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The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era

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Introduction

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

To be sure, abandoning territoriality as the ordering principle may equate to abandoning the concept of sovereign-made law in favour of a fuzzier concept of transnational 'social norms'[5] that may put traditional lawyers out of work. Thus a good deal of professional strategising might be at work in the defence of territoriality by lawyers. One may yet forgive them for such petty considerations if one were to follow the observation of the influential international relations scholar Kratochwil, that 'although clear boundaries create problems by excluding others, they also simplify international life'.[6] Indeed, do territorial boundaries not confer order and prevent chaos – a basic function of law?[7] Territorially conditioned as we are, the question appears to us as merely rhetorical. In spite

of the apparent simplicity of territorially delimited spatial blocs as an organising principle and its status as the primary nexus of jurisdiction, there is nothing natural about territoriality. Instead, as critical legal scholars have observed, territoriality is a social construct rather than a necessity. Like sovereignty, territoriality is not just a 'pure fact' that is external to the law, but is rather *determined by the law*.[8]

Buxbaum has pointed out that 'territoriality' and 'extraterritoriality' are 'claims of authority, or of resistance to authority, that are made by particular actors with particular interests to promote'.[9] In the field of data protection law, for instance, the EU is currently relying on territoriality to justify the application of EU law to EU residents' data held by data controllers abroad, whereas these controllers, and the states where they are based, would resist the same jurisdictional assertion by labelling it as 'extraterritorial'. In the past, when the United States started to vigorously apply its antitrust laws to foreign conspirators, it justified its jurisdictional authority on the basis of the territorial effects doctrine, whereas European states resisted the claims, citing unjustified extraterritorial overreaching. This speaks to the notions of territoriality or extraterritoriality being used to further, entrench, or resist positions of political power, without their having a predefined objective content.

The political character of territoriality could mean two things. On the one hand, it may refer to the open-ended, and thus malleable, nature of territoriality, which allows various actors to frame their claim in territorial terms, or to invalidate another actor's claim as being extraterritorial.[10] This open-endedness of territoriality is not unique if compared to other categories of international law. As Koskenniemi has argued, in various areas of international law, 'legal management' takes place by 'open-ended standards that leave experts with sufficient latitude to adjust and optimise, to balance and calculate'[11] in the light of momentary strategic preferences. On the other hand, the political character of territoriality may refer to territoriality being a seminal political choice that marginalised other forms of legal ordering which could pose a threat to the privileges of the powers-that-be. This corroborates the acumen of Ford in his consideration that 'territories are made, not found', and that '[a]lmost anything that is organised territorially could be organised in some other way.'[12] Differently put, even though the concepts of sovereignty and territory have risen to juggernaut proportions in international law, unassailable they are not.

In this contribution, we examine the historical existence of jurisdictional alternatives to territory, in particular community-based systems not

centred around the idea of the nation state, and inquire whether these alternatives have re-emerged in recent times, responding to the peculiar nature of the internet as a borderless, prima facie non-territorial phenomenon. Section 1 places territoriality and community in their historical context, with particular emphasis on the early modern period. This section maps how the rise of the nation state with absolute territorial control did not entirely sideline the continued existence of functionally differentiated pockets of economic communities constituting themselves as separate and recognised jurisdictional entities. Section 2 ascertains how community-based alternatives to territoriality have returned to the fore in the internet era, in which transnational communication and commerce render territorial boundaries increasingly futile, and where individuals identify with self-constituted communities rather than with the state. Such communities, while constituting separate jurisdictional systems that enact and enforce self-made rules for their members, typically exist in the shadow of the state and do not directly challenge the jurisdictional primacy of territoriality. Nevertheless they do present alternatives, alternatives that have not existed in such a clear form for quite a while. This alone represents perhaps not a challenge to the concept of territoriality as such, but indeed – in time – may challenge its primacy. We may not need to wait long however. Section 3 shows by means of a concise analysis of a number of technological virtual communities' discourses vis-à-vis state regulation, that challenges to, and even outright rejections of, territorial regulation in favour of exclusive subjection to corporate or community regulation are already discernible. Section 4 concludes with a plea for a novel conceptualisation of jurisdictional spatiality in the internet era.

