitute the ‘hollow land’ of the West Bank.³¹⁵ Weizman’s account involves a “... new way of imagining space,”³¹⁶ wherein “... two territorial networks overlapping across the same area in three dimensions, without having to cross or come together,”³¹⁷ create a “... folded, topographical arrangement of different jurisdictions.”³¹⁸ Indeed the accelerating trend towards a spatial division of the contemporary battle-space along the vertical plane – with the violence of the powerful being exercised exclusively from the air – gives material form to the overlapping jurisdictions of the space of perpetration.

To acknowledge that IHL no longer moderates the exercise of military violence but that “... in modern war *violence legislates*,”³¹⁹ is to recognise the urgency of any undertaking to rediscover the ethical kernel of the legal. I propose a further project, to map the contours of the ‘space of perpetration’ alongside the ‘space of adjudication’, in order to reveal the myriad ways in which IHL no longer operates to censure and condemn the exercise of military violence by the powerful but is forever remoulded to ensure the maintenance of their impunity. The ‘space of perpetration’ thus suggests one possible continuation of the task begun in this thesis – the spatial (re)imagining of international law. It is through an ongoing spatial interrogation of the relationship

³¹³ Delaney, *supra* note 7, 119

³¹⁴ Eyal Weizman, ‘*The Politics of Verticality*’. Available at http://www.opendemocracy.net/ecology-politicsverticality/article_801.jsp. Accessed on 15/05/2012.

³¹⁵ Eyal Weizman, ‘*Hollow Land: Israel’s Architecture of Occupation*’ (2007 Verso)

³¹⁶ *Ibid*, 182

³¹⁷ *Ibid*, 182

³¹⁸ *Ibid*, 180

³¹⁹ Weizman, *supra* note 299, 93

between military violence and its regulation by international law, that the ethical kernel of the legal may, perhaps, be glimpsed.

BIBLIOGRAPHY:

- Anders, G. (2007) 'Follow The Trial: Some Notes On The Ethnography Of International Criminal Justice' *Anthropology Today* 23(3):23
- Anghie, A. (1999) 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' *Harvard International Law Journal* 40:1
- _____, (2005) *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press
- Aoki, K. (2000) 'Space Invaders: Critical Geography, the 'Third World' in International Law and Critical Race Theory' *Villanova Law Review* 45:913
- Aradau, C. (2007) 'Law Transformed: Guantanamo and the 'Other' Exception' *Third World Quarterly* 28(3):489
- Benda-Beckmann, F, Keebert von Benda-Beckmann, and Anne Griffiths (eds) (2009) *Spatializing Law: An Anthropological Geography of Law in Society* Farnham: Ashgate
- Blandy, S. and David Sibley, (2010) 'Law, Boundaries and the Production of Space' *Social and Legal Studies* 19(3):275
- Blomley, N. (1994) *Law, Space, and the Geographies of Power* New York: Guildford Press
- Blomley, N, David Delaney and Richard T. Ford, (eds) (2001) *The Legal Geographies Reader: Law, Power, and Space* Malden MA: Blackwell
- Bourdieu, P. (1987) 'The Force of Law: Towards a Sociology of the Juridical Field' *The Hastings Law Journal* 38:814
- Braverman, I. (2010) 'Hidden in Plain View: Legal Geography from a Visual Perspective', *Law, Culture, and the Humanities* 7(2):173
- Buss, D. (2005) 'Austerlitz and International Law: A Feminist Reading at the Boundaries' in Doris Buss and Ambreena Manji (eds) *International Law: Modern Feminist Approaches* Oxford: Hart
- Butler, C. (2009) 'Critical Legal Studies and the Politics of Space', *Social and Legal Studies* 18:313
- Chander, A. (2007) Comments in 'Law and Geography. International Law Weekend – West Conference: Proceedings and Articles' *Santa Clara Journal of International Law* 5:507

- Cohen, D. (2009) 'Accountability In The Balance: Trials Before The Special Panels For Serious Crimes In East Timor 1999-2005' *Law in Context* 27(1):103
- Cunningham, D. (2008) 'Spacing Abstraction: Capitalism, Law and the Metropolis', *Griffith Law Review* 17:454
- Dean, J. (2004) 'Zizek On Law' *Law and Critique* 15:1
- Delaney, D (2010) *Nomospheric Investigations: The Spatial, the Legal, and the Pragmatics of World-Making* New York: Routledge
- Delaney, D. and Helga Leitneh (1997) 'The Political Construction Of Scale' *Political Geography* 16(2):93
- Doherty, H. (2010) 'Tipping The Scale: Is The Special Tribunal For Lebanon International Enough To Override State Official Immunity' *Case Western Reserve Journal of International Law* 43:831
- Elden, S. (2001) 'Politics, Philosophy, Geography: Henri Lefebvre in Recent Anglo-American Scholarship' *Antipode* 33:809
- Foucault, M. (1980) 'Two Lectures' in Michel Foucault and Colin Gordon (eds) *Power/Knowledge* New York: Pantheon Books
- _____, (1967/1986) 'Of Other Spaces' *Diacritics* 16:22
- Hogg, R. (2002) 'Law's Other Spaces' *Law/Text/Culture* 6:29
- Katzenstein, S. (2003) 'Hybrid Tribunals: Searching for Justice in East Timor' *Harvard Human Rights Journal* 16:245
- Kingston, J. (2006) 'Balancing Justice And Reconciliation In East Timor' *Critical Asian Studies* 38(3):271
- Lefebvre, H. (1991) *The Production of Space* Oxford: Blackwell
- Linton, S. (2001) 'Cambodia, East Timor And Sierra Leone: Experiments In International Justice' *Criminal Law Forum* 12:185
- _____, (2001) 'Prosecuting Atrocities at the District Court of Dili' *Melbourne Journal of International Law* 2:414
- Manderson, D. (2005) 'Interstices: New Work on Legal Spaces' *Law/Text/Culture* 9:1
- Massey, D. (2005) *For Space* London: Sage
- Merrifield, A. (2000) 'Henri Lefebvre: A Socialist in Space', in Mike Crang and Nigel Thrift (eds) *Thinking Space* London: Routledge
- Otto, D. (1997) 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law', *Australian Yearbook of International Law* 18:1

- _____, (1997) 'Rethinking the 'Universality' of Human Rights Law', *Colombia Human Rights Law Review* 29:1
- Pearson, Z. (2008) 'Spaces of International Law' *Griffith Law Review* 17: 489-514
- Philippopoulos-Mihalopoulos, A. (ed) (2007) *Law and the City* New York: Routledge
- _____, (2010) 'Spatial Justice: Law and the Geography of Withdrawal', *International Journal of Law in Context* 6(3):201
- _____, (2010) 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space', *Law, Culture and the Humanities* 7(2): 187
- Philippopoulos-Mihalopoulos, A. and Sharron FitzGerald (2008) 'From Space Immaterial: The Invisibility of the Lawscape' *Griffith Law Review* 17:438
- Riles, A. (1995) 'The View From The International Plane: Perspective And Scale In The Architecture Of Colonial International Law' *Law and Critique* 6(1):39
- Rose-Redwood, R. (2006) 'Governmentality, Geography, and the Geo-Coded World' *Progress in Human Geography* 30: 469-86
- Santos, B de S. (1987) 'Law: A Map of Misreading. Towards a Postmodern Conception of Law' *Journal of Law and Society* 14:297
- Soja, E. (1989) *Postmodern Geographies: The Reassertion of Space in Critical Social Theory* London: Verso
- _____, (1996) *Thirdspace: Journeys to Los Angeles and Other Real-And Imagined Places* Cambridge MA: Wiley-Blackwell
- Stramignoni, I. (2004) 'Francesco's Devilish Venus: Notations on the Matter of Legal Space', *California Western Law Review* 41:147
- Thrift, N. (2006) 'Space', *Theory Culture Society* 23:139
- Twining, W. (2000) *Globalization And Legal Theory* Cambridge: Cambridge University Press
- Weizman, E. (2007) *Hollow Land: Israel's Architecture of Occupation* London: Verso
- _____, (2011) *The Least Of All Possible Evils: Humanitarian Violence From Arendt To Gaza* London: Verso