The analysis draws on a number of disciplines such as international law, legal and economic history, political geography, political philosophy, and regulatory economics, which, from their individual perspectives, have assessed the problems inherent to state-based territorial models of jurisdiction and/or alternative, self-regulatory, community-based challengers. Such a holistic approach is especially called for to grasp phenomena as multifaceted as territory, jurisdiction, and cyberspace, to inform our understanding of the *legal* category of jurisdiction, or an entity's normative authority over events.

Territoriality and its Alternatives in Historical Context

Exactly how did the hegemonic struggle over the proper principles of jurisdictional order result in territory carrying the day? The Peace of

Westphalia in 1648 may for the first time have arranged the political boundaries of Europe, and thus constituted the foundational moment for the territory-based world order as we know it.[13] Before this event, what people or king one belonged to carried much greater importance than from where exactly one hailed and often determined which law was applicable. Law indeed was personal.[14] Starting with the Peace of Westphalia this started to change in favour of territoriality. The Westphalian concepts of territory did not arrive suddenly nor did they establish themselves, however. They were the culmination of material, political, and epistemological changes that started in the fourteenth century. The feudal structure of medieval Europe,[15] the monetisation of economic relations, the rediscovery of the concept of absolute and exclusive private property in Roman law, the use of a single perspective in visual representation,[16] the centralisation of government and – not unimportantly – the development of the science of cartography,[17] have all been considered as contributing to the rise of territoriality, an ordering notion that was, after Westphalia, further cemented by the ascendancy of democracy as a principle of internal political life. As Radon asserted, democracy reaffirmed and legitimised political and physical boundaries, as democratic rights depend on territorially bounded citizenship and popular sovereignty forges a territorial identity.[18] This process has reinforced the self-identification of individuals with territorially defined units – that is, states. Not only for lawyers then, but for any individual, it is difficult to imagine one's existence and identity outside a territorial entity.

This however does not detract from the fact that territoriality is an 'invention',[19] an imagined community,[20] or at least is historically contingent, resulting from the happenstance confluence of a number of circumstances. Other forms of social organisation are eminently feasible, and have historically existed, in particular tribal or community-based governance structures founded upon personal or kinship relations.[21] Admittedly, tribes occupied territory, but as John Ruggie has observed, it did not *define* them.[22] Even in medieval times, the ruler was considered to be the king of a people, not of a territory.[23] Until the late Middle Ages, it was common for foreigners not to be subject to the King's or the prince's law.[24]

In modern times, while territoriality has replaced community as the ordering notion, community-based jurisdictional structures have been allowed to flourish within a territorial, state-based order, even until the present day. The development of the *lex mercatoria* by trans-'national' business communities since the late Middle Ages may serve as the most prominent example. The development of this non-state law can be traced

to the rediscovery of the (long-range) 'interplace' trade,[25] for which local enforcement by Lord, City or social group did not suffice.[26] This lack of enforcement potential caused merchants to explore ways to establish who was safe to do business with and who was not. It all began fairly locally, with merchants creating monopolistic controls stipulating who could come to trade in the local town and under what conditions,[27] accompanied with the jurisdictional power of the Merchant Guilds to deny the ability to trade if the merchant did not live up to specified rules and requirements.[28] But as inter-place trade increased, Merchant Guilds needed a system that would also work outside the immediate vicinity of their place of origin or trade, so as to reduce the cost and risk of doing business with people from 'outside', whether locally or 'abroad'.[29] The system that was created was an enlargement of the pre-existing Guild system with local Guilds collaborating as larger groups.[30] The Hanseatic League is probably the one most commonly known today, but was by no means the only one.[31] All this led to what is referred to as the emergence of a *lex mercatoria*, or merchant law, a non-state and non-territory-based conglomerate of rules and customs, buttressed by an enforcement system that transcended local sovereign-enforced law. An independent and exclusively mercantile legal system was thus created to resolve the problems inherent in inter-place trade between places with differing laws.[32] The Merchant Guilds may have developed a rather unique inter-place or transnational law without state intervention, but they were not the only structures to put in place non-state forms of jurisdictional order. In particular, the Craft Guilds, which developed concurrently to the Merchant Guilds to promote and protect largely craft-internal matters, gradually grew into independent regulatory spheres that existed within, but at the same time separate from, the greater structure of the town.[33] They upheld not only work standards and fair distribution of work amongst their members, but also provided care for the poor in general, sick guild members and judged (certain) (mis-)behaviour of their members.[34] Today, the fulfilment of such functions is often considered to be part of the dominion of the state. Precisely because Craft and Merchant Guilds fulfilled such 'public' functions, it was not unusual for them to integrate into the formal governance structures of towns; they had a role and a say in the governing of the (larger) community surrounding their trade- or craft-based communities.[35]

The Guilds' eventual decline in importance did not draw the curtain for the jurisdictional powers of transnationally active non-state actors, however. For one thing, religious communities maintained jurisdictional

prerogatives over their members, the Roman Catholic Church being a case in point.[36] For another, in the economic domain the Guilds were gradually being replaced by the newly created 'corporations': forms of association, fellowships or ways to organise groups of men with joint goals into a (semblance of) unity,[37] which interacted as separate legal entities with each other and with states. Like their predecessors, the Guilds, corporations were responsible for governing many aspects of the lives of those under their care. They possessed both rights and responsibilities to create rules binding those under their jurisdiction, as well as to enforce those rules in case of breach. Like the Guilds, these corporations not only had an inward focus, but they also interacted with other corporations, as well as states, on behalf of the whole body.[38] In the empire-building era, corporations took on additional public governance tasks, having been given a mandate to settle or subdue overseas areas on behalf of states which relied upon their support to succeed in their imperial endeavours.[39] The Dutch and English East India Companies received corporate charters that limited the privileges of the issuing state and bestowed rights on them which are now associated with sovereigns.[40] Due to constraints of distance and control, these and similar companies were to some extent free to create whatever legal order they needed in the colonies,[41] and thus to create separate legal spheres.[42] Many parts of America, for instance, were settled by corporations created expressly for that purpose;[43] their formal subjection to the crown in reality was rather variable, partly due to the disparate character and charters of the corporations themselves, and subject to much debate, conflict and political manoeuvring.[44] As the corporations were tasked with all manner of public duties like defence, public expenditure, local government and law enforcement, it is unsurprising that some corporations put forward particularly strong sovereign-like claims of jurisdictional autonomy.[45] The Charter of Massachusetts Bay, for instance, gave the relevant corporation the rights to 'planting, ruling, ordering and governing of Newe England in America,' which included 'mynes and Myneralls,' as well as 'all Jurisdiccons, Rights, Royalties, Liberties, Freedomes, Immunities, Priviledges, Franchises, Preheminences, and Comodities whatsoever.'[46] The corporation's rights also included general law enforcement and adjudication, with Massachusetts Courts in fact claiming for themselves all powers that existed in England.[47] Similar to the fate that befell the Guilds in Europe before them, the jurisdictional autonomy of such corporations did not last. Their power waned as the territorially bound

nation expanded its power and sidelined other, community-based, ordering principles.

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

The Re-Emergence of Community as an Alternative to Territory in the Internet Era

The trans-'nationally' active Guilds and chartered corporations described in the previous section gradually disappeared in the late eighteenth and nineteenth centuries.[48] However, their community-based model of jurisdiction has survived as an alternative to territoriality as the ordering principle. The model has recently staged a scholarly comeback, notably in the work of Berman, who has advocated a (transnational) community-based jurisdictional model that is decoupled from physical location.[49] Berman argues that as a result of migration and increased transnational communicative connections, many people no longer possess a single cultural or territorial identity, but rather belong to multiple, overlapping communities.[50] Jurisdiction should then become a function of which community has the strongest ties with a legal dispute. This community need not be a territorial one; instead it could be based on cultural, economic or technical links. This post-modern, pluralist conception of jurisdiction chimes well with the perception that 'the world is flat', meaning that geographically remote individuals and entities could interact across borders.[51] Put differently, it may be more attuned to still novel processes of globalisation that have reduced the importance of notions of time and space, and diminished the importance of territory as an ordering principle.[52] Such community-based conceptions of jurisdiction allow a move away from the political/governmental towards the technical,[53] in that it acknowledges the power of transnational technology-based networks to set and enforce norms without state mediation. In essence, this is little more than the system of the Guilds *redux*.

In a moderate version of a community-based jurisdictional model, state prescription and adjudication do not disappear, but in transnational disputes, legislators and courts inject non-territorial connecting factors into the jurisdictional analysis. This approach may be particularly appropriate with respect to acts committed in non-territorial cyberspace. Where a territorial model may struggle to bring foreign-based persons harming domestic persons within that state's jurisdiction, a community-based model can more easily consider a remote foreign-based person targeting a domestic person to be part of the same community as the target, thus falling within the jurisdiction of the community forum. While, of course, targeting could simply be seen as a variation of the objective territorial principle, what sets the community-approach apart from it is that both parties involved may consider themselves to be part of a non-territorial, technological community rather than identify with a territorial state. A community-based jurisdiction may, compared to the nation state, more legitimately and capably assess the damage done to a particular community. Along similar lines, a (passive) personality-based model may bring an anti-competitive practice 'located' on an interactive foreign-based website within a state's jurisdiction to the extent that one of its nationals, as consumers of the website, have been harmed.[54] Such an approach, although less revolutionary than the previous one, is nevertheless a departure from the dominant territorial approach to 'reasonable' jurisdiction epitomised by Section 403 (2) of the U.S. Restatement of Foreign Relations Law (Third), under which the reasonableness of a jurisdictional assertion is dependent, in the first place, on 'the link of the activity to the territory of the regulating state (i.e., the extent to which the activity takes place within the *territory*, or has substantial, direct, and foreseeable effect upon or in the *territory*)'.[55]

In a more extreme version of a community-based jurisdictional order, the state disappears and corporations and communities regulate themselves, and constitute their own jurisdictional order, which may or may not resemble a state-based order. As Backer has observed, in this model, interest displaces territory and the market supplants popular sovereignty as the mechanism of jurisdictional legitimation.[56] Geography, once so important for power, loses its grip; jurisdictional power is instead vested in non-territorial, functionally differentiated communities below and beyond the state. The state as a territorially bounded *civitas* disappears as the referent object, and is replaced by a non-territorial, non-state *societas* and a universal one at that.[57] Or to cite Backer again, 'the old foundational notion of territoriality loses coherence as the marker *par*

excellence of jurisdiction' and a 'new territory' comes into being, a community of corporations.[58] For better or worse, this community, rather than the state, has jurisdiction over shareholders, suppliers, clients, affected communities, participants and other stakeholders.

This re-emergence of the concept of a community-based, self-regulatory model of jurisdiction is not merely theoretical. It is reflective of the current state of affairs also in the field of cyberspace regulation. Again, as in previous times, merchants and corporations prove to be significant contributors to this phenomenon. eBay, for instance, a leading internet marketplace corporation, connects sellers and buyers from across the globe – spanning many jurisdictions with their concomitant differences in substantive law. From a regulatory perspective, just like the Guilds in earlier times, eBay provides a mechanism to gather information on the reputations of buyers and sellers. In so doing, it addresses enforcement problems that are difficult to remedy through direct customer-trader relationships or state intervention. Indeed, on the internet, traders and customers are typically physically far removed from each other and have no natural singular 'fair' or common trading spot to meet and exchange information. A trader could consequently break his contracts quite often while maintaining a good enough reputation in the market as a whole as not to cause him significant losses in terms of the potential number of buyers and suppliers. State enforcement falls short in equal measure, as aggrieved persons do not go to court over the non-delivery of an item of only nominal value, and may be at a loss as to which court would have jurisdiction when the trader and the buyer are placed in different states. In the face of territory, distance and enforceability issues render individual and state enforcement practically unfeasible; eBay, like a modern Guild realising that a trader's most valuable currency is its good reputation,[59] publishes data on trader's reputation, thus allowing buyers to take an informed decision. A trader's failure to live up to his obligations will have his reputation diminished and with it the opportunity to earn money.[60] If a trader commits regular or serious violations of his obligations, eBay may suspend or ban their account/shop/identity – a measure closely resembling ostracisation, as practiced by the Merchant Guilds.

Accordingly, eBay serves as an example of stakeholders (traders and buyers in this case) forming part of a separate non-state actor-created sphere of prescriptive and enforcement jurisdiction that exists alongside jurisdictional structures of the nation state. While eBay's regulatory and enforcement system points to the existence of a legal-pluralistic world inhabited by various overlapping jurisdictional communities, it bears

emphasis that eBay's system does not (entirely) replace the territorial state-based system. Indeed, eBay acknowledges the powers of states and works alongside them;[61] it provides an additional regulatory and enforcement layer within its own functionally differentiated sphere of influence. eBay constitutes a community-based alternative to territoriality, but it does not supplant it, nor wishes to. Instead it complements the greater legal infrastructure and concepts already present in the nation states within which it operates. The manner in which eBay thus operates is in fact not very different from the status of the *lex mercatoria* in previous times: authority over most matters at the famous St Ives fair, for instance, rested with the King of England and the Abbey of Ramsey, leaving the ordering of only a minor part of conflicts to be judged by the *lex mercatoria*.[62] This goes to show that trade-based systems of jurisdictional order, also in the internet era, do not really challenge territoriality as the ordering principle: they are not entirely self-referential in the way that sovereign states and legal orders must be, but rather operate in the shadow of the state, dependent as they ultimately are on state regulatory fiat and the system already put in place by states.

Other examples of self-regulatory virtual communities can also easily be found outside the context of trading. Many of these communities are based around games and are controlled by (large) corporations. EVE-online,[63] for instance, is a game well-known for players cheating and scamming each other, stealing from each other, engaging in 'corporate spying', hostile takeovers, hostile speech and other interactions which might overstep the boundaries of what is legally permissible in 'real-life' in the countries from which they play. A significant part of the player base accepts this departure from norms shared across nations, and revels in it as well. All of this is very much intended and supported by the game's publisher CCP.[64] It cannot be simply stated that all these actions exist only in a completely separated sphere, as in-game assets are not fully disconnected from 'real space'. Due to the (officially sanctioned) possibilities for purchasing game-time which is also tradable with other players for in-game cash, it is very possible to attribute real-money value to in-game objects.[65] Like the in-game assets, the persons inside the game are not disconnected from persons in the real world. In fact, intra-game content – relationships, power blocs, disagreements and strife – in EVE has a tendency to spill over into other virtual communities and even real life.[66] Even if one is reluctant to accept online environments such as this one as communities in a general sense, when the threshold to real-life criminal action based on what happens

in and around that environment is passed,[67] one will have to accept there is more to it than 'just a game'. The point is further strengthened by the fact that most severe(ly perceived) punishment that seems to have come to pass after the event referenced in the previous sentence is done through the virtual community, not the real-world authorities.[68] By launching the EVE online environment, CCP has created a non-territorial community spanning the globe,[69] which operates under a set of rules also created by CCP and covered by extensive published arrangements.[70] Within this environment, one finds rules, or the absence of them, that are at least partly at odds with the rules existent in real space within most nation states from which the game is accessed and played – including those where the CCP's headquarters is based.[71] Here too (corporate) enforcement consists mostly of temporary or permanent ostracisation from the community when one commits repeated small infringements, or one large infringement.[72]

Those unfamiliar with games or environments such as these often suggest this does not constitute any kind of enforcement at all – any kind of action by the corporation would be limited to a person's 'presence' in their sphere. Furthermore a person could simply leave (exit) the game or environment and so remove himself from any power relevant in that sphere. Obviously, being part of such a specific corporation-owned sphere is only voluntary; no one is forced to play a game. One should not, however, underestimate the investment of players into the game/environment in time, money and social or emotional connections. Given this commitment, exit from the virtual environment, its community, and the rules that govern it may not be as realistic an option as it might appear at first blush.[73] While indeed there is a voluntariness in starting to play such a game, such significant time is spent on identity/persona whilst playing that the prospect of exit from that community may not be viable. From the previous it follows that participants in such a functionally differentiated corporate system are subject to its rules in a way that is not all that different from an individual being subject to a nation state's territorial law system. Whether or not the individual agrees with the legal system's content, he will be bound by it, with jurisdictional exit often only being hypothetical, or coming at great cost.

Even if supremacy of the corporate sphere law with regards to the state's sphere is rarely tested (in state court), a player, once committed, is part of at least two spheres which possess the power to prescribe rules and enforce decisions without requiring their further consent:[74] the company within the game and the country from which the player is

playing. In almost all cases this corporate law sphere will represent 'the' law for the player.

As seen earlier for a frequent game participant, community-based game rules might appear as much more 'real' than state rule, although again, similarly to the point made with regards to eBay, one cannot posit that a community-based game rules system has challenged or displaced the territorial regulatory structure.

Virtual Communities' Challenge to Territoriality

That virtual communities precipitated by the internet such as eBay and EVE have not challenged the state-based territorial system of jurisdiction, does not mean that they never do. In fact, they have done so, and probably increasingly will do so, as for instance Google's challenge to the EU's data protection and privacy system evidences.[75] Quite understandably, internet corporations such as Google wish to influence the content of data protection law through heavy legislative lobbying,[76] especially where such a law could have 'extraterritorial' effect on their operations.[77] Google's stance, however, goes beyond such lobbying. It has had a troubled relationship with EU regulators, which betrays hostility toward the pre-eminence of a state-based jurisdictional system and a plea for the superiority of stateless technology-driven regulation.

Google's troubles with European data protection regulators arguably started in 2012, when Google's announcement of a new privacy policy prompted an investigation by the French data protection authority. This investigation led to an increasingly unfriendly exchange between Google, the French Data Protection Authority (CNIL) and the EU Article 29 Working Party, with EU regulators asking increasingly extensive questions and Google responding by halting compliance and questioning the authority of the CNIL and the Article 29 Working Party.[78] This matter remains unresolved at the time of writing, with Google repeatedly and publicly denouncing EU data privacy law, directly or indirectly, while the Article 29 Working Party continues to remind Google of its obligation to comply with European and national legal frameworks for data protection. A similar scenario plays out in respect of the verdict of the Court of Justice of the EU (CJEU) in the *Google Spain* case (2014), a leading case regarding the right of an individual 'to be forgotten' on the internet.[79] At first glance, Google appeared to be making an effort to comply with the verdict,[80] by posting removal request forms and regularly releasing numbers about the amount of requests received and

processed.[81] In reality, however, this compliance effort does not seem to be especially sincere.[82] Apart from outright non-compliance Google makes every effort to water down the effects of the ruling and erode the rules it is based on in a way that could be considered to go well beyond what normally could be expected. Activities range from opinion pieces on the internet and in large European newspapers,[83] to advisory committees conspicuously populated with experts that have pre-existing opinions in Google's favour[84] to traveling 'public meetings' which seem to have a clear agenda of promoting Google's point of view instead of inviting open discussion.[85]

Not surprisingly, Google's initiatives have failed to impress EU privacy regulators and other privacy proponents.[86] As for actual compliance with the verdict, the veneer seems thin. For one thing, after processing removal requests, Google not only removes the result, but also displays a notice to the searcher that some results may have been omitted due to European data protection law.[87] Comparably, Google actively informs journalists whose information has been removed from Google Europe search results.[88] While laudable in the light of transparency principles, these measures also predictably generate 'pushback'[89] by people whose work has been removed from the search results. In a similar vein, while answering the questionnaire about how Google will comply with the CJEU ruling,[90] Google makes it very clear that search results will be omitted only from EU-localised versions of the Google search engine. Queries put to the search engine from a non-European domain will yield the full range of results without omission. The ability to easily route your question through a non-EU version of the search engine, combined with the ample warnings that something was filtered in the EU versions, makes it exceedingly easy to obtain the information that had been filtered. This effectively guts the effect of the removal requests that Google was ordered to implement.

Google's token compliance with the verdict together with its extensive activities to erode (support for) the rules that led to it, shows that its acceptance of state or EU jurisdiction is rather minimal; exploiting the borderless nature of the internet, it can easily avoid *genuine* subjection to state/EU enforcement jurisdiction. Therefore, one is left to wonder whether, by essentially disagreeing with the EU's stance on data protection and possessing the means to effectively evade actual compliance, ultimately Google is not challenging the jurisdictional primacy of nation-states and propounding a non-territorial, liberal system of internet content regulation.[91] In other words, Google's basic stance could be seen as denying European states or the EU the right to make laws as is their

sovereign right. That being said, even major corporations such as Google, in spite of their power, cannot just ignore territorial laws. In fact, even if internet corporations disagree with substantive state rules, they might use the state's procedural rules to contest the former's validity in courts or other dispute-resolution mechanisms, rather than just flout the rules. Moreover, states retain the power to destroy corporations' markets – for example, by blocking territorial access (as done by China), although one has to concede that, given the central economic function performed by internet corporations, states will do so at their peril.

A similar challenge to territorial, state-based regulation, and a plea for community-based regulation, has been made by Uber, a company that aims to provide taxi or rideshare services through a smartphone app, thereby providing an alternative to traditional government-regulated taxi services. Uber aims to better cater to consumer wishes at a lower price point (per service level) than regular taxi services. Uber's operations model (UberPOP), however, conflicts with regulations of certain nation states, such as the Netherlands and Germany. In the Netherlands, the authority charged with oversight of transportation services,[92] ILT, has deemed parts of Uber's services illegal and has warned that it will enforce the law against illegal taxi services.[93] Uber counters this jurisdictional assertion, with the local Uber CEO commenting that Dutch law in this regard is unclear and 'old-fashioned', and oozing confidence that the law will be adapted to allow for services like Uber's.[94] Meanwhile, at the time of writing, Uber is continuing its operations in the Netherlands and planning further expansion despite ILT's statements about its illegality. In Germany, the UberPOP service, after having been forbidden in several cities, but continuing to operate nevertheless, was banned nation-wide in 2014, after the Frankfurter Landesgericht declared the service in violation of the German Passenger Transportation Act.[95] Several German Uber spokespersons nevertheless stated that Uber would continue to operate, while appealing the decision with all possible means.[96]

Whereas Google still upheld a semblance of compliance with the law, the example of Uber shows that internet corporations may not shy away from openly challenging the state's jurisdiction to make and enforce rules in its territory: despite state laws and courts disallowing particular transportation services, Uber wilfully continues its illegal activities. Uber is not necessarily an outlier when it comes to challenging territorial jurisdiction. Its run-ins with state law may in fact be a harbinger for more radical cyber-inspired alternatives to nation state territoriality. Notably, in the United States initiatives have been launched to 'exit' the state and to form new, self-regulatory, and – while not necessarily internet-related –

mainly technological communities. Especially from the Silicon Valley area there are initiatives claiming traditional state based governance is past its due date and better contenders ought to take over. One of these initiatives is Tim Draper's 'Six California's' initiative,[97] proposing the division of California into six separate states, one of which would become the wider Silicon Valley area. This area is mainly populated by tech-oriented people and businesses, and this – so he reasons, would gain his technologist ideas traction through democratic control of the area, something unlikely to happen in California-as-it-is. Another is the 'plan' of Balaji Srinivasan to distance Silicon Valley from America's 'Paper Belt' bureaucracy and create an 'opt-in society, ultimately outside the United States, run by technology, with nation state governments unable to intervene'.[98] Most extreme perhaps is the idea of Seasteading, the concept of building new autonomous communities on physical structures in the high seas outside any nations' territorial reach to experiment with new political social and legal systems. The first initiative may not have reached the ballot, but it gathered a considerable amount of votes nevertheless. The last initiative has considerable funding and has proved substantial enough to garner at least some attention in academic circles.[99] These ideas' backers count amongst them captains of Silicon Valley industry who have considerable means, political pull and technological prowess and have proven in the past to get the 'impossible' done. Thus, while it would be easy to dismiss all these initiatives as technologist pipedreams, one would be ill-advised to do so.

Efforts such as these are driven by a need to be free from legal restrictions on technological and societal experimentation, and from a democratic process that is considered to be too slow and non-accommodating with regard to technological progress. They envisage a radically different world that is no longer dominated by territorially delimited states, but by (transnational) technological communities living under their laws, or under no law whatsoever. One should not be deluded into thinking that such claims are somehow interest-neutral. To paraphrase Buxbaum, jurisdictional claims are 'claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.'[100] There can be no mistake that the aforementioned technology-based alternatives to territoriality promote the interests of corporations. Still, while these claims might appear to be self-serving, they are not necessarily less self-serving than state-based claims. What distinguishes them from the latter, is simply that they are community- rather than territory-based: they speak to a desire of technological communities to wrest regulatory control from what they see as outmoded and even illiberal

territorial states that do not understand, or even undermine the liberating capabilities of the internet and technology in general.

Concluding Observations

As our short exploration has demonstrated, territoriality has historically been a political construct that prevailed over ancient community-based visions for jurisdictional order, while not being able to marginalise them completely. With today's fast international travel, near-instant worldwide communication, and the possibilities to interact socially, commercially or otherwise in entirely novel ways where space and time appear to collapse, it can be argued that we have seen the heyday of nation state jurisdiction based on sovereignty and territoriality, that the pendulum is swinging back toward a more community-based jurisdictional order. New technological communities, which have little or nothing to do with the constructed communities that are nation states, are emerging, coalescing around technological corporations and digital platforms, which sometimes rival the nation state in power and influence. In some cases they seem not only to rival the nation state in power and influence, but also to resist its authority as a source of law and enforcement, either by way of presenting an alternative, or by challenging the nation states' sovereign rights head-on. Because such communities have literally, not just figuratively been constructed by their members, the bond between individual member and community may have particular jurisdictional relevance. Because this bond is often stronger, and of a more voluntary, direct consent-based nature than the bond between individual and territorial state, technological connectivity may legitimise the community's jurisdictional (law-making and -enforcement) powers. As a result of this evolution a system may emerge where jurisdiction no longer radiates outward from a territorial point, but from a group to which individuals belong, or of an activity in which they participate. In this model, functionally different communities exercise jurisdiction over distinct, de-territorialised legal spheres and 'slices of life',[101] without claiming exclusivity. These spheres can co-exist peacefully, but can sometimes forcefully collide.

In such a new constellation, territoriality, as one of the jurisdictional communities with which individuals identify, appears to take a back seat. It would be incorrect, however, to posit that territoriality has disappeared, or should disappear in the face of novel challenges posed by cyberspace. After all, there is no denying that cyberspace has a connection to territory. In their seminal article, Johnson and Post may have described, or rather advocated, the existence of a 'legally significant

border between cyberspace and the "real world"',[102] but it is however an irrefutable fact that cyberspace makes use of servers, cables, modems, and computers,[103] which are located in and affect persons who are physically located in a territory.[104] Cyberspace participants can even purposely locate themselves within the territory of a state via geographic indicators that link a virtual network to a state's jurisdictional remit.[105] Equally incorrect, however, is to maintain that cyberspace issues can simply be solved by applying the classic rules from the pre-technology era. Cyberspace, and the communities which it creates, are – although not entirely virtual or spaceless – not simply connected to one specific place. The unique nature of the internet may necessitate a paradigmatic shift in how we conceptualise spatiality and hence the exercise of jurisdiction if law is to fulfil its role within modern society.[106] Cohen has argued in this respect that cyberspace calls for a new 'heterotopian' spatiality,[107] which jurisdictionally blends online and offline spatiality. Such heterotopian spatiality may acknowledge the jurisdictional interest of territorial sovereigns that is triggered by the territorial links of cyberactivity (e.g. in terms of such activity producing territorial effects), while concurrently considering cyberspace as a *res communis*: a space of informational passage that cannot be jurisdictionally appropriated by a sovereign. To prevent cyberspace from being exclusively 'occupied', or monopolised by the most powerful sovereign(s), in a mode outside the law, Hildebrandt has suggested the attribution of subjective natural rights based on a 'distributed control' over cyberspace infrastructure, in much the same way as Grotius, in the seventeenth century, laid the basis for the freedom of the high seas and functional maritime jurisdiction of states.[108] Like Grotius, she may have referred to distributed control rights exercised *by states*, but – in the light of our earlier discussion – such control rights may also be apportioned between states and non-state jurisdictional communities.

It was not our aim here to chart the exact parameters for such a distributed control in practice. If, for pragmatic reasons, we are not willing to jettison the state as the jurisdictional *locus* just yet, it appears that proximity between the harmful act or tortfeasor on the one hand, and the state's territory or nationals on the other hand, should be one of the guiding principles. Proximity between the act or individual with a particular community could for that matter also serve as a principle to identify the non-state community with the strongest jurisdictional claim. Any parameters can be agreed upon in multilateral treaties,[109] but it is more likely that, in line with how the rules of jurisdiction have historically evolved, these will take shape organically via practice, thus potentially grounding new rules of customary international law.